

**Mignoli v Oyugi**

2009 NY Slip Op 33306(U)

August 7, 2009

Sup Ct, New York County

Docket Number: 116434/05

Judge: Alice Schlesinger

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

**IA** PART 16  
PART \_\_\_\_\_

PRESENT: ALICE SCHLESINGER

Index Number : 116434/2005

MIGNOLI, MARYANN

VS.

OYUGI, M.D., SAMWEL

SEQUENCE NUMBER : 003

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

*and cross-motion for summary judgment by various defendants is granted in accordance with the accompanying memorandum decision.*

**FILED**  
AUG 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

AUG 07 2009

Dated: August 7, 2009

*Alice Schlesinger*  
ALICE SCHLESINGER S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
MARYANN MIGNOLI, as Administratrix of The  
Estate of ANTHONY MIGNOLI, deceased, and  
MARYANN MIGNOLI, Individually,

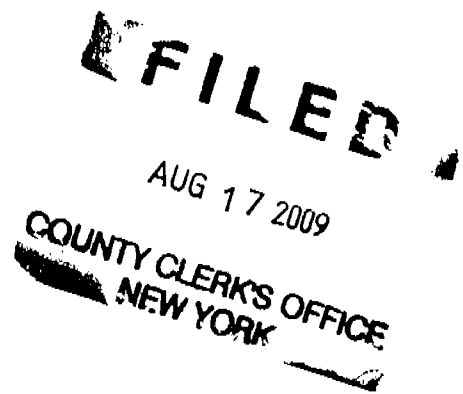
Plaintiffs,

Index No. 116434/05  
Mot. Seq. 003 and 004

-against -

SAMUEL OYUGI, M.D., STATEN ISLAND  
HOSPITALISTS, P.C. RALPH CICCONE, M.D.,  
STATEN ISLAND PULMONARY ASSOCIATES, P.C.,  
THOMAS KILKENNY, M.D., STATEN ISLAND  
UNIVERSITY HOSPITAL, JEFFREY TAMBOR, M.D.,  
PREMIER MEDICAL, PLLC, KAYAL SAMBANDAM,  
M.D., DEEPAK VADHAN, M.D., BROOK-ISLAND  
MEDICAL ASSOCIATES, P.C., RAJA FLORES, M.D.,  
MEMORIAL HOSPITAL FOR CANCER AND ALLIED  
DISEASES, AND MEMORIAL SLOAN-KETTERING  
CANCER CENTER,

Defendants.



-----X  
**SCHLESINGER, J:**

On February 19, 2005 Anthony Mignoli, then 46 years old and the father of two small children, died. The cause was lung cancer which had metastasized to his brain. Mr. Mignoli's estate subsequently brought a wrongful death action against the doctors and institutions which had treated him from June 2003 through the end of 2003.

Those defendants and their respective roles in his care are briefly as follows. The decedent entered Staten Island University Hospital "Staten Island" (a defendant) on June 10, 2003. He was admitted to the hospital by defendant Dr. Samuel Oyugi, a hospitalist. While at the institution, he was seen and treated by defendant doctors, Ralph Ciccone, a lung specialist, and Thomas Kilkenny also a pulmonologist and partner of Dr. Ciccone who was covering for the latter. Mr. Mignoli was discharged from Staten Island by Dr. Oyugi on June 17, 2003.

At the time of the admission, the decedent had complaints of night sweats, a cough with blood-tinged sputum, and a history of weight loss of 10lbs in the preceding month. He was also an habitual smoker (1-2 packs a day for 30 years). A chest x-ray showed a right upper lobe infiltrate. A CAT Scan was performed on June 14, 2003 and when it was read, for the first time, by a hospital radiologist on June 18, it was "most suspicious for a primary lung cancer with post-obstructive pneumonitis of the right upper lobe."

Dr. Ciccone had tried to perform a bronchoscopy during the admission, but during the procedure, the patient's right upper lobe opening collapsed. Mr. Mignoli had been prescribed antibiotics throughout his admission. Despite his having been given instructions to see Dr. Ciccone in 2-3 weeks, Mr. Mignoli did not, and after discharge, the decedent never saw any of these defendants again.

On August 21, 2003, Mr. Mignoli presented himself to defendant Dr. Jeffrey Tambor and his group defendant Premier Medical. The history given to Dr. Tambor was spitting up blood, night sweats, and pain and burning on the right side of his chest. Dr. Tambor, an internist, x-rayed the patient's chest and recommended that he go immediately to see defendants Drs. Kayal Sambandam and Deepak Vadhan, pulmonologists associated with defendant Brook-Island Medical Associates, P.C.

Dr. Sambandam saw the patient on August 25, 2003 in her office where she performed a full physical examination and work up. She included in her differential diagnosis lung cancer. She recommended a repeat CAT Scan of the chest which was performed on August 30 and read on September 2, 2003. This revealed a mass

obstructing the right upper lobe bronchus completely with right upper lobe collapse. Other lesser findings were made. A bone scan was advised.

Dr. Sambandam also performed a bronchoscopy with biopsy and cytology washings on September 4, 2003 at St. Vincent's Catholic Medical Center. This was non-diagnostic, leading her to recommend a CT-guided biopsy to further evaluate his right upper lobe mass.

Mr. Mignoli then underwent a CAT Scan of his head on September 11 and a bone scan on September 14. These were read as normal without evidence of bone metastatic disease. However, on September 17, a fine needle aspiration biopsy was performed at St. Vincent's which diagnosed a lung carcinoma.

Dr. Tambor saw the patient again on September 21 but advised him to continue treatments with a pulmonologist. Dr. Vadhan saw the patient one time, on September 25, 2003, after the various diagnostic tests described above had been performed. He noted the patient to be in either Stage II or Stage III cancer and ordered him to consult with a thoracic surgeon for a possible resection of the tumor because up to then, no diagnosis of metastatic cancer had been made.

Following this recommendation, Mr. Mignoli presented himself to defendant Raja M. Flores, a thoracic surgeon associated with the Department of Surgery of defendant Memorial Hospital for Cancer and Allied Diseases (Memorial) on October 6, 2003. Dr. Flores had reviewed reports of the patient's history before this initial visit.

Dr. Flores, on October 6, did preliminarily stage his patient's cancer as a T3NOMO lesion but made plans to do a complete work-up before final staging and a surgical plan were decided. The "MO" here stands for no metastasis. The work-up

would include blood tests, a CAT Scan, a PET scan, pulmonary function tests and a nuclear stress test. That same day, R. N. Catherine Wickersham of the Thoracic Service referred Mr. Mignoli to Memorial's Social Work Department. The following day, he was seen by C.S.W. Annanna Ahohan Koba, who offered supportive services regarding medicaid, insurance, etc.

During the following week, the hospital provided Health Plus, Mr. Mignoli's insurance company, information so that the desired testing would be approved. And by October 27, 2003, all the tests, with the exception of the cardiac stress test, had been done. He was to have that done at a facility on Staten Island.

The CAT and PET Scans showed some progression of the mass and a new complete right upper lobe atelectasis in place of the previous consolidation. Both tests contained findings regarding the thoracic spine for which metastatic disease could not be excluded.

Also, on October 27, 2003, Mr. Mignoli underwent pulmonary function testing by Dr. Jean O. Santamand of Memorial. There was a finding of bilateral obstructive airway disease.

On October 29, a cardiac stress test was performed in Staten Island but could not be completed due to the patient's suboptimal level of exercise from shortness of breath and right-sided chest pain. Thus, the test was deemed by cardiologist Dr. Vadde Prasad to be inadequate to assess for ischemia.

Dr. Flores saw Mr. Mignoli on November 3. At this time he had reviewed all the tests. He then explained to Mr. Mignoli that future surgery would be more extensive than originally thought and because of the location of the tumor, there would need to be

a tracheal as well as a bronchial resection. This increased the surgical risks and could result in death. Dr. Flores then recommended a repeat stress test and an appointment to see a thoracic oncologist, Dr. Christopher Azzoli.

This doctor then saw the decedent on November 14. Dr. Azzoli had reviewed the scans and had spoken to Dr. Flores. The latter advised him that he felt Mr. Mignoli was a poor risk for surgery due to the size and location of the tumor, cardiac disease, severe chronic obstructive pulmonary disease and an ongoing smoking habit. (The decedent still had not completely stopped smoking). Dr. Azzoli then discussed with Mr. Mignoli the alternatives to surgery, including chemotherapy and radiation. Two days earlier, the patient had had a consultation with Dr. Peter Teines, a cardiologist who, in a report of November 21, had cleared the decedent for surgery but believed nonetheless that such surgery would pose intermediate to high overall cardiac risk.

At the November 14, visit with Dr. Azzoli, Mr. Mignoli was offered Memorial's Patient Financial Services to assist in obtaining coverage for him. However, this was the last visit the patient had with any physicians of that hospital. Instead, the family decided to obtain treatment in Staten Island.

On January 7, Mr. Mignoli saw a radiation oncologist, Dr. Philip Silverman, with the Department of Radiology at defendant Staten Island University Hospital. The case was discussed at a radiosurgery conference, which concluded that he was not a proper candidate for surgery. Rather, a concurrent course of chemotherapy/radiation was recommended. Such treatment was begun in January 13 under the direction of a medical oncologist at Staten Island, Dr. Marcel Odami. On that day, the patient related also that he was suffering from morning headaches. On February 2, 2004, after several

treatments, the patient suffered a seizure. This led to a CAT Scan and MRI of his brain. These tests revealed multiple lesions consistent with cerebral metastasis. Whole brain radiation was then commenced. Later in February, Mr. Mignoli sustained a pneumothorax and underwent a right thoracostomy.

Various treatments were administered together with scans to determine their effectiveness. On December 2, 2004 a repeat MRI of the brain showed metastasis, with increase in the size of the lesions and new hydrocephalus. Additional radiosurgery was administered at Staten Island. Finally, on February 19, 2005, Anthony Mignoli succumbed to his lung cancer and died.

Collectively and individually, counsel for the plaintiff points to each of the multiple defendants, beginning with the doctors who examined and treated him at Staten Island University Hospital in June 2003, though the treatment given to him by Doctors Tambor, Sambandam and Vadhan in August and September of 2003, finally to the advice and treatment given to him by Dr. Flores and the staff of Memorial in October and November of 2003, and claims that their failure to properly diagnose and treat his lung cancer caused Mr. Mignoli's cancer to progress until his death from lung cancer in February of 2005.

In the face of these allegations, all of the defendants have moved for summary judgment, all the while acknowledging the tragedy to the decedent and his family. All of the movants include affirmations from credentialed specialists to support their motions. All of those experts opine that the care given by each of the named defendants was in accordance with acceptable standards. More significantly, the experts, particularly the ones supporting motions by Dr. Flores and Memorial and Dr. Oyugi and Staten Island, opine that this tragedy, at least from June, 2003 on, was unavoidable.



Specifically, counsel for Doctors Ciccone, Kilkenny, Tambor, Sambandam, and Vadhan and their respective medical groups include an affirmation by Dr. Ian Newmark. He is a board certified pulmonologist. In a somewhat conculsory fashion, he reviews the treatment provided by the above physicians and opines as follows:

First, that Ciccone and Kilkenny appropriately treated and diagnosed Mr. Mignoli during his hospital admission in June, 2003. He then suggests that the patient was culpable in not returning to see Dr. Ciccone as he was advised to do and waiting two months before seeking treatment with Doctor Tambor.

Regarding the work-up by Tambor, Sambandam and Vadhan, it was appropriate and resulted in a timely diagnosis of lung cancer and a proper referral. Finally, Dr. Newmark states with a reasonable degree of medical certainty, as were all of his opinions, that any alleged delay in diagnosis from June 2003 through September 2003 did not make a difference in decedent's diagnosis, treatment, prognosis or life expectancy.

The more impressive affirmations then come in the cross-motions on behalf of Dr. Flores and Memorial and Dr. Oyugi and Staten Island University Hospital. Dr. Flores, a thoracic surgeon, and Memorial support their papers with two affirmations. The first is from Dr. Angelo Reyes, a board certified general and thoracic surgeon. He is also Chief of the Division of Thoracic Surgery at Beth Israel Medical Center. The second affirmation is from Dr. Marc Citron, who is board certified in medical oncology. He is Clinical Professor of Medicine at the Albert Einstein College of Medicine.

Dr. Reyes in his sixty-five paragraphs of review and opinions summarizes his position as follows vis-a-vis Dr. Flores: that he acted with good and accepted care by

conducting a speedy and thorough work-up, by appropriately ruling out surgery ,and by promptly referring his patient for non-operative oncologic management.

This affirmation is anything but conclusive. Rather, Dr. Reyes explains in great detail why he agrees that surgery was contraindicated and why starting any kind of definitive chemo or radiation therapy would have been detrimental to the patient while surgery was still an option.

The work-up by Flores was excellent, according to Dr. Reyes, as were his conclusions; namely, that with all of Mr. Mignoli's risk factors, for example his poor pulmonary function test measure of 49%, as well as his significant cardiac issues, the possible post-operative complications would increase exponentially. He also points out that Staten Island later relied on Dr. Flores' conclusions and agreed that surgery was not in order. With regard to staging of the disease, Dr. Reyes explains that this cannot be precise until surgery with a biopsy is performed.

Finally, he concludes that Mr. Mignoli's headache complaint in January 2004, together with the February brain scan showing the spread of cancer to the brain, convince him that the cancer had advanced to Stage IV metastatic lung cancer when Memorial first saw him in October of 2003. He says "this sad and incurable outcome was neither caused by nor hastened by" Dr. Flores or Memorial.

Dr. Citron agrees with this staging. He explains in some detail how the findings in the February 2, 2004 CAT Scan, along with decedent's complaint of headaches in January 2004, convince him that the cancer had already metastasized in October 2003, when Mr. Mignoli first presented to Memorial and Flores. "It is conclusive" he states, due to the size and multiplicity of the lesions in the brain and the history, that this was

so even though the September 2003 brain scan was negative. He opines that the cancer cells had to have been present microscopically in September for them to have reached their observable size in February.

Finally, on behalf of Dr. Oyugi and Staten Island University Hospital, counsel submits an affirmation from Dr. Roman Perez-Soler, board certified in medical oncology with a subspecialty in thoracic oncology. He is the Gutman Professor of Medicine and Chairman of the Department of Oncology at Montefiore Medical Center as well as holding other positions at Albert Einstein College of Medicine.

After carefully reviewing Mr. Mignoli's course of treatment between June 10 and June 17 at Staten Island, he gives the following opinions. First, that the work-up, consultation and testing by Dr. Oyugi were timely and properly advised, well within the accepted standard of care. Second, that the discharge for further work-up as an out-patient was appropriate considering that the patient was in stable condition at that time. Third, that a comparison of the CAT Scan performed on June 14, 2003 and August 30, 2003 showed no significant increase in size. He elaborates on this opinion and concludes (paragraph 23) that "the stage of the cancer as seen in these films is

unchanged from June 14 to August 30, 2003." Fourth, that he agrees with Dr. Flores' assessment, from a review of all of the CT films, that the October 27, 2003 scan also showed no progression in the size of the right lung mass compared with the June 14, 2003 scan and says (¶ 25) that "there was no appreciable difference in the medical treatment options and chances for successful treatment of the lung mass once a diagnosis of cancer was made." In fact, even the eight-week delay, attributed to Mr.

Mignoli's delay in getting follow-up care after his discharge from Staten Island Hospital, did not significantly affect his treatment options or chances for a better outcome.

Dr. Perez-Soler's opinions are expressed in paragraphs 31 and 32 of his affirmation. Similar to what Dr. Citron states, this oncologist says to a reasonable degree of medical certainty that the size and location of the lesions in the brain observed in February 2004 were "certainly present" prior to that date.

Indeed based upon the size and location of the lesions observed in the MRI and CAT Scans in February 2004, the brain lesions were developing, although so microscopic as to be undetectable, even when the decedent presented to Staten Island University Hospital in June 2003. This means that at the time of his first presentation for treatment on June 20, 2003, it is reasonably certain that the patient's lung cancer had already metastasized to his brain.

In other words, on June 20, 2003 the lung cancer was obviously a Stage IV cancer. Therefore, even if an immediate diagnosis had been made of the cancer in the June 2003 admission and treated, the metastasis could not have been prevented, nor the progression to death.

The first issue to consider when defendants move for summary judgment is whether they have made out a prima facie entitlement to such relief. If they have, then the burden shifts to the opposing plaintiff to see if he has, with the aid of an expert, created legitimate issues of fact. In the first instance here, I do find that all moving defendants have made out such a prima facie case. They have done this with their experts as to the standard of care and the issue of causation. Therefore, the burden has shifted. The question becomes, has the plaintiff met that burden?

In opposition, counsel for the plaintiff has submitted one affirmation from a board certified physician specializing in medical oncology. Therefore, it is my job to assess the content and quality of the opinions which are expressed therein. Early on, in this affirmation, this doctor opines that each defendant, thirteen in number, deviated from good and accepted medical practice and that the deviations were a proximate cause of Mr. Mignoli's injuries and death. This is his opinion generally which he will expound upon.

First, he discusses Dr. Oyugi, who supervised Mr. Mignoli's treatment in Staten Island between June 10 and June 17, 2003. This expert says Dr. Oyugi departed by failing to consider lung cancer and to perform testing to rule this in or out. However, he fails to specify what other testing Dr. Oyugi should have ordered. The expert says Dr. Oyugi failed to call in proper consulting doctors. But he did call in a pulmonologist and an infectious disease physician. The expert fails to specify what other specialist should have been consulted.

He then criticizes Dr. Oyugi, as well as Drs. Ciccone and Kilkenny, for discharging Mr. Mignoli before the June 14 CAT Scan film had been read and discussed. This was a departure because a diagnosis of lung cancer could have been made and appropriate treatment started. What that treatment should have been and how effective it would have been, however, is not stated.

Also, the expert criticizes Drs. Ciccone and Kilkenny's failure to consider lung cancer as part of their differential diagnosis or to consult with the hospital's radiologist and to appropriately test. Further, he says, it was a departure not to share the results of the CAT Scan, showing a suspicion of lung cancer, with Mr. Mignoli.

Regarding Dr. Jeffrey Tambor, he allegedly departed from accepted standards by failing to obtain the Staten Island records. This was now August of 2003. However, new CAT Scans were taken and a complete work-up was done by pulmonologists Dr. Tambor referred the patient to Doctors Sambandam and Vadhan. They diagnosed cancer the following month in September. Other than using the words "substantial factor" and "proximate cause," no explanation is given as to how this delay made any difference to Mr. Mignoli and what the treatment should have been.

The expert criticizes the fact that by December 10, 2003, Mr. Mignoli still had received no treatment for his cancer but was finally referred to an oncologist Dr. Odami. But, the expert completely fails to confront the fact that surgery was being chiefly considered to be the best option until Dr. Flores decided that, because of the incurring risk factors, surgery was not viable. Further, he fails completely to show why he believes chemotherapy or radiation should have started while surgery was still being considered.

The expert then discusses Dr. Flores and his diagnosis of lung cancer via a needle biopsy performed on September 17, 2003, as well as his plan to work up the patient for possible surgery to remove the cancer. This expert, who is not a surgeon, then opines that Dr. Flores "departed from good and accepted medical practice in failing to perform the proposed surgery according to his own plan" (§ 44). He ignores the fact that Dr. Flores never finalized a plan until the work-up had been completed in November, and he fails to deal in any way with the grave surgical risks of going ahead with this surgery as testified to by Dr. Flores and confirmed by thoracic surgeon Dr.

Reyes. It should be noted here that Dr. Flores' opinion not to proceed with surgery was adopted and acted upon by subsequent treating physicians at Staten Island.

In his final paragraphs, 48 and 49, the plaintiff's expert points out that it was Dr. Odami who started the chemotherapy and radiation therapy, seven months from the original CAT Scan performed in June of 2003. He further comments that by the February brain scans, the lung cancer had progressed to Stage IV (end stage). While these selected facts are true, what is so egregiously absent is this expert's opinion, with the requisite certainty, that treatment seven months earlier, whatever that may have been, would have made any difference.

This is an absolutely fatal flaw in the affirmation. At least two highly credential oncologists, Dr. Citron and Dr. Perez-Soler have stated their belief to a reasonable degree of medical certainty, based on the findings of the February 2004 tests, that Mr. Mignoli had metastatic lung cancer in 2003 and that nothing could have been done to change the outcome. The plaintiff's expert not only fails to rebut these opinions, he ignores them. He fails to discuss in any way the meaning of the February 2004 scans.

This was a tragic death, involving a young man with small children. However, pointing fingers at doctors and institutions without specifically showing how they failed him by inadequately providing medical care and how those failures caused his demise, physicians who tried to help but could not, is not enough to establish malpractice. I find that the opposition affirmation is completely conclusory and devoid of probative value. Further, it fails to address in any meaningful way the significant and compelling opinions stated in the moving papers.

Accordingly, it is hereby

ORDERED that the motions and cross-motions by the various defendants for summary judgment are all granted, and the action is dismissed with prejudice. The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: August 7, 2009  
**AUG 07 2009**



ALICE SCHLESINGER, J.S.C.

**ALICE SCHLESINGER**

**FILED**  
AUG 17 2009  
COUNTY CLERK'S OFFICE  
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