

<b>Ellis v Eng</b>
2009 NY Slip Op 33474(U)
March 25, 2009
Supreme Court, Kings County
Docket Number: 13209/05
Judge: Gloria M. Dabiri
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25<sup>th</sup> day of March 2009.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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SHAVON ELLIS, Individually and as Administratrix of the Estate of SAMUEL ELLIS, DECEASED,

Plaintiff(s),

**Index No.: 13209/05**

-against-

KENNETH ENG, M.D., DELPHIC SURGICAL ASSOCIATES, P.C., GEORGE GUSSET, M.D., and UNIVERSITY UROLOGY ASSOCIATES, INC.

Defendant(s).

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The following papers numbered 1 to 13 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition Cross-Motion and Affidavits (Affirmations) Annexed_____	<u>1-2, 3-4, 7-9</u>
Opposing Affidavits (Affirmations)_____	<u>10</u>
Reply Affidavits (Affirmations)_____	<u>11, 12, 13</u>
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, George Gusset, M.D. seeks leave to reargue this court's decision and order of July 17, 2008 as denied portions of his motion for summary judgment.

Kenneth Eng, M.D. and Delphic Surgical Associates ("Dr. Eng") cross-moves for leave to reargue the July 17, 2008 decision and order to the extent that it denied portions of

their motion for summary judgment.

Plaintiff Shavon Ellis moves for leave to renew and reargue the July 17, 2008 decision and order to the extent that it granted summary judgment to the defendants, dismissing certain claims against them.

**GEORGE GUSSET, M.D.**

Dr. Gusset's motion to reargue is limited to the court's ruling that there were issues of fact regarding his negligence in failing to detect the decedent's recurrent colon cancer. Dr. Gusset argues that, on the issue of causation, no expert opines that CEA or other testing if performed in or about September 2002 would have had any potential to detect recurrence of the decedent's cancer, and that plaintiff's expert ignores the fact that the decedent did not return to Dr. Gusset between September 2002 and December 2003, when cancer was detected, and the September 2002 visit was unrelated to any gastrointestinal complaint. More specifically, Dr. Gusset argues that plaintiff assumes that he was in a position to monitor decedent every three months notwithstanding decedent's failure to return for fourteen months after September 2002 (*Cavlin v. New York Medical Group, P.C.*, 286 AD2d 469 [2001]; *Heckstall v. Pincus*, 19 AD3d 203[2005]; *Sanders v. Jamaica Hospital*, 280 AD2d 462 [2001]).

However, in opposition to the original motion plaintiff supplied the affirmation of an oncology expert who opines that since 80 percent of colon cancer recurrence occurs within the first two years after resection, intensive monitoring including imaging, endoscopy and

blood work should be undertaken during this period. The oncologist avers that Mr. Ellis was a high risk Stage II cancer patient because “the involvement of the bladder usually heralds a more aggressive tumor than often is metastatic at the time of the detection.” Thus, serial CEA testing should have been done every 3 months to test for the recurrence of systemic metastasis. The expert opines that such testing also should have been undertaken during Mr. Ellis’ August 1, 2002 and September 3, 2002 visits to Dr. Gusset, and concludes that as a result of Dr. Gusset’s failures it is “more probable than not that Mr. Ellis lost his best chance of survival as his prognosis was significantly altered.”

An expert need not quantify the exact extent to which a particular act or omission decreased a patient’s chance of survival or cure, as long as it can be inferred that it was probable that some diminution in the chance of survival or cure had occurred (*Jump v. Facelle*, 275 AD2d 345, 346 [2000]; see also *Alicea v. Ligouri*, 54 AD3d 784, 785 [2008]; *Wong v. Tang*, 2 AD3d 840 [2003]). Here, plaintiff’s oncologist indicated that symptoms exhibited by the decedent on August 1, 2002 and September 3, 2002 were consistent with metastatic malignancy but went unrecognized and unexplored by Dr. Gusset, and that as a result it is “more probable than not that Mr. Ellis lost his best chance of survival as his prognosis was significantly altered due to [Dr. Gusset’s] failures” (see *Borawski v. Huang*, 34 AD3d 409 [2006]; *Schaub v. Cooper*, 34 AD3d 268 [2006]).

**KENNETH ENG, M.D. and DELPHIC SURGICAL ASSOCIATES, P.C.**

Dr. Eng and Delphic Surgical Associates, P.C. (“Dr. Eng”) cross-move for leave to

reargue that portion of their motion as sought dismissal of plaintiff's claim that the failure to recommend that the decedent undergo post-operative chemotherapy was a departure from the standard of care. Dr. Eng points out that on the original motion both his oncology and colorectal experts agreed that in 2002 chemotherapy was not recommended for patients, such as Mr. Ellis, with Stage IIb colon cancer. In fact, in 2004 the American Society of Clinical Oncology ("ASCO") published guidelines stating that, at that time, there was no direct evidence to support its use with Stage IIa or Stage IIb colon cancer. Dr. Eng argues that, in opposition to his *prima facie* showing, plaintiff failed to support the conclusions of her experts that ASCO guidelines, since 2000, "strongly recommended" chemotherapy for patients such as Mr. Ellis in that plaintiff failed to produce the claimed guidelines. Similarly, argues Dr. Eng, plaintiff failed to supply the 2002 American Cancer Association guidelines upon which her oncologist relied in opining that chemotherapy should have been considered the standard of care for Stage II colon cancer patients. Dr. Eng contests plaintiff's assertion that such guidelines exist. Finally, Dr. Eng contends that, assuming the existence of such guidelines, plaintiff's experts still fail to establish that the guidelines set forth the generally accepted standard of care (*Diaz v. NY Downtown Hospital*, 287 AD2d 357, 358-359 [2001], *aff'd* 99 NY2d 542 [2002]).

#### **PLAINTIFF**

Because the plaintiff's motion is not based upon new evidence unavailable to her at the time of the original motion, it is deemed a motion to reargue (*Rochester v. Quincy Mutual*

*Fire Insurance Company*, 10 AD3d 417, 418 [2004]; *Bossio v. Fiorillo*, 222 AD2d 476, 476 [1995]). Plaintiff, however, makes no showing that the court overlooked or misapprehended the facts or law, or for some reason mistakenly granted partial summary judgment to defendants. Significantly, plaintiff also fails to provide the contested ASCO and American Cancer Association guidelines upon which her experts rely and which were omitted from her submissions on the earlier motion. Accordingly, it is

ORDERED, that the motion of George Gusset, M.D. is denied, and it is further

ORDERED that the cross-motion of Kenneth Eng, M.D. and Delphic Surgical Associates, P.C. is granted and upon reargument plaintiff's claims that Dr. Eng and Dr. Gusset<sup>1</sup> departed from accepted standards by failing to recommend to, or to otherwise discuss with, plaintiff's decedent the use of chemotherapy following surgery are dismissed; and it is further

ORDERED, that the motion of plaintiff is denied; and it is further

ORDERED that counsel for all parties appear in the Central Compliance Part on April 28, 2009 at 9:30 A.M.

E N T E R,



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J.S.C.

HON. GLORIA DABIRI

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<sup>1</sup>Because on the original motion Dr. Gusset relied upon the expert affirmations of Dr. Eng, the July 17, 2008 order denied Dr. Gusset's motion to dismiss plaintiff's claim that Dr. Gusset should have recommended that the decedent receive chemotherapy, for the same reason Dr. Eng's motion was denied.