

## *Appellate Decisions of Interest*

*Anderson v. Beth Israel Medical Center*  
Appellate Division, First Department (July 13, 2006)

**Guiding Principle:** Where a plaintiff flagrantly changes his story and fails to submit expert evidence supporting his claims of medical malpractice, his lawsuit should be dismissed.

**Brief summary of the facts:** The plaintiff had an operation for a sinus condition. After surgery, the plaintiff was diagnosed with a blood clot in his left arm and shoulder.

The plaintiff brought a lawsuit against the hospital and the anesthesiologist. He alleged the blood clot had developed as the result of medical malpractice on the part of the anesthesiologist. Among other things, the plaintiff claimed that the anesthesiologist placed a blood pressure cuff on the plaintiff's left arm, which was contraindicated due to the presence of a preexisting peripherally inserted central catheter (PICC) line in the left arm. The plaintiff further claimed that this caused the blood clot to develop.

At their pre-trial depositions, the anesthesiologist and a nurse testified that the blood pressure cuff had been placed on the plaintiff's right arm, not his left arm. The plaintiff, on the other hand, admitted at his deposition that he could not remember whether the blood pressure cuff had been placed on his left arm or the right arm. He testified, "I don't remember exactly what [the anesthesiologist] was doing."

The defendants asked the court to grant summary judgment dismissing the plaintiff's complaint. In support of their application, the defendants submitted the affidavit of an expert board-certified anesthesiologist, who stated that the blood pressure cuff had been placed in accordance with standard anesthesia practice and on the plaintiff's right arm.

The plaintiff opposed the defendants' request to dismiss his complaint by submitting an affidavit changing the testimony he had given at his deposition. Now, the plaintiff swore that he distinctly remembered having the blood pressure cuff placed on his left arm prior to surgery. The plaintiff did not explain what it was that suddenly refreshed his memory. Nor did the plaintiff submit an expert affidavit in support of his claims of malpractice.

**Ruling of the court:** The Appellate Division held that the plaintiff's affidavit was a blatant change of his deposition testimony. The defendants therefore had the right to submit a further expert affidavit stating that, even assuming the accuracy of the plaintiff's mysteriously recovered memory, the defendants had not committed any malpractice and could not have caused the plaintiff's injury. The defendants were granted summary judgment and the plaintiff's complaint was dismissed.

**Reasoning:** The plaintiff never offered any expert evidence to support his claims.

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