

Cover Story

Claims of Failure To Detect Lung Cancer Can Go Forward

BY JASON GRANT

A STATE appeals court has ruled that certain medical malpractice claims launched by the estate of a woman who died from cancer can go forward against her former internal medicine doctors after they allegedly failed to order a chest X-ray that, according to a plaintiff's expert, would have revealed the woman's lung cancer before its ultimate late-stage discovery at stage IV.

"Plaintiff's expert asserted that defendants' failure to order a diagnostic work-up prior to October 2012, including at minimum a chest X-ray, constituted a deviation from the standard of care," wrote an Appellate Division, First Department panel on Tuesday in an opinion that reversed a 2019 dismissal of the certain claims by Manhattan Supreme Court Justice Eileen Rakower.

"Plaintiff's expert further opined that, had decedent been given a chest X-ray prior to October 2012, the lung cancer would have been discovered before it entered Stage IV, and, thus, she would have had



MITCHELL KESSLER, A MANHATTAN LAWYER REPRESENTING PLAINTIFF TANIA PEREZ

a greater chance of survival," the unanimous panel said.

The panel further wrote that the expert's affirmation was sufficient to defeat summary judgment dismissal of the claims related to not performing a chest X-ray because it contained "adequately detailed assertions ... 'since they were predicated on specific factual evidence, and were not merely speculation,'" quoting *McManus v. Lipton*, 107 A.D.3d 463.

The lawsuit was lodged in 2015 by Tania Ventura Perez, as

administrator of the estate of Ramona Antonia Perez, who succumbed to her cancer in March 2014, according to court documents.

Ramona Perez was first diagnosed with cancer in April 2013, after going to Columbia Presbyterian Hospital's emergency room. Medical staff there discovered that she had stage IV lung cancer that had metastasized to the brain, according to court documents, including a transcript of summary judgment dismissal oral

arguments held before Rakower in July 2019.

According to a separate 2020 Rakower decision and the 2019 transcript, Ramona Perez had been treated at 139 Medical Facility, a medical group in Manhattan, from 2008 to April 2, 2013, for ailments, including headaches, shortness of breath and coughing. Ultimately, plaintiff Tania Perez came to believe that Romona Perez's lung cancer should have been discovered by the medical facility and earlier than at stage IV, according to the transcript.

In Tania Perez's 2015 complaint, she named as defendants 139 Medical Facility, three staff physicians there, three nurse practitioners and a physician assistant.

Numerous individual defendants have since been dismissed from the action, and Tuesday's First Department decision specially addressed a dismissal motion that had been lodged by three defendants: 139 Medical Facility, Dr. Muhammad Haque Jr., and Dr. Muhammad Mishbah-Ul Haque. (A currently available WedMD "Physician Directory" page on 139 Medical Facility lists two Dr. Haques, one as practicing "internal medicine" and the other as practicing "adolescent medicine, pediatrics." It was unclear whether they were necessarily the Dr. Haques named in the lawsuit because of differences in the spelling of parts of their names on the web page versus various court papers.)

In their opinion Tuesday, Justices Rolando Acosta, Barbara Kapnick,



Stethoscope

Peter Moulton and Lizbeth González wrote that they were modifying, on the law, Rakower's 2019 decision to deny a motion regarding claims related to defendants 139 Medical Facility, Dr. Muhammad Haque Jr. and Dr. Muhammad Mishbah-Ul Haque's failure to perform the chest X-ray. They wrote that they were otherwise affirming Rakower's decision.

The justices noted that the plaintiff's expert had asserted that the failure to give, at a minimum, the chest X-ray was a standard of care deviation, "in view of decedent's clinical picture, including her apparent non-responsiveness to asthma medication, her status as a smoker, her age, the development of a bad cough that may have subsequently been masked by medication, and the change in the character of her headaches."

Alexander Sikoscow of Gerspach & Sikoscow in Manhattan, an

attorney representing 139 Medical Facility, Dr. Muhammad Haque Jr. and Dr. Muhammad Mishbah-Ul Haque, according to the panel's decision, declined to comment on Wednesday.

Mitchell Kessler, a Manhattan lawyer representing plaintiff Tania Perez, also declined to comment Wednesday.

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