

**Vaz v New York Presbyt. - Brooklyn Methodist Hosp.**

2023 NY Slip Op 33984(U)

October 31, 2023

Supreme Court, Kings County

Docket Number: Index No. 506875/2018

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of October 2023

P R E S E N T:

HON. GENINE EDWARDS

Justice.

-----x  
RANDOLPH VAZ, individually, and as Administrator of the Estate of CHARISSE VAZ, Deceased,

Plaintiff,

-against-

Decision and Order  
Index No.: 506875/2018

NEW YORK PRESBYTERIAN - BROOKLYN METHODIST HOSPITAL and IOSIF GULKAROV, M. D.,  
Defendants.

-----x  
The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motions, Affirmations and Exhibits.....64-67, 87-90  
Opposing Affirmations.....112-113, 116-117  
Affirmations in Reply.....125, 126

In this action to recover damages for medical malpractice and wrongful death, defendants NEW YORK PRESBYTERIAN - BROOKLYN METHODIST HOSPITAL (“NYPBMH”) and IOSIF GULKAROV, M. D. (“Dr. Gulkarov”) moved, separately, for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff opposed the motions.

FACTS

Charisse Vaz, the decedent, was a 45-year-old woman, and a practicing Jehovah’s Witness, who would not accept blood transfusions as contrary to her beliefs. She had an extensive medical history, including: pulmonary arterial hypertension causing end-stage

lung disease; chronic systolic right heart failure; chronic hypoxemic respiratory failure; the need for oxygen supplementation for 18-24 hours daily since 2008; congestive heart failure since 2009; continuous home health care since 2012; the need for a cane, rolling walker, and wheelchair since 2013; obstructive sleep apnea since 2014; the need for Remodulin infusions through a surgically implanted port to treat pulmonary arterial hypertension since 2015; diabetes mellitus; hypertension; cardiomyopathy; dyslipoproteinemia; hypothyroidism; osteoarthritis; obesity; schizoaffective psychosis/schizophrenia; manic depression; and bipolar disorder.

On April 20, 2017, Ms. Vaz was referred by her private attending pulmonologist, Ruth Minkin, M.D. ("Dr. Minkin") to the Emergency Department of NYPBMH. Dr. Minkin evaluated decedent, noting acute clinical decompensation and concern for progression of disease, with "worsening pericardial effusion." A chest x-ray found "extensive cardiomegaly cannot rule out cardiomyopathy or pericardial effusion." Dr. Minkin assessed severe pulmonary hypertension and congestive heart failure exacerbation. A consultation with Dr. Gulkarov, a cardiothoracic surgeon on the staff of NYPBMH was requested. As Ms. Vaz's condition deteriorated, it was determined that a percutaneous pericardiocentesis with a micropuncture needle and simultaneous ultrasound guidance and insertion of a catheter be performed, to slowly drain the fluids surrounding her heart.

On the morning of April 24, 2017, the date the surgery was to be performed, Ms. Vaz signed a consent form, which indicated "It has also been explained to me the possibility that I might require a blood transfusion." This sentence was typed in small print; towards the bottom of the form there was additional language following two asterisks: "If the patient/ proxy/ next of kin/ guardian refuses a blood transfusion. Form #2839 'Refusal to permit Blood Transfusion' must be completed and such refusal must be attached to this form."

Although all the parties concur that Ms. Vaz's beliefs would not allow her to accept a blood transfusion, no such refusal form was appended. The parties also concur

that the percutaneous pericardiocentesis procedure was the preferred way to treat Ms. Vaz given that her religious beliefs precluded accepting blood transfusions.

Ms. Vaz was stable following the operation. The next day, April 25, 2017, the drain was not pulling out fluid, thus an x-ray was performed. The results revealed that the drain was dislodged, but not completely out of the body, nor were the sutures torn. That evening, Dr. Gulkarov placed a chest tube and blood-tinged fluid drained through the tube, indicating active internal bleeding. Ms. Vaz was stable from 6:00 P.M., on April 25, 2017, through approximately 1:00 A.M., on April 26, 2017.

Later in the morning of April 26, 2017, Ms. Vaz's blood levels were exceptionally low. According to Dr. Gulkarov's deposition testimony, the patient and her family refused a blood transfusion, and he did not feel comfortable performing corrective surgery due to that refusal to accept a blood transfusion. Ms. Vaz died later that day.

#### LAW

The elements of a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. A defendant's negligence is the proximate cause when it is a substantial factor in the events that produced the injury. *Templeton v. Papathomas*, 208 A.D.3d 1268, 175 N.Y.S.3d 544 (2d Dept. 2022). "When moving for summary judgment, a defendant... must establish the absence of any departure from good and accepted medical practice or that... plaintiff was not injured thereby." *Barnaman v. Bishop Hucles Episcopal Nursing Home*, 213 A.D.3d 896, 184 N.Y.S.3d 800 (2d Dept. 2023). To sustain the burden, a defendant "must address and rebut any specific allegations of malpractice set forth in plaintiff's bill of particulars." *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017).

In opposition, the plaintiff must "raise a triable issue of fact regarding the element or elements on which defendant has made its prima facie showing." *Aliosha v. Ostad*, 153 A.D.3d 591, 61 N.Y.S.3d 55 (2d Dept. 2017). To do so, 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 plaintiff's injuries." *Kielb v. Bascara*, 217 A.D.3d 756, 191 N.Y.S.3d 158 (2d Dept. 2023).

### ANALYSIS

#### *Medical Malpractice*

Here, defendants established their prima facie entitlement to judgment as a matter of law insofar as asserted against them by submitting the affirmations of expert physicians, who opined that the decedent's demise was inevitable due to her serious underlying conditions, exacerbated by her refusal to accept a blood transfusion, and was not caused by any departures from proper care on the parts of the defendants.

Dr. Gulkarov's expert, Dr. Culliford opined that drain dislodgment and bleeding were known risks of a pericardiocentesis. This was an unavoidable dislodgment that resulted in bleeding. The decedent signed a consent form acknowledging transfusions may be required. He opined that Dr. Gulkarov was not aware that Ms. Vaz would refuse a blood transfusion if needed, since not all Jehovah's witnesses refuse transfusions. Dr. Culliford stated that decedent did not inform Dr. Gulkarov that she would refuse any transfusions until the decedent sustained the bleed/hemothorax on April 25<sup>th</sup>. It was only then that she first advised the physicians that she would not accept transfusions. Dr. Culliford indicated that due to decedent's refusal to accept blood, which diminished her options, including a potentially life-saving surgery, the subsequent treatment was in accordance with the standard of care.

NYPBMH contended, via the opinion of its expert, Dr. Gonclave, that there were no departures from the standard of care during the treatment decedent received at NYPBMH in April of 2017, nor did any acts or omissions result in any of the claimed injuries. In particular, NYPBMH claimed that 1) the decedent was timely and correctly diagnosed with pericardial effusion; 2) a percutaneous pericardiocentesis was indicated to prolong the decedent's life; 3) the percutaneous pericardiocentesis was timely performed within two days; 4) the percutaneous pericardiocentesis was appropriately performed by Dr. Gulkarov with a micropuncture needle and simultaneous ultrasound guidance, and the catheter was properly placed to initiate controlled drainage; 5) the decedent sustained two

known and accepted complications of the percutaneous pericardiocentesis: a hemothorax and catheter dislodgment; 6) both complications were timely diagnosed; 7) unfortunately, the hemothorax did not resolve without intervention. Dr. Gonclave explained that decedent's physicians appropriately considered proceeding with video-assisted thoracoscopic surgery [VATS]. In such a procedure, a camera is placed in the patient's chest cavity in an attempt to identify and then treat the source of the hemorrhage. Pursuant to the standard of care, this procedure cannot be performed on a patient unless the patient consents to receive blood transfusions. The expert asserted (without personal knowledge) that the record is clear that the defendants explained the gravity of her condition to decedent, her family, and the Jehovah's Witness church elders, all in an effort to persuade decedent to consent to a potentially life-saving blood transfusion. The decedent and her family continued to refuse same. Dr. Gonclave confirmed that considering decedent's compromised condition, without consent to a blood transfusion, the standard of care prevented decedent's physicians from performing a VATS or other surgical procedure to attempt to treat the hemothorax. In the absence of a blood transfusion, Dr. Gonclave opined that decedent's decline and demise could not be prevented.

Defendants' experts opined that her death was due to her serious co-morbidities, such that she needed a heart and lung transplant, which could not be performed due to her refusal to accept a blood transfusion and, that her life expectancy was severely limited without the transplants. Defendants further contended that her refusal to consent to a blood transfusion, which was necessary to perform further surgical interventions, was the immediate cause of her death, though, even with the corrective surgery, decedent's life expectancy was short.

In opposition, plaintiff's expert affirmation raised triable issues of fact. Among other things, plaintiff's expert opined that defendants both failed to appreciate an *increased* risk to a transfusion-refusing patient *if* a post-operative bleed happened and, once the post-operative bleed did happen, to timely recognize it *and* appropriately intervene. As summarized in the affirmation of plaintiff's medical expert, plaintiff

contended that defendants deviated from good and accepted standards of medical and surgical practice: (1) in failing to recognize the increased danger of bleeding, post-surgically in a patient who was a Jehovah's Witness; (2) in failing to be prepared to deal with complications of a post-surgical bleed in a patient who was a Jehovah's Witness; (3) in failing to recognize, on April 25, 2017, at 6:00 PM, when the chest tube drained a large amount of blood-tinged fluid, and decedent had a hematocrit of 31.2, that surgical intervention was required immediately; (4) in failing to recognize on April 25, 2017, at 6:00 PM, that it was an appropriate time for surgical intervention with the best chance of stopping the bleeding with the lowest risk especially since blood transfusion was not an option; (5) in failing to take action and surgically intervene on April 26, 2017, at some point shortly after 6:00 PM; (6) in improperly labeling decedent "not a surgical candidate" and foregoing surgery; (7) in improperly waiting until a surgical emergency occurred before acting; (8) in ineffectively controlling a post-surgical bleed; (9) in taking a "wait and see" approach to decedent's post-surgical bleed and the possibility that bleeding would stop.

Essentially, plaintiff's expert asserted that defendants knew there was an inherent risk of internal bleeding from the procedure, and that Ms. Vaz's religious beliefs might preclude a necessary blood transfusion if such a known complication arose. Plaintiff's expert opined that defendants knew that Ms. Vaz was bleeding for more than twelve hours, and for the first several hours after the bleeding was appreciated, she was relatively stable with a hematocrit of 31, which was acceptable for surgery. Surgical control of the hemorrhage was the only effective treatment available and the only chance that Ms. Vaz had to survive. Dr. Gulkarov's failure to act during that critical period resulted in Ms. Vaz's death. Moreover, plaintiff's expert stated that even though Ms. Vaz's refusal of a blood transfusion increased the risk of surgical intervention as the day progressed, surgery would still have given her a chance for survival, and it should have been attempted. Based upon these deviations, it is plaintiff's expert's opinion that Ms. Vaz bled uncontrollably and died.

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions.” *Cerrone v. North Shore-Long Is. Jewish Health Sys., Inc.*, 197 A.D.3d 449, 152 N.Y.S.3d 147 (2d Dept. 2021).

### *Informed Consent*

To establish a cause of action to recover damages for medical malpractice based on lack of informed consent, a patient must prove: (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed; and (3) that the lack of informed consent is a proximate cause of the injury. McKinney's Public Health Law § 2805–d(1). *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 21 N.Y.S.3d 143 (2d Dept. 2015). The fact that plaintiff signed a consent form alone does not establish a defendant's prima facie entitlement to judgment as a matter of law. *Guinn v. New York Methodist Hosp.*, 212 A.D.3d 787, 789, 183 N.Y.S.3d 431, 435 (2d Dept. 2023).

Defendants' experts asserted that all the risks of surgery and the dangers of refusing a blood transfusion were explained to the decedent and to her family, and Ms. Vaz signed a consent form for the surgery. Dr. Gulkarov avers that he discussed the dangers of refusing blood, and that Ms. Vaz made an informed decision in that regard. As such, there was no lack of informed consent. Plaintiff's opposition to the motion accepted as a fact that Ms. Vaz would not allow any blood transfusions. Defendants contend, primarily through the testimony of Dr. Gulkarov, that there were discussions with Ms. Vaz and her family regarding performing surgery without the ability to transfuse blood.

However, the parties' deposition testimony and the record raised several issues of fact regarding what defendants advised Ms. Vaz and what she agreed to in the consent form. In the first instance, the consent form provided by defendants and signed by decedent was unclear concerning what she was consenting to regarding blood

transfusions. No additional page clarifying that she would refuse blood was appended to the form, leading defendant's expert, Dr. Culliford, to opine that Dr. Gulkarov was not advised that there was an issue about accepting a blood transfusion until after the initial surgery.

But, at his deposition, Dr. Gulkarov testified that upon consultation with Dr. Minkin, the decision to perform the percutaneous pericardiocentesis procedure was related to the fact that Ms. Vaz would not accept a blood transfusion, since that procedure was the best treatment for a person who would not accept a blood transfusion. This contradicts his expert Dr. Culliford's opinion that he did not know there would be no consent to a transfusion and demonstrates that the consent form was unclear as to that critical point.

Dr. Gulkarov claimed that he discussed the issue with Ms. Vaz after the surgery, when the internal bleeding was discovered, telling her that she had to have the transfusion to live. Yet, the nurse who was with Ms. Vaz following the surgery had no recollection of any conversations by any hospital personnel nor Dr. Gulkarov regarding blood transfusions, nor did Ms. Vaz's father, plaintiff, Rudolph Vaz. The deposition testimony of Felicia Gill, R.N. ("Nurse Gill"), on behalf of NYPBMH, revealed that Ms. Vaz was in pain following the surgery and Nurse Gill was there with decedent the morning of April 26, 2017, along with the hospital's attending physician. Her notes contained no references to any discussions about the need for a blood transfusion. Asked if she remembered anything not in her notes, Nurse Gill testified that she independently remembered the following:

A. "I did say to her if you take one little blood transfusion, it will help you feel better.

Q. And what was her response?

A. She said no, it's my religious belief.

Q. Did she say what religious belief that she held, that prevented her from taking a blood transfusion?

A. I don't recall if she did."

Dr. Gulkarov testified at his deposition that the need for a transfusion to repair the internal bleeding was explained, and the elders of Ms. Vaz's church were contacted. But, he had no direct recollection of the discussion, who was present when the issue was allegedly discussed, or who contacted Ms. Vaz's church. No records of any such discussion were made nor was any updated consent form provided.

Decedent's father, Rudolf Vaz, testified at his deposition, that he was not a Jehovah's Witness, and he did not recall any conversations with any of the doctors or staff about the need for any possible life-saving interventions on April 26, 2017 nor the need for a blood transfusion.

The record does not establish that Ms. Vaz was informed of the possible necessity of further corrective surgery when the internal bleeding was discovered, given the likelihood that Ms. Vaz's would refuse a blood transfusion, or within any time frame before or after the defendants contend it was too late to proceed without one.

Plaintiff's expert opined that the surgery should have been attempted regardless, since failing to proceed meant certain death for Ms. Vaz.

The defendants have not demonstrated that they ever obtained informed consent as to the refusal for any blood transfusions, or specifically, that any consent was sought for the corrective surgery needed. As such, defendants failed to establish that there were no triable issues of fact with respect to the cause of action alleging lack of informed consent. *Lavi v. NYU Hosps. Ctr.*, supra 133 A.D.3d at 832.

The plaintiff failed to establish the fourth and fifth causes of action, asserting that NYPBMH failed to select, screen and train personnel (4<sup>th</sup> cause of action) or promulgate, enforce, and ensure compliance with rules (5<sup>th</sup> cause of action). The Court considered the parties' remaining contentions and found them unavailing. All relief not expressly granted is denied.

Accordingly, it is

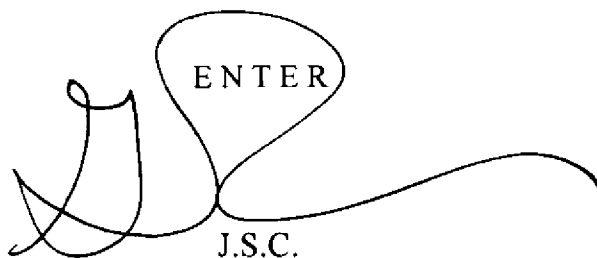
**ORDERED** that the branch of defendants' motions seeking dismissal of the fourth and fifth causes of action are granted, and the fourth and fifth causes of action asserted in the complaint are dismissed, and it is further

**ORDERED** that defendants' motions for summary judgment are in all other respects denied, and it is further,

**ORDERED** that plaintiff's counsel is directed to electronically serve a copy of this decision/order with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service with the Kings County Clerk, and it is further

**ORDERED** that the parties are directed to appear for an Alternative Dispute Resolution conference on December 13, 2023, at 2PM.

The foregoing constitutes the decision and order of this Court.



ENTER

J.S.C.

**HON. GENINE D. EDWARDS**