

**Shields v Geller**

2018 NY Slip Op 32176(U)

September 7, 2018

Supreme Court, New York County

Docket Number: 156102/2016

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN Justice

PART 11

SHANA YVETTE SHIELDS, as Administratrix of the Goods, Chattels and credits of the Estate of DEBRELLA NESBITT, and GREG SHIELDS, individually,

Plaintiffs,

- v -

STELLA GELLER, D.O., IDEAL MEDICINE, P.C., PRIORITY MEDICAL, DFU MEDICAL P.C., UNIVERSAL FAMILY MEDICINE, MAXIM KREDITOR, M.D., MAXIM KREDITOR, M.D, P.C.,

Defendants.

156102 | 2016

INDEX NO. : ~~805004714~~

MOTION DATE:

MOTION SEQ. NO.: 002

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [ ] Yes [x] No

Plaintiffs move, by order to show cause, for an order pursuant to CPLR 3025(b) granting leave to amend the complaint to include a cause of action for wrongful death. Defendants Maxim Kreditor and Maxim Kreditor, P.C. (together “Kreditor defendants”), DFU Medical P.C. and Universal Family Medicine, P.C. s/h/a Universal Family Medicine (together “the Universal defendants”), and Stella Geller D.O. separately oppose the motion.

This is an action for medical malpractice arising from allegations that defendants, inter alia, failed to timely and properly diagnose lung cancer. It is alleged that decedent was treated by Dr. Geller from April 13, 2007 through in or about December 12, 2014, and by Dr. Kreditor

on November 6, 2009, November 30, 2009, May 3, 2011, and April 4, 2014. It is alleged that decedent was diagnosed with stage IV lung cancer in or around June 14, 2014. This action was filed on July 22, 2016, and decedent died on April 5, 2017.

In support of their motion to amend, plaintiffs submit the uncertified hospital records from New York Presbyterian Hospital stating that the immediate cause of decedent's death was NSCLC (i.e. non-small cell lung cancer), and her death certificate indicating that she died of natural causes. In addition, in her affirmation, counsel states that "[w]e have conferred with an expert in hematology/oncology who has opined to a reasonable degree of medical certainty that the malpractice alleged in this action was the proximate cause of decedent's death."

The Kreditor defendants oppose the motion, arguing that plaintiffs failed to sufficiently show the merit of the proposed amendment since they did not submit an affidavit from an expert in hermatology/oncology establishing a causal connection between the alleged malpractice and plaintiff's death, citing e.g. McGuire v. Small, 129 AD2d 429, 429 (1<sup>st</sup> Dept. 1987); Cruz v. Brown, 129 AD3d 455 (1<sup>st</sup> Dept 2015). The Universal defendants and Dr. Geller oppose the motion on similar grounds.

In reply, plaintiffs assert that Cruz v. Brown, supra is not controlling here, and that their papers adequately demonstrate that the amendment is not palpably insufficient or devoid of merit.<sup>1</sup>

Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18

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<sup>1</sup>The court has not considered the Kreditor defendants' sur-reply since, in their reply, plaintiffs do not raise new arguments or submit additional evidence.

AD3d 352, 355-356 (1<sup>st</sup> Dept 2005)(internal citations and quotations omitted). In this context, the courts define prejudice as a “some special right lost in the interim, some change of position, or some significant trouble or expense which could have been avoided had the original pleading contained what the amended one wants to add.” Barbour v. Hospital for Special Surgery, 169 AD2d 385, 386 (1<sup>st</sup> Dept. 1991)(citations omitted). Here, there are no assertions of prejudice or surprise.

Instead, at issue is the merit of the proposed wrongful death claim. In this regard, in general, leave to amend is granted as long as the proponent submits sufficient support to show that proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1<sup>st</sup> Dept 2010)(citation omitted). That said, however, the Appellate Division, First Department has held that in the context of personal injury and medical malpractice actions, in order to add a wrongful death claim, a plaintiff must submit “competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff.”<sup>2</sup> Gambles v. Davis, 32 AD3d 224, 225 (1<sup>st</sup> Dept 2006), *citing* McGuire v. Small, 129 AD2d at 692; See also, Frangladakis Estate of Bazas v. 51 West 81<sup>st</sup> Street Corp., 161 AD3d 478 (1<sup>st</sup> Dept 2018)(“to support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff”)(internal citations and quotations omitted).

Here, plaintiffs have not submitted competent proof of causation but, instead, rely on the

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<sup>2</sup>Unlike the First Department, the Second Department does not require competent medical proof to demonstrate the merit of a proposed claim for wrongful death. See Lucido v. Mancuso, 49 AD3d 220 (2d Dept 2008), appeal withdrawn 12 NY3d 804 (2009).

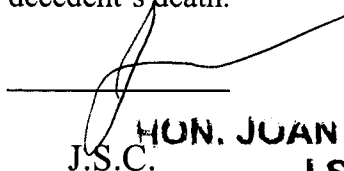
uncertified hospital records and statement of counsel describing the opinion of their expert.

McGuire v. Small, 129 AD2d at 692 (trial court erred in granting leave to amend to add a wrongful death action as plaintiff did not “present expert medical opinion that the alleged failure to diagnose splenic carcinoma was causally connected to the plaintiff’s death”); Frangladakis Estate of Bazas v. 51 West 81<sup>st</sup> Street Corp., 161 AD3d at 478 (affirming trial court order granting leave to amend to add wrongful death claim based on affirmation of plaintiff’s expert which stated that to a reasonable degree of medical certainty the decedent’s injury led to his death).<sup>3</sup>

In view of the above, it is

ORDERED that the motion for leave to amend the complaint to add a cause of action for wrongful death is denied without prejudice to renewal upon competent medical proof of the casual connection between the alleged malpractice and decedent’s death.

DATED: September 7, 2018

  
 HON. JUAN A. MADDEN  
 J.S.C.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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<sup>3</sup>Contrary to plaintiffs’ argument, Hickey v. Kaufman, 156 AD3d 436 (1<sup>st</sup> Dept 2017) is not controlling here since it did not involve a medical malpractice action or a motion to amend to add a wrongful death claim.