

34 A.D.3d 267, 824 N.Y.S.2d 240, 2006 N.Y. Slip Op. 08164
(Cite as: 34 A.D.3d 267, 824 N.Y.S.2d 240)

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Supreme Court, Appellate Division, First Department, New York.

Francie METH, individually and as Executrix of the Estate of Buddy Meth, et al., Plaintiff-Respondent,
v.

Steven GORFINE, M.D., et al., Defendants-Appellants,

Mount Sinai Medical Center, Defendant.
Nov. 14, 2006.

Background: Medical malpractice suit was brought alleging that physicians failed to diagnose patient's pelvic cancer. The Supreme Court, New York County, Alice Schlesinger, J., denied physicians' motions for summary judgment. They appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) physicians did not establish prima facie case, and
- (2) *Frye* hearing was not required.

Affirmed.

West Headnotes

[1] Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

Burden never shifted to medical malpractice plaintiffs to submit evidentiary facts or material raising triable issue of fact in summary judgment proceeding, where individual defendants failed to meet their burden of eliminating material issues of fact for trial.

[2] Evidence 157 ↪ 555.10

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.10 k. Medical Testimony.

Most Cited Cases

Patient's pelvic cancer and issue of whether delay in diagnosing it would have affected patient's prognosis were typical oncological issues that were appropriate for jury in medical malpractice action, and did not involve the type of procedure or test contemplated for *Frye* hearing.

****241** Wilson, Elser, Moskowitz, Edelman & Dickler LLP, New York (Robin N. Gregory of counsel), for Steven Gorfine, M.D., appellant.

Martin Clearwater & Bell LLP, New York (Nancy A. Breslow of counsel), for Norman Sohn, M.D., appellant.

Nagel, Rice & Mazie, LLP, Roseland, NJ (Adam Slater of counsel), for respondents.

BUCKLEY, P.J., SAXE, WILLIAMS, SWEENEY, MALONE, JJ.

***267** Order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 19, 2005, which, to the extent appealed from, denied defendant Gorfine's motion for summary judgment except as to any malpractice allegedly committed by him since January 2002, and denied in its entirety defendant Sohn's ***268** cross motion for summary judgment or, in the alternative, for a *Frye* hearing, unanimously affirmed, without costs.

[1] In this medical malpractice action alleging, inter alia, failure to diagnose plaintiff's pelvic cancer, the individual defendants failed to meet their burden, on summary judgment, of eliminating material issues of fact for trial (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]). Thus, the burden never

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shifted to plaintiffs to submit evidentiary facts or material raising a triable issue of fact (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]).

[2] The IAS court properly denied a *Frye* hearing. The type of cancer and whether the diagnostic delay would have affected plaintiff's prognosis are typical oncological issues that should be presented to a jury, and do not involve the type of procedure or test contemplated for a *Frye* hearing (*see Marsh v. Smyth*, 12 A.D.3d 307, 785 N.Y.S.2d 440 [2004]).

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