

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: October 18, 2005 Question Certified to the New York
Court of Appeals: February 23, 2006 Decided: May 21, 2007)

Docket No. 05-1305-cv

PATRICIA COLAVITO, as personal representative of Robert Colavito,
Deceased,

Plaintiff-Appellant,

- v -

NEW YORK ORGAN DONOR NETWORK, INC., ROB KOCHIK, SPENCER HERTZEL,
GOOD SAMARITAN HOSPITAL MEDICAL CENTER, DOE, I and II, M.D. DR.,

Defendants-Appellees.

Before: JACOBS, Chief Judge, CABRANES, and SACK, Circuit
Judges.

In Colavito v. N.Y. Organ Donor Network, Inc., 8 N.Y.3d
43, 58, 860 N.E.2d 713, 722-23, 827 N.Y.S.2d 96, 105-06 (2006),
the New York Court of Appeals answered a question that we had
certified to it in Colavito v. N.Y. Organ Donor Network, Inc.,
438 F.3d 214, 232-33 (2d Cir. 2006), as to whether the intended
recipient of an organ donation can bring a private cause of
action for common law conversion or under the New York Public
Health Law if he does not receive the organ. In light of the
Court of Appeals' response, summary judgment granted by the

1 district court (Dora L. Irizarry, Judge) in favor of all of the
2 defendants is:

3 Affirmed.

4 Denise Winter Luparello, Hicksville, NY,
5 for Plaintiff-Appellant Patricia
6 Colavito, as personal representative of
7 Robert Colavito, Deceased.

8 Richard E. Lerner, Wilson, Elser,
9 Moskowitz, Edelman & Dicker P.C., New
10 York, NY, for Defendants-Appellees New
11 York Organ Donor Network, Inc., Robert
12 Kochik, and Spencer Hertzell.

13 SACK, Circuit Judge.

14 The plaintiff's decedent, Robert Colavito ("Colavito"),
15 suffering from grave kidney disease, was the intended recipient
16 of two kidneys from the body of his late close friend, Peter
17 Lucia. The New York Organ Donor Network ("NYODN") sent one of
18 Lucia's kidneys to Florida, where Colavito resided. But contrary
19 to the wishes of the Lucia family, the NYODN designated the other
20 kidney for another recipient before it was known whether the
21 first one could be successfully transplanted to Colavito. When
22 Colavito's doctor discovered that the kidney sent to Florida was
23 damaged and therefore incapable of being transplanted
24 successfully, he tried to obtain the second Lucia kidney from
25 NYODN. That one, however, was by then in the process of being
26 implanted in the other patient. Colavito, thinking that he had
27 an enforceable right to the second kidney, brought suit against
28 the defendants for fraud, conversion, and violation of New York

1 Public Health Law Articles, 43 and 43-A, in the United States
2 District Court for the Eastern District of New York.

3 The district court (Dora L. Irizarry, Judge) granted
4 summary judgment to the defendants on the merits of Colavito's
5 fraud claim. Colavito v. N.Y. Organ Donor Network, Inc., 356 F.
6 Supp. 2d 237, 241 (E.D.N.Y. 2005) ("Colavito I"). It also
7 concluded that a public policy against recognizing property
8 rights in human corpses barred Colavito's attempt to state a
9 cause of action for common law conversion or under the New York
10 Public Health Law, Articles 43 and 43-A. Id. at 241-47.

11 Colavito appealed to this Court. We affirmed with
12 respect to the fraud claim, but certified to the New York Court
13 of Appeals questions as to whether, under New York law, Colavito
14 could maintain the causes of action for conversion or pursuant to
15 the New York Public Health Law. Colavito v. N.Y. Organ Donor
16 Network, Inc., 438 F.3d 214, 232-33 (2d Cir. 2006) ("Colavito
17 II"). Specifically, we asked

18 (1) Do the applicable provisions of the New
19 York Public Health Law vest the intended
20 recipient of a directed organ donation with
21 rights that can be vindicated in a private
22 party's lawsuit sounding in the common law
23 tort of conversion or through a private right
24 of action inferred from the New York Public
25 Health Law? (2) Does New York Public Health
26 Law immunize either negligent or grossly
27 negligent misconduct? (3) If a donee can
28 bring a private action to enforce the rights
29 referred to in question 1, may the plaintiff
30 recover nominal or punitive damages without
31 demonstrating pecuniary loss or other actual
32 injury?

33 Id. at 233.

1 The New York Court of Appeals accepted the certified
2 questions. See Colavito v. N.Y. Organ Donor Network, Inc., 6
3 N.Y.3d 820, 846 N.E.2d 467, 813 N.Y.S.2d 37 (2006).¹ In its
4 subsequent response to the questions, Colavito v. N.Y. Organ
5 Donor Network, Inc., 8 N.Y.3d 43, 58, 860 N.E.2d 713, 722-23, 827
6 N.Y.S.2d 96, 105-06 (2006) ("Colavito III"), the Court concluded
7 that although the intended recipient of a donated organ might
8 have a common law right to it under New York law, no such right
9 exists for the "specified donee of an incompatible kidney." Id.
10 at 53, 860 N.E.2d at 719, 827 N.Y.S.2d at 102 (emphasis added).
11 The court also decided that whether or not a private cause of
12 action exists under the New York Public Health Law for the
13 disappointed intended recipients of organ donations, it is
14 available only to those who fall within the statutory term
15 "donee," which the court read the statute to "define[] as someone
16 who needs the donated organ." Id. at 57, 860 N.E.2d at 722, 827
17 N.Y.S.2d at 105. The court concluded that inasmuch as Colavito
18 could gain no medical benefit from the organs in question, he did
19 not "need" them and therefore was not covered by the Act. Id.

20 The Court, "under the circumstances of this case,"
21 decided certified question no. 1 -- "Do the applicable provisions
22 of the New York Public Health Law vest the intended recipient of

¹ Colavito died between our decision certifying questions to the New York Court of Appeals and that court's resolution of them. His widow, Patricia Colavito, has been substituted as his personal representative for purposes of this litigation pursuant to Fed. R. App. P. 43(a)(1).

1 a directed organ donation with rights that can be vindicated in a
2 private party's lawsuit sounding in the common law tort of
3 conversion or through a private right of action inferred from the
4 New York Public Health Law?" -- in the negative. The Court
5 concluded that in light of its answer to question no. 1, it was
6 not required to answer questions no. 2 -- "Does New York Public
7 Health Law immunize either negligent or grossly negligent
8 misconduct?" -- or no. 3 -- "If a donee can bring a private
9 action to enforce the rights referred to in question 1, may the
10 plaintiff recover nominal or punitive damages without
11 demonstrating pecuniary loss or other actual injury?" Id.
12 ("[U]nder the circumstances of this case, certified question No.
13 1 should be answered in the negative, and certified question Nos.
14 2 and 3 not answered as academic.").

15 This leaves us a single further question for
16 resolution. The Court of Appeals, as a basis both for answering
17 our first question and deciding that the other two questions need
18 not be addressed, assumed -- understandably, in light of the
19 facts and the language of our prior opinion -- that Lucia's
20 kidneys were incompatible with Colavito's immune system, thus
21 preventing the organs from being successfully transplanted to
22 Colavito. That assumption underlies the Court of Appeals'
23 conclusion that Colavito had no common law property right in the
24 incompatible kidney (common law conversion) and did not "need" it
25 (New York Public Health Law). But neither the district court in
26 Colavito I, nor we in Colavito II, ever actually decided whether

1 there was a "genuine issue" of "material fact," Fed. R. Civ. P.
2 56(c), that would require a trial as to whether Lucia's kidneys
3 and Colavito's immune system were compatible. See Colavito I,
4 356 F. Supp. 2d at 240; Colavito II, 438 F.3d at 223. Colavito
5 himself refused to concede that a successful transplant was
6 impossible. See Colavito II, 438 F.3d at 223 ("Although he will
7 not concede the point, the evidence strongly suggests that
8 neither of Peter Lucia's kidneys was, it turned out, suitable for
9 implantation in Colavito's body."). We cannot decide the
10 propriety of the district court's grant of the defendants' motion
11 for summary judgment without determining whether compatibility
12 remains a genuine issue of material fact in this case.

13 Ordinarily, we "will not review an issue the district
14 court did not decide." Chertkova v. Conn. Gen. Life Ins. Co., 92
15 F.3d 81, 88 (2d Cir. 1996) (citing Singleton v. Wulff, 428 U.S.
16 106, 120-21 (1976)). However, "whether we do so or not is a
17 matter within our discretion." Id.

18 We think this is an appropriate case in which to
19 exercise our discretion to decide this issue in the first
20 instance. Colavito's contention throughout has been that
21 compatibility is immaterial. See Colavito I, 356 F. Supp. 2d at
22 240 (recognizing that Colavito "does not outright dispute
23 [compatibility] but instead argues that incompatibility has no
24 bearing on the fact that defendants misappropriated the second
25 kidney"); Colavito III, 8 N.Y.3d at 48, 860 N.E.2d at 716, 827
26 N.Y.S.2d at 99 (stating that Colavito maintains "that

1 incompatibility is irrelevant to his claim"). We have
2 nonetheless noted that "the evidence strongly suggests that . . .
3 the Lucia kidneys were . . . useless to" Colavito. Colavito II,
4 438 F.3d at 223. Indeed, there is ample evidence to that effect.
5 See, e.g., Burke Dep. 7:22-12:7, May 10, 2004; Gaston Aff. ¶¶ 6-
6 10, May 13, 2004. At the same time, Colavito himself presented
7 no evidence to the district court that would have raised a
8 genuine issue with respect to compatibility. The notion that
9 Lucia's second kidney might have been successfully transplanted
10 to Colavito is, on the evidence in the district court record,
11 speculative at best. A party may not defeat a Rule 56 motion
12 based on conjecture alone. See McClellan v. Smith, 439 F.3d 137,
13 144 (2d Cir. 2006).

14 Because we conclude as a matter of law that Colavito
15 could not have derived a medical benefit from the organ and did
16 not "need" it, we also conclude that in light of the New York
17 Court of Appeals' answer to our first certified question, he had
18 no cause of action under either the New York common law of
19 conversion or the New York Public Health Law. The defendants
20 were therefore entitled to summary judgment.²

² Chief Judge Jacobs, who subscribes to this analysis, adheres to the view (expressed in his dissent from the certification opinion) that Colavito could not in any event have had a medical "need" under the statute for both of Lucia's kidneys, and that the defendants therefore had no duty to hold the second (or transport it to Colavito) to hedge the risk that the first would be damaged or incompatible. See Colavito II, 438 F.3d at 234.

1 Accordingly, we affirm the district court's grant of
2 summary judgment to the defendants on all of Colavito's claims.