

**Fishman v Dharmasena**

2023 NY Slip Op 32084(U)

June 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 514302/2017

Judge: Genine D. Edwards

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At an I.A.S. Trial Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams St., Brooklyn, New York, on the 20th day of June 2023

P R E S E N T :

Hon. Genine D. Edwards, Justice

LEONID FISHMAN, as Administrator of the Estate  
the Estate of AYSIK FISHMAN, deceased and  
LEONID FISHMAN, individually,

Index No. 514302/2017

Plaintiffs,

-against-

SANATH DHARMASENA, M.D., ALEXEY  
ISAKOV, M.D., STEVE NOZAD, M.D., HAROUT  
NALBANDIAN, M.D., ISAIA AVRAHAM, M.D.,  
YURIY PERTSOVSKY, M.D., METROPOLITAN  
CENTER DIGESTIVE AND LIVER DISEASES, and  
NEW YORK COMMUNITY HOSPITAL,

Defendants.

The following e-filed papers read herein:

NYSCEF Doc. No.

Notice of Motion and Affidavits (Affirmations) and Exhibits.....	121-137; 142-184
Answering Affidavit (Affirmation) and Exhibits.....	193-201
Reply Affidavit (Affirmation) and Exhibits.....	207
Stipulations of Adjournment.....	190; 192

This is an action to recover damages for medical malpractice and wrongful death.

Defendants Harout Nalbandian, M.D., Steve Nozad, M.D., Isaia Avraham, M.D., and

Alexey Isakov, M.D. separately moved for summary judgment dismissing the complaint

and any crossclaims against them.<sup>1</sup> Plaintiffs opposed the motion from Alexey Isakov, M.D. (“Dr. Isakov”), but did not oppose the motions from Harout Nalbandian, M.D., Steve Nozad, M.D., and Isaia Avraham, M.D.

### FACTS

Decedent Aysik Fishman’s medical history included hypertension, coronary artery disease with stent placement, hypercholesterolemia, hyperlipidemia, obesity, benign prostatic hyperplasia, and diabetes mellitus. In 2009, decedent’s primary care physician, Dr. Isakov, referred him to a pulmonologist due to complaints of choking attacks at night, severe snoring, frequent awakening at night, and occasionally falling asleep while watching TV. Obstructive sleep apnea syndrome was suspected. In November 2010, decedent saw another pulmonologist due to complaints of shortness of breath. The pulmonologist concluded decedent’s symptoms were attributable to obesity. On June 25, 2015, decedent presented to Fit Feet Podiatry for pain in his left great toe joint. Fit Feet Podiatry documented that decedent was “negative for asthma, sleep apnea, snoring, or other breathing problems.” *Affidavit in Opposition to Motion, Exhibit B, pg. 83.*

Decedent presented to defendant New York Community Hospital on November 7, 2015, around 6:50AM, following five episodes of diarrhea and complaints of abdominal pain that radiated to his back. Defendant Sanath Dharmasena, M.D. (“Dr. Dharmasena”) examined decedent in the emergency room between 7:00AM and 7:34AM. At 7:01AM, the decedent’s abdominal pain was an “8” on a scale of 1 to 10 and,

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<sup>1</sup> Defendants Sanath Dharmasena, M.D. and New York Community Hospital previously settled. Yuriy Pertsovsky, M.D. was discontinued from the action. Metropolitan Center Digestive and Liver Diseases did not appear.

at 7:20AM, a “6” on a scale of 1 to 10. Decedent’s vital signs were blood pressure 186/87, pulse 63, and respiration 16. The differential diagnosis included appendicitis; abdominal aortic aneurysm; incarcerated hernia; mesenteric ischemia or thrombosis; myocardial infarction or coronary artery disease; testicular ovarian or salpingo torsion; large or small bowel volvulus; liver failure pancreatitis; ruptured viscous (liver, spleen, bowel); intraabdominal abscess; intussusception; and hemolytic uremic syndrome. Dr. Dharmasena ordered a complete blood count (CBC); complete metabolic panel (CMP); PT; INR; EKG; lipase; portable chest x-ray; urinalysis; blood cultures; lactic acid; and an abdominal CAT scan with IV and oral contrast. She also ordered that decedent be given 2 milligrams of morphine intravenously.

Decedent was administered, intravenously, 2 milligrams of morphine at 8:06AM and 4 milligrams of morphine around 10:23AM. His abdominal pain was a “7” on a scale of 1 to 10 at 10:24AM, and at 11:07AM, a “4” on a scale of 1 to 10. Decedent had a kidney stone in his left kidney per the CAT scan. Around 12:05PM, Dr. Dharmasena spoke with Dr. Isakov, who determined that decedent should be admitted to the hospital on the general medical floor. Decedent was transferred out of the emergency room at 1:00PM.

At 12:56PM, decedent’s vital signs were blood pressure 170/72, pulse 75, and respiration 18. At 1:25PM, his vital signs were blood pressure 163/80, pulse 73, and respiration 18. His abdominal pain was an “8” on a scale of 1 to 10. Accordingly, house physician Moe Myint, M.D. (“Dr. Myint”) ordered morphine, 2 milligrams, intravenously. Decedent was administered morphine at 2:04PM, and by 3:01PM his pain was a “3” on a scale of 1 to 10. Later, Dr. Myint stopped the morphine, 2

milligrams, intravenously and instead instructed that decedent be given morphine, 2 milligrams, subcutaneously every 4 hours, for three days, as needed for pain.

Decedent's vital signs were blood pressure 166/86, pulse 75, and respiration 18 at 3:35PM. Dr. Isakov saw the decedent around 4:00PM. The differential diagnosis included abdominal pain of unknown origin, gastroenteritis, and ischemic bowel syndrome. Dr. Isakov stopped Dr. Myint's morphine order and issued another order that decedent receive morphine, 4 milligrams, subcutaneously every 4 hours as needed for pain. Dr. Isakov also ordered consultations with surgery, cardiology, gastroenterology, and infectious disease.

Decedent was given morphine, 4 milligrams, subcutaneously at 5:45PM. His abdominal pain was documented as a "9" on a scale of 1 to 10; by 6:40PM, it was a "4" on a scale of 1 to 10. At 8:00PM., decedent's vital signs were blood pressure 162/94, pulse 60, and respiration 18.

Surgeon Camille Armand, M.D. ("Dr. Armand") examined decedent around 9:27PM. She reviewed decedent's lab work, diagnostic testing, and EKG, and spoke to a few doctors, but not Dr. Isakov. Dr. Armand changed decedent's pain medication. She ordered hydromorphone, 4 milligrams, intramuscularly, every 4 hours as needed for pain. The hydromorphone was administered to decedent and by 10:30PM, decedent's pain was a "3" on a scale of 1 to 10 from a "10" on a scale of 1 to 10 at 9:30PM.

On November 8, 2015, at 2:10AM, decedent was given hydromorphone, 4 milligrams, intramuscularly. He was found unresponsive at 6:50AM, resuscitated, intubated, and transferred to the Intensive Care Unit (ICU). Thereafter, infectious disease physician Isaia Avraham, M.D. examined decedent and noted his "cardiopulmonary arrest may be associated with his history of sleep apnea while

receiving various pain medications since arrival.” *Notice of Motion, Exhibit F, pg. 16.*

Before that note there was no mention in the medical records of decedent having a past or current history of sleep apnea or utilizing any treatments or medications for same.<sup>2</sup>

Decedent was terminally extubated and passed away on November 17, 2015.

### ANALYSIS

The summary judgment motions from defendants Harout Nalbandian, M.D., Steve Nozad, M.D., and Isaia Avraham, M.D. are granted because plaintiffs did not oppose those motions.

Concerning Dr. Isakov’s summary judgment motion, “[a] physician [who moves] for summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of plaintiff’s injuries.” *Schwartzberg v. Huntington Hospital*, 163 A.D.3d 736, 81 N.Y.S.3d 118 (2d Dept. 2018) quoting *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017). To sustain the burden, the physician “must address and rebut any specific allegations of malpractice set forth in a plaintiff’s bill of particulars.” *Mackauer*, 148 A.D.3d 873.

“In opposition, the plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden.” *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). Accordingly, a plaintiff must submit the affidavit of “a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician’s opinion that the alleged departure was a competent producing cause of

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<sup>2</sup> Defendant Isaia Avraham, M.D. was not deposed.

plaintiff's injuries." *Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). See *Sunshine v. Berger*, 214 A.D.3d 1020, 186 N.Y.S.3d 326 (2d Dept. 2023).

Here, Dr. Isakov established entitlement to judgment as a matter of law through the affirmation of his expert, who stated, based upon a review of the medical records, that Dr. Isakov's care and treatment of decedent was within the standard of medical practice. The expert opined, *inter alia*, that Dr. Isakov's prescription of 4 mg of morphine to be given to decedent every four hours was appropriate and within the standard of care for a physician prescribing opioid medication to a patient, and there was no need to escalate decedent's opioid medication to 4 mg of hydromorphone, the equivalent of 20-40 mg of morphine, as Dr. Armand later prescribed. In addition, Dr. Isakov was unaware of whether decedent was diagnosed or treated for sleep apnea.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's expert opined that Dr. Isakov departed from the standard of care by failing to alert and inform hospital staff of decedent's past medical history significant for sleep apnea and failing to issue appropriate orders for decedent to be continuously monitored (telemetry monitoring) given his significant cardiac and pulmonary history. In the first instance, the failure to continuously monitor decedent was a new theory of liability. "A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars." *Anonymous v. Gleason*, 175 A.D.3d 614, 106 N.Y.S.3d 353 (2d Dept. 2019). Secondly, prior to his death, decedent's medical records did not evince a medical history significant for sleep apnea. Indeed, the records did not confirm that decedent had nor received treatment for sleep apnea.

Accordingly, defendants' motions for summary judgment dismissing the complaint and all crossclaims are decided as follows: it is

ORDERED that summary judgment is granted in favor of defendants Harout Nalbandian, M.D., Steve Nozad, M.D., Isaia Avraham, M.D., and Alexey Isakov, M.D. The complaint and all crossclaims, if any, are dismissed.

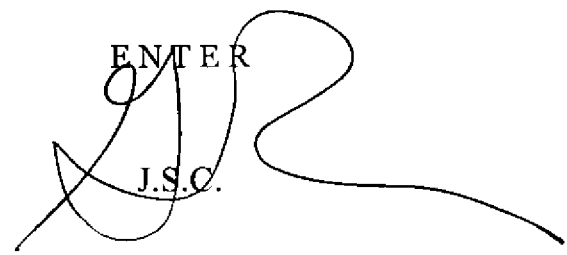
This constitutes the Decision and Order of the Court.

For Clerks use only

MG \_\_\_

MD \_\_\_

Motion Seq.#: 5, 6, 7, 8

ENTER  
J.S.C.  
  
HON. GENINE D. EDWARDS