

## NY CLS CPLR § 4401-a

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*New York*

*Consolidated Laws Service* >  
*Civil Practice Law And Rules (Arts. 1 — 100)* >  
*Article 44 Trial Motions (§§ 4401 — 4406)*

### § 4401-a. Motion for judgment

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A motion for judgment at the end of the plaintiff's case must be granted as to any cause of action for medical malpractice based solely on lack of informed consent if the plaintiff has failed to adduce expert medical testimony in support of the alleged qualitative insufficiency of the consent.

### History

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Add, L 1975, ch 109, § 9, eff July 1, 1975.

Annotations

### Notes to Decisions

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The petition of the guardian of an 83-year-old man, who was being maintained by a respirator in a permanent and irreversible vegetative state, to remove the respirator was properly granted, where the evidence clearly and convincingly showed that before becoming incompetent the patient had made it known that under the circumstances he would want the respirator removed. The application of a state official for permission to administer blood transfusions to a profoundly retarded 52-year-old man with terminal cancer, after the patient's mother had refused consent on the grounds that such transfusions would only prolong his discomfort and would be against his wishes if he were competent, should have been granted where the evidence convincingly

showed that the transfusions did not involve excessive pain, and that with the transfusions the patient's mental and physical abilities would be maintained at their usual levels. *In re Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64, 1981 N.Y. LEXIS 2234 (N.Y.), cert. denied, 454 U.S. 858, 102 S. Ct. 309, 70 L. Ed. 2d 153, 1981 U.S. LEXIS 3593 (U.S. 1981).

Showing of qualitative insufficiency of consent under CLS Public Health § 2805-d is required to be supported by expert medical testimony. *Hylick v Halweil*, 112 A.D.2d 400, 492 N.Y.S.2d 57, 1985 N.Y. App. Div. LEXIS 56152 (N.Y. App. Div. 2d Dep't 1985).

Trial court properly dismissed medical malpractice cause of action predicated on lack of informed consent where plaintiff's expert testified only that it would have been good medical practice to advise plaintiff of risks and alternatives, but did not express opinion as to adequacy of information provided to plaintiff by defendant doctors, and plaintiff otherwise failed to adduce expert medical testimony to support alleged qualitative insufficiency of plaintiff's consent. *Gonzalez v Moscarella*, 142 A.D.2d 550, 530 N.Y.S.2d 218, 1988 N.Y. App. Div. LEXIS 7786 (N.Y. App. Div. 2d Dep't 1988).

In medical malpractice action against hospital based on lack of informed consent for corneal transplant surgery, court should have granted hospital's post-trial motion to dismiss complaint where plaintiff did not offer testimony of medical expert which would indicate that his consent was not informed prior to operation, and that hospital's employees failed to advise him of risks such as infection, hemorrhage and loss of vision. *Sallam v New York Hosp.*, 155 A.D.2d 389, 548 N.Y.S.2d 16, 1989 N.Y. App. Div. LEXIS 15066 (N.Y. App. Div. 1st Dep't 1989), app. dismissed, 75 N.Y.2d 1004, 557 N.Y.S.2d 310, 556 N.E.2d 1117, 1990 N.Y. LEXIS 950 (N.Y. 1990), app. denied, 75 N.Y.2d 712, 557 N.Y.S.2d 310, 556 N.E.2d 1117, 1990 N.Y. LEXIS 1091 (N.Y. 1990).

While factual issue as to informed consent may arise from divergent claims of patient and doctor concerning advice given by doctor, case of medical malpractice based on lack of informed consent may not be submitted to jury in absence of expert medical testimony to support

qualitative insufficiency of consent. *Briggins v Chynn*, 204 A.D.2d 158, 611 N.Y.S.2d 871, 1994 N.Y. App. Div. LEXIS 5338 (N.Y. App. Div. 1st Dep't 1994).

Plaintiff's testimony that he would not have agreed to tattoo removal operation if he had been fully informed of possibility of hypertrophic scarring was sufficient to present question of fact requiring jury to assess risks and benefits of operation and then to determine whether reasonably prudent person would have agreed to operation. Plaintiff was not required to adduce expert medical testimony to effect that reasonably prudent person in his position would not have undergone tattoo removal operation if he or she had been fully informed of risk of hypertrophic scarring. *Osorio v Brauner*, 242 A.D.2d 511, 662 N.Y.S.2d 488, 1997 N.Y. App. Div. LEXIS 9129 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 813, 674 N.Y.S.2d 278, 697 N.E.2d 179, 1998 N.Y. LEXIS 1275 (N.Y. 1998).

Court properly granted defendant's motion for judgment as matter of law at close of plaintiff's case in action based on lack of informed consent where plaintiff failed to offer expert testimony as required by CLS CPLR § 4401-a to show qualitative insufficiency of his consent and to prove that reasonably prudent person in his position would not have taken prescribed drug "Coumadin" to reduce risk of stroke if fully informed of its potential risks. *Berger v Becker*, 272 A.D.2d 565, 709 N.Y.S.2d 418, 2000 N.Y. App. Div. LEXIS 6030 (N.Y. App. Div. 2d Dep't 2000).

Medical malpractice action based on lack of informed consent was properly dismissed at end of plaintiff's case, absent evidence proving qualitative insufficiency of consent or supporting conclusion that reasonably prudent person in patient's position would not have undergone treatment if fully informed. *Faulknor v Shnayerson*, 273 A.D.2d 271, 709 N.Y.S.2d 848, 2000 N.Y. App. Div. LEXIS 6499 (N.Y. App. Div. 2d Dep't 2000).

Defendant physician in malpractice case was entitled to directed verdict under CLS CPLR § 4401-a where plaintiff's expert, who had testified that defendant departed from good medical practice in failing to inform plaintiff of risk of facial nerve damage, later admitted that it was not within his expertise to comment on risks of surgery to which plaintiff had consented. *Gershberg*

v Wood-Smith, 279 A.D.2d 424, 719 N.Y.S.2d 846, 2001 N.Y. App. Div. LEXIS 876 (N.Y. App. Div. 1st Dep't 2001).

Because a patient was entitled to an opportunity to conclude a case against a dentist and to present expert medical testimony in support of the alleged qualitative insufficiency of the consent under N.Y. C.P.L.R. § 4401-a, the trial court erred in sua sponte dismissing the action before the proof was completed. Greenbaum v Hershman, 31 A.D.3d 607, 818 N.Y.S.2d 606, 2006 N.Y. App. Div. LEXIS 9404 (N.Y. App. Div. 2d Dep't 2006).

Plaintiffs' claim relating to a lack of informed consent in a medical malpractice action was properly dismissed under N.Y. C.P.L.R. 4401-a because expert testimony on the issue was precluded as plaintiffs failed to disclose the substance of the anticipated expert testimony as required by N.Y. C.P.L.R. 3101(d) once defendant made a request for such information. Harper v Findling, 38 A.D.3d 601, 832 N.Y.S.2d 266, 2007 N.Y. App. Div. LEXIS 2893 (N.Y. App. Div. 2d Dep't 2007).

Jury verdict for a patient against a hospital in a malpractice case was improper because the patient failed to establish a lack of informed consent claim under N.Y. Pub. Health Law § 2805-d; the patient's expert, who found no fault with the surgery itself, did not indicate how the consent obtained was insufficient, and, in fact, his opinion was based on a hypothetical question that presupposed facts that varied from what the actual evidence in the case revealed. There was insufficient evidence that the patient did not understand the discussions with the surgeon or other hospital staff, there was a discrepancy in the patient's own testimony on the issue of whether she would have proceeded with the surgery in any event, and the evidence did not support the jury's finding that a reasonably prudent person in her position would not have proceeded with the surgery had she been fully informed of the risks, benefits, and alternatives. Rodriguez v New York City Health & Hosps. Corp., 50 A.D.3d 464, 858 N.Y.S.2d 99, 2008 N.Y. App. Div. LEXIS 3348 (N.Y. App. Div. 1st Dep't 2008).

In an action against a surgeon for damages based on an alleged lack of informed consent, the qualitative insufficiency of the patient's consent to the surgery at issue under N.Y. Pub. Health

Law § 2805-d(1), (3) was demonstrated by expert medical testimony under N.Y. C.P.L.R. § 4401-a. *Sarwan v Portnoy*, 51 A.D.3d 655, 857 N.Y.S.2d 667, 2008 N.Y. App. Div. LEXIS 4076 (N.Y. App. Div. 2d Dep't), app. denied, 11 N.Y.3d 705, 866 N.Y.S.2d 609, 896 N.E.2d 95, 2008 N.Y. LEXIS 2623 (N.Y. 2008).

Contrary to a doctor's contention, the qualitative insufficiency of the consent given by the decedent's family was established by expert medical testimony. *Johnson v Jacobowitz*, 65 A.D.3d 610, 884 N.Y.S.2d 158, 2009 N.Y. App. Div. LEXIS 6101 (N.Y. App. Div. 2d Dep't 2009), app. denied, 14 N.Y.3d 710, 903 N.Y.S.2d 768, 929 N.E.2d 1003, 2010 N.Y. LEXIS 1057 (N.Y. 2010).

The fact that medical expert testimony is required at trial as part of the plaintiff's prima facie case as to any cause of action for medical malpractice based solely on lack of informed consent (CPLR 4401-a) does not require denial of plaintiff's motion to serve an amended pleading alleging lack of informed consent for failure to supply an affidavit from a medical expert attesting to the insufficiency of the attempt to make the disclosures necessary for an informed consent since the requirements of proof at trial do not constitute an additional condition precedent to the liberally available right to amend the pleadings (CPLR 3025, subd [b]); in any event, since the moving papers adequately set forth the claim of negligently given, erroneous misinformation constituting a lack of informed consent based upon an alleged misdiagnosis of cancer, an affidavit of a medical expert specifying what type of disclosure is necessary, would be superfluous and of no benefit in connection with the issues inherent in the motion. *Williams v Cordice*, 100 Misc. 2d 425, 418 N.Y.S.2d 995, 1979 N.Y. Misc. LEXIS 2477 (N.Y. Sup. Ct. 1979).

CPLR § 4401-a applies to medical rather than dental malpractice cases. *Carrasquillo v Rothschild*, 110 Misc. 2d 758, 443 N.Y.S.2d 113, 1981 N.Y. Misc. LEXIS 3156 (N.Y. Sup. Ct. 1981).

Physician was entitled to summary judgment in a patient's medical malpractice action based on lack of informed consent because the patient could not meet the requirement of N.Y. C.P.L.R.

4401-a by naming the physician as her expert witness, and she had named no other expert who would testify that her informed consent to a facelift performed by the physician was inadequate; nothing in the physician's deposition testimony indicated that he would testify that the consent he took was inadequate. *Gardner v Wider*, 32 A.D.3d 728, 821 N.Y.S.2d 74, 2006 N.Y. App. Div. LEXIS 10812 (N.Y. App. Div. 1st Dep't 2006).

Plaintiff's medical malpractice action is not subject to dismissal for failure to introduce expert testimony under CPLR 4401-a, since requirement for expert testimony applies only to causes of action arising after July 1, 1975 and only to causes of action based solely on lack of informed consent. *Ezagui v Dow Chemical Corp.*, 598 F.2d 727, 1979 U.S. App. LEXIS 15210 (2d Cir. N.Y. 1979).

Plaintiff's failure to offer competent medical expert testimony was fatal to claim of medical malpractice predicated on lack of informed consent (CLS CPLR § 4401-a). *Good v Presbyterian Hosp.*, 934 F. Supp. 107, 1996 U.S. Dist. LEXIS 11256 (S.D.N.Y. 1996).

## **Opinion Notes**

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### **Agency Opinions**

The provisions of Public Health Law, § 2805-d and CPLR, §§ 208, 214-a, 4401-a and Rule 3403, dealing with various aspects of medical malpractice actions, do not apply to dentists. 1979 N.Y. Op. Att'y Gen. No. 49, 1979 N.Y. AG LEXIS 21.

## **Research References & Practice Aids**

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### **Federal Aspects:**

Motion for judgment on the pleadings in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 12(c).

### **Jurisprudences:**

76 NY Jur 2d Malpractice §§ 198., 317.

92 NY Jur 2d References §§ 33.

105 NY Jur 2d Trial §§ 278., 301.

61 Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 150 et seq.

8 Am Jur Proof of Facts 2d 145., Failure to Inform Patient of Nature and Hazards of Surgery.

10 Am Jur Proof of Facts 2d 265., Physician's Misdiagnosis of Appendicitis.

10 Am Jur Proof of Facts 2d 605., Surgeon's Failure to Discover Breakage of Surgical Instrument.

11 Am Jur Proof of Facts 2d 319., Negligent Performance of Biopsy.

12 Am Jur Proof of Facts 2d 603., Physician's Failure to X-ray.

16 Am Jur Trials 471., Defense of Medical Malpractice Cases.

23 Am Jur Trials 479., Determining the Medical and Emotional Basis for Damages.

### **Law Reviews:**

Motion practice under the CPLR. 9 NY L Forum 317.

### **Treatises**

#### **Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4401-a, Motion for Judgment.

#### **Matthew Bender's New York CPLR Manual:**

CPLR Manual § 23.06. Trial and post-trial motions.

#### **Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Negligence § 7.06. Choosing Appropriate Basis of Liability.

**Annotations:**

Physician's duty to inform patient of nature and hazards of disease or treatment. 79 ALR2d 1028.

Necessity of expert evidence to support an action for malpractice against a physician or surgeon. 81 ALR2d 597.

Malpractice: physician's duty to inform patient of nature and hazards of radiation or x-ray treatments under the doctrine of informed consent. 69 ALR3d 1223.

Malpractice: physician's duty to inform patient of nature and hazards of treatment in pregnancy and childbirth cases under the doctrine of informed consent. 69 ALR3d 1250.

Tort liability of physician or hospital in connection with organ or tissue transplant procedures. 76 ALR3d 890.

Malpractice: questions of consent in connection with treatment of genital or urinary organs. 89 ALR3d 32.

Medical malpractice: "loss of chance" causality. 54 ALR4th 10.

**Forms:**

Bender's Forms for the Civil Practice Form No. CPLR 4401-(a):1.

LexisNexis Forms FORM 75-CPLR 4401-a:1.— Order on Motion for Judgment at Close of Plaintiff's Case; Medical Malpractice Action Based Upon Lack of Informed Consent.

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 21:101 et seq .(trial motions).

**Hierarchy Notes:**

NY CLS CPLR, Art. 44



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