

**Cilento v Samel**

2011 NY Slip Op 33333(U)

October 31, 2011

Supreme Court, Richmond County

Docket Number: 101227/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No. 101227/08  
Motion No.: 2 & 4**

**ROBERT L. CILENTO, as Administrator of the Estate of  
JEAN CILENTO, Deceased; and  
ROBERT L. CILENTO, Individually**

*Plaintiff*

*against*

**SHMUEL SAMEL, M.D.;  
AHMED EL-SOURY, M.D.;  
JAMES BRUNO, M.D.;  
LEONARD LEFKOVIK, M.D.;  
STATEN ISLAND UNIVERSITY HOSPITAL;  
SATYAGNANI NAGUBAND, M.D.;  
MURLIDHAR PAHUJA, M.D.; and  
JOSEPH MASBAD, M.D.**

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*Defendants*

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The following items were considered in the review of the following motions for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motions and Affidavits Annexed	1 & 2
Answering Affidavit	3
Replying Affidavits	4 & 5
Exhibits	Attached to Papers
Memorandum of Law	2

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The defendant, Joseph Masbad, MD (“Dr. Masbad”), moves for summary judgment against the plaintiffs Robert L. Cilento, as administrator of the estate of Jean Cilento, deceased, and Robert L. Cilento, individually. Dr. Masbad’s motion is granted. The defendants, James Bruno, M.D. (“Dr. Bruno”) and Leonard Lefkovik, M.D. (“Dr. Lefkovik”) move for summary judgment against the plaintiffs. The motion is granted.

## Facts

The plaintiff was an eighty-two year old woman who became ill on April 25, 2007. She went to the emergency room (“ER”) of Staten Island University Hospital (“SIUH”) on April 26, 2007 complaining of difficulty breathing and wheezing. In the ER, she related a history of hypertension, macular degeneration, emphysema and a previous left mastectomy. On examination the plaintiff had wheezing and she used her accessory muscles to breathe. The plaintiff received oxygen, inhalation treatments with albuterol and atrovent, intravenous corticosteroids, furosemide, and four baby aspirin. She then reported feeling better. Her diagnoses at the time of admission were mild chronic obstructive pulmonary disease, congestive heart failure and possible myocardial infarction. In the plaintiff’s initial history she did not recount having abdominal pain or gastrointestinal symptomatology. Dr. Masbad’s admitting physical examination showed a non-tender soft abdomen, without distension, and with normal bowel sounds. The plaintiff’s initial chest x-ray was interpreted as showing hyperaeration, and the electrocardiogram showed sinus tachycardia. The defendant, Shmuel Samel, MD (“Dr. Samel”), reviewed Dr. Masbad’s findings on April 27, 2007 and agreed with them and with his plan of care.

On April 27, 2007, the plaintiff was seen by Dr. Lefkovic, a cardiologist, who recorded positive blood tests compatible with the plaintiff having had a myocardial infarction. However, he did not plan an immediate cardiac catheterization. The plaintiff’s medications were adjusted to include Cardizem. The plaintiff’s abdominal findings remained unchanged. During that day, the plaintiff developed worsening respiratory status. An echocardiogram showed mild mitral, mild tricuspid, and trace aortic regurgitation. Ultrasound evaluation for lower extremity venous thrombosis was negative. Dr. Masbad reviewed findings with Dr. Bruno, a pulmonary specialist, who saw the plaintiff in consultation.

The following day, April 28, 2007, Dr. Masbad’s examination of the plaintiff’s abdomen was unchanged, but a chest x-ray showed lucency overlying the upper abdomen and upright

views of the abdomen showed air-filled loops of small and large bowel. Dr. Lefkovik's cardiac assessment was unchanged as well.

On April 29, 2007, Dr. Lefkovik assessed the plaintiff's prognosis as being "guarded". On that date, the examination of the plaintiff's abdomen by Dr. Samel showed a soft abdomen with bowel sounds present. On April 30, 2007, the plaintiff reported to her physicians that she felt better. Examination of her abdomen was documented as unchanged, however, x-rays again showed a lucency under the right hemidiaphragm. Clinical improvement continued on May 1, and May 2, 2007, although a chest x-ray again seemed to show a loop of bowel under the diaphragm. The plaintiff was still wheezing, and her abdominal examination showed a soft, non-tender, non-distended abdomen with bowel sounds present. Dr. Masbad reported the plaintiff's chest x-ray showed no infiltrates or effusion. During deposition, Dr. Masbad states that the plaintiff was discussed on rounds and the decision was made not to consult gastroenterology or to do an abdominal CT scan.

On May 3, 2007, Dr. Lefkovik saw the plaintiff and recorded slightly elevated blood pressure, peripheral edema and exertional dyspnea. By 11:00 AM, the plaintiff had a tympanitic (a drum like sound when tapped), distended abdomen, and had decreased bowel sounds. The plaintiff had already been given Senna and Colace which had failed to stimulate bowel movements, and the laxative Lactulose was added. When this failed to prompt a bowel movement, a rectal examination was performed that showed a small amount of firm stool in the rectal vault without detectable blood. A small amount of stool was manually removed. The plaintiff continued to complain of constipation to her nursing staff. Dr. Lefkovik suggested a computerized tomography scan ("CT scan") of the abdomen, which was ordered. Dr. Samel noted distension of the abdomen on that day. Dr. Masbad noted the abdominal distension as well and described the plaintiff's abdominal x-ray as showing colonic distension. Dr. Masbad ordered an oil retention enema which failed to prompt a bowel movement. That night, the plaintiff was seen by Dr. Bruno who noted the plaintiff had a stable pulmonary status, but also had a distended, painful abdomen with constipation. The pertinent findings on the abdominal CT scan

were a distended abdomen, moderate diffuse small bowel distension and fecal material in the ileum. On May 4, 2007, Dr. Lefkovic noted the plaintiff was still constipated despite medications. He suggested magnesium citrate and evaluation of the plaintiff's CT scan and laboratory blood work.

By the morning of May 5, 2007, Dr. Lefkovic reported the plaintiff's CT scan showed possible obstruction and intestinal perforation. Dr. Lefkovic suggested gastroenterological evaluation and consultation with a surgeon. Later that day, the plaintiff was found out of bed, in a chair and unresponsive. She had agonal respiration and dilated pupils. Dr. Masbad noted the plaintiff's worsening condition included low blood pressure, cyanotic coloring, and vomiting of "coffee-ground" material (characteristic of coagulated and partially digested blood). The plaintiff was intubated. Her abdomen was distended, there were no bowel sounds, and she guarded her abdomen from palpation. Suctioning the plaintiff's gastric contents recovered fecal material. A surgical consultation was obtained. The surgeon assessed a surgical emergency and the plaintiff was brought to the operating room. Despite suspecting a perforated intestine, only a non-focal bowel obstruction was found, and the small bowel was decompressed. A gastroenterologist evaluated the plaintiff after surgery. The plaintiff's medical status deteriorated with the development of both acute renal and respiratory failure. A new cyanosis of the right hand developed on May 6, 2007. Her pulses were good and the color of the hand improved after nitrate therapy. Both Dr. Lefkovic and the consulting surgeon assessed the plaintiff's prognosis as being grave. Moreover, during that day, nursing notes documented decreased cardiac output and hypotension. The plaintiff suffered a cardiac arrest during the evening. She could not be resuscitated.

### **Discussion**

This is an action based upon medical malpractice in failing to consult proper specialties and failing to diagnose the plaintiff's bowel obstruction. Three of the defendants, Dr. Masbad, Dr. Bruno, and Dr Lefkovic, move for summary judgment.

**Dr. Masbad did not act independently, nor did ordinary prudence demand disobedience.**

Dr. Masbad moves for summary judgment stating he was not liable here because he was an intern working in the hospital under the orders of attending physicians. A hospital is liable for the actions of employed physicians acting within the scope of their employment.<sup>1</sup> Generally, neither a hospital nor its nursing staff are liable when the hospital's employees follow clear and explicit orders given by the patient's attending physician.<sup>2</sup> The generality applies unless the orders are so contraindicated that ordinary prudence would dictate the order not be followed.<sup>3</sup> Strong policy considerations behind this principle include the concept that the primary function of a hospital staff is to follow the directions of physicians, and that there are strong reasons to encourage a hospital's staff to diligently carry out physician's orders.<sup>4</sup> This applies to physician employees of a hospital during the course of performing a procedure where there is no independence of action.<sup>5</sup> The Appellate Division, First Department has stated that in order for a hospital resident physician to be liable in medical malpractice, evidence must be presented that the resident physician exercised independent medical judgment.<sup>6</sup> Here, the record clearly establishes that Dr. Masbad was a first year intern at the time of the events described. Therefore, he was a hospital physician-employee. Ian Newmark, M.D. gave expert medical testimony that Dr. Masbad was functioning as a first year intern and that he did not exercise independent medical judgment.

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<sup>1</sup>*Bing v. Thunig*, 2 NY 2d 656, 667 [1957].

<sup>2</sup>*Toth v. Community Hospital at Glen Cove*, 22 NY 2d 255, 265 [1968]; and *Salandy v Bryk*, 55 AD 3d 147, 165 [2d Dept 2008].

<sup>3</sup>*Toth v. Community Hospital at Glen Cove*, 22 NY 2d at 265 FN 3.

<sup>4</sup>*Toth v. Community Hospital at Glen Cove*, 22 NY 2d at 265.

<sup>5</sup>*Soto v. Andaz*, 8 AD 3d 470, 471 [2d Dept 2004].

<sup>6</sup>*Crawfore v. Sorkin*, 41 AD 3d 278, 280 [1st Dept 2007].

The plaintiff's expert's opinion does not explicitly state that SIUH's intern-physician, Dr. Masbad, exercised independent medical judgment. Nor does the plaintiff's expert affirmation give examples of Dr. Masbad's independent judgment. Despite citing several instances of supposed deficiencies in the care rendered to the plaintiff, there is no statement that the alleged deficiencies resulted from the independent medical judgment of the intern, Dr. Masbad. Further, the plaintiff's expert does not state that the orders given by the plaintiff's attending physicians were so contradicted by ordinary prudence that Dr. Masbad should have taken independent action not authorized by his superiors and mentors.

Therefore, the conditions for attaching liability to the actions or omissions of Dr. Masbad, as a first-year, hospital-employed interning physician, are not met since there is no evidence in admissible form that he exercised independent medical judgment, nor any evidence that ordinary prudence required Dr. Masbad to disregard the orders of physicians higher than he in the hospital hierarchy. Consequently, summary judgment is granted to Dr. Masbad.

**Dr. Bruno and Dr. Lefkovik only had a duty to the plaintiff in their sub-specialties.**

It is well established actions based upon medical malpractice, as in other actions based upon negligence, that “[t]he existence of a duty is a question of law is to be determined by the court.”<sup>7</sup> It is further well established that “[a]lthough physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient.”<sup>8</sup> Therefore, a physician owes a duty to a patient both if the physician undertakes a particular role in the care of a patient, and if the patient relies upon that physician to function in that role.

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<sup>7</sup>*Markley v. Albany Medical Center Hosp.*, 163 AD 2d 639, 640 [3d Dept 1990]; *Eiseman v. State of New York*, 70 NY 2d 175, 187 [1987]; *DeAngelis v. Lutheran Medical Center*, 58 NY 2d 1053, 1055 [1983]; and see *Palsgraf v. Long Island R.R. Co.*, 248 NY 339, 343 - 347 [1928].

<sup>8</sup>*Boone v. N. Shore Univ. Hosp. at Forest Hills*, 12 AD 3d 338, 339 [2d Dept 2004]; *Wasserman v. Staten Island Radiological Assocs.*, 2 AD 3d 713, 714 [2d Dept 2003]; *Chulla v. DiStefano*, 242 AD 3d 657, 658 [2d Dept 1997]; *Markley v. Albany Medical Center Hosp.*, 163 AD 2d at 640; and see *Murphy v. Blum*, 60 AD 2d 914, 915 [2d Dept 1990].

Dr. Bruno moves for summary judgment on the grounds that the duty he owed to the plaintiff was to provide care as her pulmonologist. In that regard, there is no allegation that the pulmonary care he rendered to the plaintiff did not meet the required standard of care. Donald R. Fishman, M.D. provided an expert opinion that Dr. Bruno's care was within the standard of care of a pulmonologist. Dr. Bruno's duty toward the plaintiff only encompassed his performance as a pulmonologist and he owed no duty to the plaintiff in any other respect. Therefore, Dr. Bruno asserts he is not liable for any medical malpractice committed in the general medical care of the plaintiff, in her surgical care, or in her gastroenterological care.

Dr. Bruno was consulted solely as a pulmonologist and he saw the plaintiff in that role. There is no evidence the plaintiff or her family requested Dr. Bruno to fulfill any role other than as a pulmonologist. Further, there is no evidence the plaintiff and her family relied upon Dr. Bruno to undertake the plaintiff's general medical, gastroenterological, or abdominal surgical care. According to the plaintiff's expert opinion a general duty is attached to the role of every medical consultant. In law, a medical consultant ordinarily owes a duty to a patient that pertains to the particular role of the consultant, and then only if the patient relies upon the consultant for that role. Dr. Bruno owed a duty to the plaintiff only in regard to his role as a pulmonologist. There is no evidence that Dr. Bruno's actions or inactions as a pulmonologist was a proximate cause or significant factor in the plaintiff's gastroenterological or surgical complications. Therefore, Dr. Bruno's motion for summary judgment is granted.

Dr. Lefkovik also moves for summary judgment. He presents the expert opinion of Monty M. Bodenheimer, M.D. who opines that Dr. Lefkovik acted within the standard of care of a cardiologist. Dr. Bodenheimer affirms that Dr. Lefkovik's role was solely that of a cardiologist. The plaintiff's expert would again impose upon Dr. Lefkovik the duties of a practitioner in internal medicine constipation. A specialist in one field may be regarded as fulfilling the role of a physician in a second field by assuming a role in patient care that encompasses the second field. For example, an infectious disease specialist may have assumed the ordinary role of a cardiologist

by performing and reading an EKG and acting upon his interpretation of the electrocardiogram.<sup>9</sup> Here, the medical problems that led to the plaintiff's demise originated from abdominal problems. Notwithstanding the opinion of the plaintiff's expert, the plaintiff has not shown a prima facie case for Dr. Lefkovik being regarded as a general internist, gastroenterologist, or abdominal surgeon. Nor is there a showing that the family relied upon Dr. Lefkovik in any role other than as a cardiologist. There is no evidence Dr. Lefkovik's cardiac care was a proximate cause or significant factor in the plaintiff's gastroenterological or surgical complications. Therefore, summary judgment is granted to Dr. Lefkovik.

**The findings of the quality assurance committee are not applicable.**

Among the plaintiff's exhibits is a copy of a "summary statement of deficiencies" created by a hospital committee. The statement purports that the plaintiff did not have a prompt referral to a specialist physician and that recommended radiological studies were not performed. The plaintiff represents these findings as assigning blame to individuals. The plan of correction for these alleged deficiencies includes counseling of an unnamed physician and reviewing criteria for consultations. Despite the plaintiff's innuendos, the contents of the summary and plan are not directed against any individual physician. The copies of documents provided are hearsay without an established exception. Consequently, the documents are not evidence in admissible form against the defendants and are meaningless and moot.

Accordingly, it is hereby:

ORDERED, that Joseph Masbad, M.D.'s, James Bruno, M.D.'s, and Dr. Robert Lefkovik, M.D.'s motions for summary judgment are granted, and the complaints are hereby severed and dismissed as against the defendants Joseph Masbad, M.D., James Bruno, M.D., and Robert Lefkovik, M.D., and the clerk is directed to enter judgment in favor of said defendants; and it is further

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<sup>9</sup>*Alp v. Baboumian*, \_\_\_ Misc. 3d \_\_\_; 2011 NY Slip Op 31606U \*1. \*10 [Sup Ct, New York Cty 2011].

ORDERED, that the case is marked stayed and the remaining parties shall contact chambers when the stay is lifted to schedule a conference date.

ENTER,

DATED: October 31, 2011

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Joseph J. Maltese  
Justice of the Supreme Court