

**Brown v Kamlet**

2010 NY Slip Op 32049(U)

July 27, 2010

Sup Ct, NY County

Docket Number: 601477/00

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
Justice

~~PA~~ PART 16

Index Number : 101487/2006

**BROWN, GRANT**

vs.

**KAMLET, M.D., DAVID**

SEQUENCE NUMBER : 010

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment is granted as to defendant Jean Pascal Simon, M.D., in accordance with the accompanying memorandum decision, the original of which is attached to motion sequence 007.

**FILED**

AUG 04 2010

NEW YORK  
COUNTY CLERK'S OFFICE

*Alice Schlesinger*

Dated: JUL 27 2010

**ALICE SCHLESINGER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
GRANT BROWN, as Administrator of the Estate  
of REBECCA BROWN, and GRANT BROWN,  
Individually,

Plaintiffs,

-against-

DAVID KAMLET, M.D., JEAN PASCAL SIMON, M.D.,  
BARRY SLOAN, D.O., STEVEN GOLDSTEIN, M.D.,  
DEBORAH R. HUNTER, M.D., JEREMIE R.  
RACHUNOW, M.D., and MIDTOWN MEDICAL  
CARE CENTER,

Defendants.

Index No. 601477/00  
Motion Seq Nos. 007 & 010

**FILED**  
AUG 04 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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SCHLESINGER, J.:

This is an action sounding in wrongful death wherein the plaintiff Grant Brown, the surviving widower of Rebecca Brown, is suing various health care providers for failing to diagnose his wife's lung cancer. This cancer, which was diagnosed in early May 2005 at St. Luke's/Roosevelt Hospital, not a defendant, resulted in the death of Mrs. Brown on March 5, 2007.

Before the Court are motions by Dr. Jeremie Rachunow, Midtown Medical Care Center and Dr. Jean Pascal Simon, for summary judgment and dismissal of the action. Other defendants have been let out of this action by Stipulation, and the only remaining doctor, Dr. David Kamlet, is not moving for any relief.

Mrs. Brown sought treatment for general medical conditions from Midtown Medical Care Center ("Midtown") for the first time on February 24, 2003. She complained of intermittent hot flashes, sweating and a two-year history of depression. She was 50 years old at the time and what she wrote as her "chief complaint" on that day was the following: "ALL - Everything - Fat Tired Scared."

Her lungs were checked and found normal. She returned two days later complaining of nausea, and her medications were adjusted. Her next visit to Midtown was on March 11, 2003. She had come in for a follow-up of lab results. She was still complaining of depression, hot flashes and weight gain. She had reported an allergy to wheat.

It was at her next visit to Midtown that she first met and was examined by the moving defendant, Dr. Rachunow. There, she repeated her earlier complaints. There was no complaint of coughing. Dr. Rachunow ordered blood tests for July 11, and these did show a slightly elevated abnormal white blood cell count of 14.3.

The next time the decedent saw Dr. Rachunow was on September 18, 2003, which visit was the last Mrs. Brown had with this doctor. At that time, Mrs. Brown made complaints similar to those she had made at the earlier visits. However, for the first time she complained of a cough of about one month in duration. Dr. Rachunow attributed this cough to a post-nasal drip and prescribed Flonaze. However, it should be noted that when Dr. Rachunow was deposed after this action was commenced, she testified that she had observed no symptoms of this post-nasal drip.

No chest X-Rays were ordered by any of the doctors at this point. Also it should be noted that Mrs. Brown reported that she was a smoker for a number of years and was presently smoking about 1/4 of a pack of cigarettes a day. Also, no follow-up blood tests were ever done by Dr. Rachunow (or any other doctor at Midtown) to see whether there were changes in the patient's white blood cell count.

After seeing Dr. Rachunow on September 19, 2003, her next visit with Midtown was on November 7, 2003, when she saw another doctor. On this visit, Mrs. Brown made

complaints of a cough for approximately one month. This was noted to be a dry cough associated with a post-nasal drip. She also reported a tickling in her throat. She received medications for allergic rhinitis. She returned again on November 18, 2003, where she made complaints of frequent urination and incontinence when coughing. She was given a gynecological examination which was found to be negative.

On March 5, 2004 she made a visit marked "urgent", where she made complaints of coughing, urinary incontinence, sometimes brought on with coughing and sneezing but sometimes without, as well as fecal incontinence with coughing. Again, it should be noted that no chest X-Rays were ordered.

Mrs. Brown was then referred by the March 5 doctor to see the moving defendant Dr. Jean Pascal Simon, who she saw on April 1, 2004. This April 1 visit was Mrs. Brown's last visit at Midtown. It should also be pointed out that the doctors she saw at Midtown, who included Drs. Sumitra-Albert and McKnight, as well as Dr. Rachunow, were all employees of Midtown with the exception of Dr. Simon. Dr. Simon was identified as an independent contractor and a gynecologist. On April 1<sup>st</sup>, Dr. Simon performed a gynecological exam. The patient, Mrs. Brown, reported nothing about coughing at that visit.

After ending her relationship with Midtown on April 1, 2004, Mrs. Brown saw the defendant Dr. David Kamlet on December 22, 2004. She reported to him chronic or frequent coughs and shortness of breath. On April 19, 2005, plaintiff arrived at St. Luke's-Roosevelt Hospital emergency room with complaints of shortness of breath, which she indicated she had been experiencing for three months, with the condition worsening in the past few days. When she coughed, there was a mild yellow productive phlegm. She also

complained of chest pains when coughing. She was given a chest X-Ray and a CT scan and was admitted to the hospital.

The tests showed that Mrs. Brown had a soft tissue density at the left hilum, likely representing a lymph node, but there was large right pleural effusion. However, there was no discrete mass or lesion seen. On April 30, 2005 she was seen by a thoracic surgeon. He drained the pleural effusions and ordered another CT scan, this time with contrast. This was done on May 2, 2005, and disclosed a 15mm speculated nodule in the medial right base. This led to a May 5, 2005 CT scan directed needle biopsy of a 1.5 cm lesion of the right lung base. This was found to be negative for malignancy. However, there was found to be sub-pleural chronic inflammation with reactive mesothelial cells. Another sample of fluid was sent to pathology, and this sample contained a diagnosis of "clusters of highly atypical epithelial cells consistent with endocarcinoma." Following this diagnosis Mrs. Brown met with a medical oncologist at Memorial Sloan Kettering (also not a defendant) where she received treatment, but succumbed to the disease on March 5, 2007.

I have a motion from Dr. Rachunow and Midtown and a separate one from Dr. Simon. The first contains an affirmation from Dr. Reed E. Phillips, who is Board Certified in Medical Oncology. He reviewed all the visits at Midtown, focusing primarily on the two in July and September 2003 with Dr. Rachunow. His position, in summary, is that the decedent developed any symptomology of lung cancer well after she left the care of Midtown and any of its doctors. Therefore, he opines that there was no delay in the diagnosis of the cancer because the patient displayed no symptoms of this disease during the period from February 2003 to her last visit on April 1, 2004. The expert further points out that the patient was given physical examinations which were normal, and at no time did

Mrs. Brown ever complain of any significant pulmonary symptoms. He adds that it is not the standard of care to order annual screening chest X-Rays even if the patient is a smoker.

In Mrs. Brown's case, he states that she never complained of any other symptoms, such as weight loss or shortness of breath. He further adds that it would be speculative to suggest that in this period of time, February 2003 through April 1, 2004, if an X-Ray had been done, a tiny nodule would have shown up. Finally, on this point, he gives his opinion that Mrs. Brown was terminally ill from the moment that she first exhibited shortness of breath. Therefore, any delay in diagnosis was probably for no greater a period than approximately four months before the actual diagnosis was made. Dr. Rachunow's treatment ended more than a year before that diagnosis, as did all the care from any doctor at Midtown.

Specifically with regard to the care provided by Dr. Rachunow, where the last visit was September 18, 2003, Dr. Phillips points out that the patient's cough was associated with a post-nasal drip and she was prescribed proper medication. With regard to the elevated white blood cell count, Dr. Rachunow properly recommended a follow-up appointment.

I find that Midtown and Dr. Rachunow, on the basis of Dr. Phillips' statement have made out a prima facie case entitling them to summary judgment.

The next motion by Dr. Jean Pascal Simon, who saw Mrs. Brown for one time on April 1, 2004, points out that Mrs. Brown was referred to him, a gynecologist, by Dr. McKnight, who had seen the patient at a visit marked "urgent" on March 5, 2004. Dr. Simon's motion is supported by an affirmation from Dr. Leonard Benedict, a physician

Board Certified in Obstetrics and Gynecology. His opinion is similar to the one offered by Dr. Phillips. Specifically, his position is that nothing about Mrs. Brown's condition, symptoms or complaints, either before or at the one visit with Dr. Simon, in any way warranted a diagnosis of lung cancer or a referral for any other treatment. Dr. Benedict points out that Mrs. Brown exhibited no signs or symptoms to Dr. Simon with regard to lung problems or even coughing. In this regard, he points out that the earlier complaints of a cough were in no way indicative of lung cancer. Again, there were no complaints of shortness of breath, no phlegm, no spitting of blood, no chest pain or weight loss. He also points out that her first complaints with regard to shortness of breath were made to Dr. Kamlet on December 22, 2004, and at that time Mrs. Brown said that this condition had persisted for about four months, which would go back to August 2004. Again, the expert reminds the Court that Dr. Simon only saw Mrs. Brown one time, four months before that, on April 1, 2004. Further, he opines that as a gynecologist, there was no reason for Dr. Simon to review earlier visits except for gynecological ones or the immediate referral by Dr. McKnight. I find that Dr. Simon has also made out a prima facie case entitling him to summary judgment.

The burden therefore now shifts to the plaintiff to see whether or not, via a submission of an expert affirmation, it can be shown that there are legitimate issues of fact sufficient to defeat these motions. One other thing should be noted here, which is a submission by counsel for Dr. Kamlet. He states that he takes no position on the motions but wants to preserve his Article 16 defenses. Additionally, he does not want the Court to make any factual findings in deciding these motions which might be adverse to his client, such as when the cancer first showed diagnosable signs.

The opposition to the motions by Midtown, Dr. Rachunow and Dr. Simon come in the form of an affirmation from an unnamed physician who identifies himself/herself as a Board Certified Internist who is Director of the Yale University Health Services. The expert gives an opinion that there was a deviation by all the doctors associated with Midtown and thereby by Midtown itself. The position is that there was a deviation from acceptable medical care by all these health care providers, including the named defendants, in their failure to ascertain the cause of Mrs. Brown's persistent cough.

In this regard, he points out that from September 18, 2003 through all of her ensuing visits to the doctors in Midtown, except for the last one on April 1, 2004, Mrs. Brown always complained of a cough. On the visit of March 5, 2004, she saw Dr. McKnight where the complaints she made were of severe cough. This doctor opines further that the likelihood is that if an X-Ray had been done during the latter part of 2003 into early 2004, the cancer would have been diagnosed and treated earlier, which would have led to a greater chance of survival by Mrs. Brown.

With regard to Dr. Rachunow, the opposition points out that this patient, who was returning for a follow-up at her September 18, 2003 visit, was not given any kind of further blood work-ups. Also, pursuant to the testimony given at her deposition, Dr. Rachunow acknowledges that though she wrote down that the cough was secondary to a post-nasal drip, Mrs. Brown did not display any symptoms of a post-nasal drip.

Regarding Dr. Simon, the opposition urges that he had an obligation to read the earlier notes, at the very least with regard to any prior gynecological visits such as the one by Dr. Sumitra-Albert and the immediate referral by Dr. McKnight. Both of these physicians described coughing by Mrs. Brown so severe that it caused urinary and fecal

incontinence. This doctor also points out that at the visit to Dr. Simon, the patient again indicated that she was smoking 1/4 pack of cigarettes a day. The opposition argues that all the doctors here failed in their duty to give Mrs. Brown appropriate care because all of them failed to properly evaluate her persistent cough, particularly by failing to order a chest X-Ray. It was necessary, the expert says, to attempt to find the cause for these symptoms, not just to treat them.

Counsel for Dr. Simon then argues in Reply that there is no actual showing by the plaintiff that his client reviewed the previous notes from Midtown dated November 18 or March 5. Further, he urges that the characterization of incontinence as being caused by the cough is not really substantiated by the records, since there was incontinence even without coughing and sometimes with sneezing. This counsel also points out that no complaint of coughing was actually ever made to Dr. Simon, whose job it was to evaluate Mrs. Brown from a gynecological point of view only. Finally, counsel urges that with regard to the issue of causation, the opposition does not go into any details as to why it is believed that an X-Ray in April 2004 would have established an earlier stage of cancer and why treatment would have been more effective at that time.

*My decision is as follows. As earlier stated, I do feel that the moving defendants in the first instance have made out a prima facie case. So the issue here is, has the plaintiff, via its expert, sufficiently refuted it. I believe it has vis-a-vis Midtown, but not with regard to the individual moving defendants Dr. Rachunow and Dr. Simon.*

With regard to Dr. Simon, as counsel argues, he only saw Mrs. Brown one time. At that visit, which consisted of a gynecological examination, Mrs. Brown made no complaints of coughing. Perhaps it would have been the better practice to have reviewed the earlier

notes, but there is no stated departure here, nor is there an opinion given that any failure to do so was causative of injury. And again, it should be emphasized that Dr. Simon was only seeing this patient as a gynecologist. Without being able to assign him the responsibility of reviewing all the prior visits and without any immediate complaints of coughing or related issues, this Court would be hard pressed to find that this one visit, wherein he did not order a chest X-Ray or refer the patient for additional treatment, was a deviation from the standard of care.

Likewise with regard to Dr. Rachunow, who saw Mrs. Brown early on in July and then again in September 2003, I cannot find that there was a sufficient amount of information given to Dr. Rachunow, in the way of lung complaints, to find that she had an obligation to order a chest X-Ray. Mrs. Brown only complained of a cough on the second visit to Dr. Rachunow, which was her last visit. She also indicated that she was a smoker. She had never before made any complaints of coughing to the other doctors who had examined her before Dr. Rachunow. The cough was reported then to be of short duration, and the patient herself may have attributed it to allergies. The elevated white blood cell count was only minimally elevated, and the patient did not seem to display any other signs of physical illness. So based on all of this information, this Court cannot find that Dr. Rachunow departed from any standard of care vis-a-vis the failure to order a chest X-Ray after seeing the patient in July and/or September of 2003.

However, despite these findings vis-a-vis the individual doctors, I cannot say the same for Midtown. Here, I do find that the opposing plaintiff's expert has been successful in creating an issue of fact as to whether the persistent cough complained of by the decedent for a period of time beginning in September of 2003 and extending through

March of 2004, which at times caused urinary and fecal incontinence because of its severity, at the very least called for a chest X-Ray to discern the cause of this cough. The failure to order such an X-Ray could be seen by fact finders as a departure from accepted standards of medical care.

As to the issue of causation, there really is a stand off here between Dr. Phillips and the plaintiff's expert. Dr. Phillips opines that it is speculative that a tiny nodule would have shown up in 2003 and early 2004, but on the other hand, plaintiff's expert says that he believes it would have shown up and led to an earlier diagnosis and treatment. Neither opinion provides any real basis for its conclusions. Therefore, on this issue it cannot be said that the moving defendant Midtown has created a prima facie case entitling it to summary judgment.

Finally, with regard to Dr. Kamlet, this decision in no way precludes him from an Article 16 defense at trial, even though Dr. Rachunow and Dr. Simon as individual defendants will not be present at the trial as the action is dismissed against them. But it should be noted that in the aggregate, since I am retaining Midtown as a defendant, all counsel at trial will be able to discuss all the care and treatment received by Mrs. Brown during the visits that she made there.

Accordingly, it is hereby

ORDERED that the motions for summary judgment by defendants Jeremie R. Rachunow, M.D., and Jean Pascal Simon, M.D., are granted, and the complaint is dismissed in its entirety as against said defendants, and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

ORDERED that the motion for summary judgment on behalf of defendant Midtown Medical Care Center is denied, and the action is severed and continued against Midtown Medical and the nonmoving defendant David Kamlet, M.D.

This constitutes the decision and order of this Court.

Dated: July 27, 2010

**JUL 27 2010**

  
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**ALICE<sup>J.S.C.</sup> SCHLESINGER**

**FILED**  
**AUG 04 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**