

Ruffin v North Shore Univ. Hosp. at Forest Hills

2009 NY Slip Op 30524(U)

February 24, 2009

Supreme Court, Kings County

Docket Number: 22314/01

Judge: Marsha Steinhardt

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At an IAS Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of February, 2009

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice.

-----X

GWENDOLYN RUFFIN,

Petitioner(s),

- against -

Index No. 22314/01

NORTH SHORE UNIVERSITY HOSPITAL AT FOREST
HILLS, A DIVISION OF NORTH SHORE - LONG ISLAND
JEWISH SYSTEM, et al,

Respondent(s).

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The following papers numbered 1 to 20 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1 - 9
Opposing Affidavits (Affirmations)_____	10 - 16
Reply Affidavits (Affirmations)_____	17 - 20
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Patrick Likang Chao, M.D., s/h/a as Likang Chao, M.D., moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint and all cross claims against him. Defendants North Shore University Hospital at Forest Hills s/h/a North Shore University Hospital at Forest Hills, a Division of North Shore - Long Island Jewish System (the Hospital) and James R. Matteson,

M.D., s/h/a James Matteson, M.D., move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the summons and complaint. Defendant Joseph Taff, M.D., moves for an order: (1) pursuant to CPLR 3212, granting him summary judgment dismissing the complaint and all cross claims against him or, in the alternative, (2) compelling plaintiff to comply with the order of this court dated May 9, 2008.

Facts and Procedural Background

Plaintiff commenced this action seeking to recover damages for medical malpractice, claiming that an exploratory laparotomy performed on her on August 19, 1999 severed and/or transected her left ureter, causing urine to enter her retroperitoneal cavity. As a result, plaintiff alleges that she also suffered a significant injury to her urinary tract system; kidney damage; ligation of the left distal ureter; obstruction injury of the right ureter; and loss of ovaries, which required additional surgery, hospitalization and procedures and caused depression, anxiety and trauma.

Dr. Chao began treating plaintiff on July 14, 1999. On August 19, 1999, Dr. Chao, assisted by Drs. Robert Hosty and George Delshad, two Hospital employees, performed an exploratory laparotomy and left oophorectomy on plaintiff to remove an ovarian cyst, which was 8 cm in size; plaintiff's pre-operative diagnosis was an ovarian mass, pelvic pain, history of total abdominal hysterectomy and C-section. Plaintiff remained in the Hospital until August 23, 1999. She was thereafter seen by Dr. Chao in his office on August 25, 1999 and was readmitted to the Hospital on August 26, 1999 with complaints of constipation and

abdominal pain. An abdominal and pelvic CAT scan indicated a collection of fluid in the lower pelvic areas, which was drained and determined to be urine. In order to ascertain the cause of this collection of urine, plaintiff underwent a urology consult with Dr. Irina Gunther, whose pre-operative diagnosis was “rule out left ureteral injury.” Dr. Gunther performed a cystoscopy, left retrograde pyelogram and an attempted left ureteral stent insertion; it was then determined that plaintiff had a left ureteral obstruction. Plaintiff accordingly underwent a left percutaneous nephrostomy so that the urine generated by the left kidney could exit the body through a catheter. Plaintiff was discharged from the Hospital on September 4, 1999.

On November 17, 1999, plaintiff visited Dr. Taff, a private attending urologist affiliated with the Queens-Long Island Medical Group (the Medical Group), upon the referral of Dr. Gunther. On a subsequent visit on December 7, 1999, when plaintiff complained of pain on her left side, Dr. Taff irrigated the nephrostomy and her pain subsided. Dr. Taff explained to plaintiff that an exploratory laparotomy would be necessary to investigate and repair the left ureteral obstruction, but that the timing of the surgery was discretionary. Plaintiff elected to have the surgery performed after mid-December.

On January 3, 2000, plaintiff presented to the Emergency Room of the Hospital and was readmitted because of an infection at the nephrostomy site. She was treated with antibiotics and on January 10, 2000, she underwent an exploratory laparotomy performed by Dr. Taff, assisted by Dr. Matteson, a urology resident at the Hospital. During the procedure, Dr. Taff found that a distal section of the left ureter was encased in fibrotic tissue and

performed a Boari bladder flap procedure that bypassed the obstructed section of the ureter and attached it to bladder. Plaintiff was thereafter assigned to the intensive care until January 14, 2000, when she was transferred to a general hospital floor. Plaintiff was discharged on January 22, 2000.

On January 31, 2000, plaintiff saw Dr. Taff for a post-operative office visit. A renal scan performed on February 7, 2000 showed impaired right renal function. On February 9, 2000, plaintiff was readmitted to the Hospital for the purpose of investigation of the possibility of obstructive uropathy to the right ureter. Imaging studies indicated that the right ureter was obstructed and the interpreting radiologist suspected that the obstruction was the result of extensive fibrotic material and granulation tissue. A percutaneous nephrostomy to the right kidney was performed and plaintiff was discharged on February 12, 2000.

On May 12, 2000, plaintiff was again admitted to the Hospital and underwent another exploratory laparotomy performed by Dr. Taff. During the surgery, Dr. Taff found and resected an obstruction of the right ureter and plaintiff was discharged on May 15, 2000. On May 22, 2000, plaintiff visited Dr. Taff at his office, when he removed her staples and Foley catheter, an x-ray was performed and it was noted that the stent would be removed in one month. On July 13, 2000, the right ureteral stent was removed and plaintiff was directed to undergo a renal scan. Dr. Taff had no further contact with plaintiff.

Summary Judgment

“The requisite elements of proof in a medical malpractice action are (1) a deviation

or departure from accepted standards of medical practice, and (2) evidence that such a departure was a proximate cause of the plaintiff's injury" (*Keevan v Rifkin*, 41 AD3d 661, 662 [2007]; *DiGiario v Agrawal*, 41 AD3d 764,767 [2007]). "On a motion for summary judgment, a defendant doctor has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Keevan*, 41 AD3d at 662, quoting *Williams v Sahay*, 12 AD3d 366, 368 [2004]; *DiGiario*, 41AD3d at 767). Defendant must make this showing through medical records and competent expert affidavits (*Jones v Ricciardelli*, 40 AD3d 935, 935 [2007]). "Once the defendant has made a prima facie showing, the burden shifts to the plaintiff to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (*DiGiario*, 41 AD3d at 767, quoting *Chance v Felder*, 33 AD3d 645, 645-646 [2006]).

"In opposition, a plaintiff must submit a physician's affidavit of merit attesting to a departure from accepted practice and containing the attesting doctor's opinion that the defendant's omissions or departures were a competent producing cause of the injury" (*Keevan*, 41 AD3d at 662, quoting *Thompson v Orner*, 36 AD3d 791, 792 [2007]). "General allegations of medical . . . malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical . . . malpractice, are insufficient to defeat defendant physician's . . . summary judgment motion" (*Starr v Rogers*, 44 AD3d 646, 648 [2007], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; see also *Keevan*, 41 AD3d at 662 [general allegations that are conclusory and unsupported are

insufficient to defeat summary judgment]).

It must be recognized, however, that “[s]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. Such credibility issues can only be resolved by a jury” (*Bengston v Wang*, 41 AD3d 625, 626 [2007], quoting *Feinberg v Feit*, 23 AD3d 517, 519 [2005]). As is also relevant herein, “a doctor is not liable in negligence merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective or a diagnosis proves inaccurate. Not every instance of failed treatment or diagnosis may be attributed to a doctor’s failure to exercise due care” (*Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002], citing *Schrempf v State of New York*, 66 NY2d 289, 295 [1985]). Ordinarily, the happening of an accident, including death following surgery, is no proof that it was caused by a defendant’s negligence (*George v New York*, 22 AD2d 70, 71 [1964], *affd* 17 NY2d 561 [1966], citing *Shkoditch v 150 William St.*, 17 AD2d 168 [1962], *affd* 16 NY2d 609 [1965]; *Kaplan v City of New York*, 10 AD2d 319 [1958]).

As is also relevant herein, a claim of lack of informed consent is based upon the theory that a physician performed a medical procedure without disclosing the material risks, benefits, and alternatives to the contemplated procedure (*Rodriguez v New York City Health & Hosp. Corp.*, 50 AD3d 464 [2008]).

Dr. Chao

Plaintiff's Claims

In her bill of particulars, plaintiff claims that Dr. Chao performed unnecessary surgery on her, that he negligently performed a salpingo-oophorectomy and lysis of adhesions by failing to properly identify and protect the left ureter, that he negligently severed and/or transected her left ureter, that he failed to determine that he had done so prior to her discharge and that he failed to timely correct the condition. Plaintiff also claims that Dr. Chao failed to obtain an informed consent, failed to heed post-operative complaints and engaged in a cover-up.

Dr. Chao's Contentions

In support of his motion, Dr. Chao alleges that there is no evidence that he caused plaintiff to sustain any kidney damage, loss of ovaries, diabetes or exacerbation of any condition concerning her ureter. More specifically, Dr. Chao argues that his deposition testimony and the notes from the Medical Group and from the Hospital establish that Leslie Ostrover, a nurse practitioner specializing in obstetrics and gynecology, examined plaintiff on June 25, 1999; a pelvic ultrasound report dated July 1, 1999 revealed that plaintiff had a partial hysterectomy and that she had a large cystic structure in the midline above the vaginal cuff. Ostrover referred plaintiff to Dr. Chao, who began treating her on July 14, 1999. On August 4, 1999, plaintiff called Dr. Chao, complaining of pain in her pelvis that had been present for approximately six months; Dr. Chao's notes indicate that during this telephone

conversation, he explained the procedure that he intended to perform on plaintiff, including both the benefits and the risks of anesthesia, infection, bleeding and transfusions. On August 16, 1999, Dr. Chao saw plaintiff and told her that he would be performing a salpingo-oophorectomy, or removal of the ovarian mass. He contends that he further explained that complications could include bowel obstruction and/or complications of the bladder and ureter. Plaintiff signed an informed consent.

On August 19, 1999, Dr. Chao performed surgery on plaintiff at the Hospital. His operative report indicates that the cyst was almost on top of the left ureter and that plaintiff had multiple dense adhesions involving the omentum, large intestine, small intestine, bladder, pelvic walls and ureter, with more adhesions on the left side, which Dr. Chao had to lyse and divide with his fingers or scissors. Dr. Chao claims that he located, visualized and secured the left ureter and that he noted peristalsis. Plaintiff remained hospitalized until August 23, 1999, when Dr. Chao again spoke to her; she did not complain about abdominal pain. Dr. Chao again saw plaintiff on August 25, 1999, to remove her staples; she complained of constipation. On August 26, 1999, Dr. Chao examined plaintiff when she presented to the Emergency Room for complaints of abdominal pain and constipation; he diagnosed her as having possible partial bowel obstruction, pyelonephritis and dehydration and wanted to admit her. He became aware of a problem of pooling urine in the pelvis on August 27, 1999 from a CAT scan and told plaintiff that the condition could have resulted from a disruption of the ureter, which could have numerous causes, including the formation of scar tissue

which could cause the ureter to be blocked. Thereafter, Dr. Chao talked to plaintiff on September 9, 1999 and on September 28, 1999; he kept calling her because she would not come in. Dr. Chao saw plaintiff on November 30, 1999, when she complained about vaginal itching and urinary frequency; he prescribed antibiotics for her and he did not see her again.

Dr. Chao also relies upon an affidavit from Dr. Frank A. Manning, a board certified obstetrician/gynecologist, to establish that he did not depart from good and accepted standards of medical treatment in his care of plaintiff. Therein, Dr. Manning alleges that after reviewing plaintiff's medical records, he is of the opinion that the surgery that Dr. Chao performed on her was indicated and necessary. He is also of the opinion that Dr. Chao obtained a valid informed consent following the disclosure of all attendant benefits and risks, including possible complications of the ureter. Dr. Manning also alleges that Dr. Chao properly identified and clamped the ureter during the surgery and that the observation of peristalsis meant that the ureter was intact to propel urine. Dr. Manning also alleges that plaintiff's records reveal that her post-operative course was uneventful. The problem with urine collecting in the pelvic area was identified after plaintiff was readmitted to the Hospital on August 26, 1999 and was alleviated with a nephrostomy. Hence, Dr. Manning opines that any subsequent disruption or blockage of the left ureter in all likelihood resulted from preexisting scar tissue and the formation of new scar tissue from the operation, which occluded, or blocked the ureter.

Dr. Chao thus argues that his deposition testimony, plaintiff's medical records and Dr.

Manning's affidavit establish that he properly performed plaintiff's surgery, that he properly observed and protected the ureter during the procedure and that he did not cut it. Dr. Chao therefore concludes that plaintiff's continuing problems involving the left ureter were a known risk associated with the surgery that he performed on her, based upon her overall pre-existing condition, and was not the result of any departures from accepted medical practices.

Plaintiff's Contentions

In opposition, plaintiff argues that Dr. Chao did not meet his burden of proving entitlement to summary judgment and that issues of fact exist that warrant denial of the motion. In this regard, although Dr. Manning states that plaintiff suffered a "disruption of the left ureter," the medical records and the affidavit from her expert establish that there was never any blockage, since the ureter was severed or cut. Moreover, Dr. Manning does not state that damage to the ureter is a risk of the procedure. Dr. Manning similarly fails to address the claim that Dr. Chao failed to discover that the left ureter was severed. Finally, plaintiff alleges that Dr. Chao failed to obtain an informed consent and/or failed to advise plaintiff of other options to surgery for her ovarian cyst, since she testified at her deposition that she was never advised of any risks or alternatives, but was told that she had a cyst that had to be removed.

More specifically, in reliance upon an affidavit submitted by an unidentified expert who specializes in the practice of obstetrics and gynecology, in which he or she alleges that after reviewing plaintiff's medical records; the deposition testimony of Drs. Chao, Taff and

Matteson; and the expert affidavits of Drs. Rubin, Taff and Manning, it is his or her opinion that Dr. Chao and his assistants departed from accepted standards of medical and surgical care in their treatment of plaintiff by failing to properly identify, isolate and protect the left ureter during the surgery performed on August 19, 1999. The expert further opines that Dr. Chao departed from accepted medical practice when he failed to perceive and discover that he had inflicted serious injury to the ureter and when he failed to timely correct and repair the damage. The expert concludes that as a result, plaintiff suffered a severe and permanent injury to the left ureter.

The expert also avers that Dr. Manning's conclusion that adhesions from prior surgeries, together with scarring, caused plaintiff's condition must fail. In the first instance, since Dr. Chao claims that he removed extensive adhesions during the surgery, the adhesions were no longer present and could not cause further injury. In addition, the procedure conducted on August 19, 1999 could not typically form adhesions by August 26, 1999, when plaintiff was readmitted to the Hospital with a collection of urine in the retroperitoneal and pelvic space. The expert thus concludes that Dr. Chao and his assistants severed and/or disrupted the ureter during the August 19, 1999 surgery. Moreover, the presence of adhesions would not justify this damage, since the presence of adhesions could be expected in a patient with plaintiff's history and accepted medical and surgical practice requires that the ureter nonetheless be properly traced and protected. The expert further alleges that Dr. Chao's post-operative diagnosis of left ovarian cyst, with no mention made of the ureter,

indicates that the ureter was not properly protected during the surgery. The expert also states that even if the ureter had been severed or transected, it would still demonstrate peristalsis, so that the presence of peristalsis does not rule out damage. Plaintiff's expert is also of the opinion that following her surgery, Dr. Chao failed to properly assess and treat plaintiff's condition, since she complained of pain and was prescribed Demerol, Phenergan, Percocet and Tylenol throughout her stay at the Hospital and she had an elevated temperature. Moreover, since the CAT scan performed when she was readmitted on August 26, 1999 revealed "extensive retroperitoneal and pelvic extravasation of urine," it is clear that the ureter was transected, and not obstructed, so that urine was pouring into the retroperitoneal cavity, which was treated by Dr. Gunther's performance of a percutaneous nephrostomy. The expert further alleges that Dr. Manning's opinion that surgery was necessary to remove plaintiff's ovarian cyst is without merit, since a cyst of that size could be removed or observed. In this regard, the expert contends that there is no evidence to support a finding that Dr. Chao afforded plaintiff an option other than surgery.

Plaintiff also notes that the conclusion that the ureter was injured by the August 19, 1999 surgery is further supported by various medical notes and Hospital records so indicating. More specifically, a follow-up note made by Dr. Chao in the Medical Group's notes states that plaintiff sustained a ureteral injury on the left side on August 19, 1999, as was also noted by Dr. Taff in his notes of November 17, 1999. Further, when plaintiff was readmitted to the Hospital on January 3, 2000, her Hospital chart notes that she was "status

post left ureteral interruption secondary to gyn/pelvic surgery in 8/99.” It was again noted on January 10, 2000 that plaintiff had sustained a ureteral injury during an exploratory procedure on August 19, 1999. Also significant is the fact that the discharge diagnosis made by Dr. Taff on January 22, 2000 was “accidental cut/puncture/perforation/hemorrhage during surgical operation” and “accidental puncture or laceration during a procedure, not elsewhere classified,” which plaintiff contends refers to the surgery of August 19, 1999. Plaintiff also notes that when she was again readmitted to the Hospital on February 9, 2000, Dr. Taff’s pre-operative and post-operative diagnosis was “right renal obstruction” and that a note in the emergency room records indicates that “the patient had her ureter transected in August during an oophorectomy,” which plaintiff again contends refers to the surgery performed by Dr. Chao in August 1999.

Dr. Chao’s Reply

In reply, in reliance upon all of the evidence before the court, including the affirmation submitted by Dr. Rubin in support of the motion by the Hospital and Dr. Matteson, along with a supplemental affidavit from Dr. Manning, Dr. Chao argues that the surgery that he performed on plaintiff was indicated because she had a large ovarian mass or cyst, with increasing pelvic pain and discomfort for at least six months. In this regard, Dr. Rubin’s assertion that the cyst did not need to be removed while plaintiff was monitored is offered without any reason or support and there is no indication that this course of action would have improved plaintiff’s comfort or that the mass would have gone away. Further,

Dr. Chao's records and deposition testimony establish that he fully explained the risks to plaintiff, including the possibility of damage to the ureter. Moreover, there is no dispute that plaintiff signed a consent for an operative invasive diagnostic procedure, since such consent is included in the Hospital's records and plaintiff acknowledged at her deposition that she signed the consent. Further, during the surgery, Dr. Chao identified the ureter, as explained at his deposition and in his moving papers; that Dr. Chao did not mention the ureter in his post-operative report is of no moment.

Dr. Manning again opines that since Dr. Chao observed peristalsis at the end of the procedure, the ureter was intact during the surgery, since peristalsis cannot occur if the ureter had been severed. Dr. Manning is also of the opinion that following the surgery, plaintiff was properly treated and discharged, since pain and fever would be expected in any patient. Moreover, Dr. Manning notes that the only post-operative complaint that plaintiff had was constipation. Dr. Chao thus concludes that there is no evidence of any kidney or urologic dysfunction when plaintiff was discharged on August 23, 1999.

In addition, although plaintiff points to notes made by Dr. Chao, Dr. Taff and the Hospital staff to establish that the ureter was severed during the surgery on August 19, 1999, no ureteral tear was seen in any post-operative diagnostic studies or during the subsequent exploratory procedure conducted by Dr. Taff on January 10, 2000. In this regard, Dr. Taff testified at his deposition that he never saw any evidence that there was a transection of the ureter; while plaintiff had an obstruction at the level where the surgery had been done, there

was no way for him to tell if there was a laceration or cut, since the ureter was completely fixed in fibrotic material and there was no reason to dig it out. He further testified that a cut ureter would not have caused an obstruction. Dr. Taff also stated that adhesions form very quickly and plaintiff was a person who would develop extensive scar tissue. Hence, Dr. Chao argues that this evidence also refutes plaintiff's efforts to show that her injuries were not caused by adhesions, scars or fibrotic tissue. In this regard, he also notes that although he did remove some adhesions during the initial surgery, he was unable to remove all of them. Dr. Chao also emphasizes that it must be noted that plaintiff's propensity with problems of her ureters was the result of multiple adhesions and fibrotic tissue which became more manifest when she developed problems with the right ureter, which damage was not caused in any manner by the alleged laceration of the left ureter.

Discussion

The court finds that Dr. Chao fails to make a prima facie showing that he did not depart from good and accepted medical practice and that he did not proximately cause plaintiff's claimed injuries. More specifically, although he and his expert opine that the surgery that he performed on August 19, 1999 was properly carried out, neither doctor nor any of plaintiff's medical records identify the cause of the pooling of urine in plaintiff's pelvic area that occurred less than one week after the operation (*see generally Luu v Paskowski*, ___ AD3d ___, 2008 NY Slip Op 10135, 2 [2008] [plaintiffs failed to raise a triable issue of fact where their expert submitted an affidavit that indicated that defendants

failed to detect a great amount of post-operative blood loss, as well as the plaintiff's small bowel obstruction and pelvic hematoma, but did not, inter alia, state when the blood loss occurred or how it caused the small bowel obstruction and hematoma]). From this it follows that Dr. Chao fails to establish that the left ureter was not severed during the surgery, so as to cause the pooling of urine, as alleged by plaintiff. In addition, there is no indication that Dr. Chao gave plaintiff the option of declining to have surgery to remove the cyst, albeit with an explanation that she would likely continue to experience discomfort (*see generally Velez v Goldenberg*, 29 AD3d 780, 781 [2006] [the expert medical evidence adduced at trial as to the propriety of the laparoscopic cholecystectomy provided a sufficient basis upon which a reasonable juror could have concluded that, despite the plaintiff's signature indicating her consent to the procedures, the doctor did not provide her with sufficient information as to the available alternatives that her consent could be said to have been informed]).

Even assuming, however, that the court concluded that Dr. Chao sustained his burden of proof, plaintiff's expert raises issues of fact with regard to whether Dr. Chao departed from accepted standards of medical care in that he severed or transected plaintiff's left ureter during the August 19, 1999 surgery and whether he attributed the proper significance to her complaints after the surgery, so as to properly to identify and repair the alleged damage. Similarly the above discussed notations in plaintiff's medical record referring to the left ureter being injured during the surgery raise issues of fact. Accordingly, denial of the motion is warranted, since credibility issues are not properly resolved on a motion for summary

judgment (see e.g. *Monsels v Sinclair*, 52 AD3d 487 [2008]; *Darwick v Paternoster*, 56 AD3d 714 [2008]; *Bengston*, 41 AD3d at 626; *Feinberg*, 23 AD3d at 519; *Shields v Baktidy*, 11 AD3d 671, 672 [2004]).

The Hospital/Dr. Matteson

Plaintiff's Claims

Plaintiff contends that Drs. Hosty and Delshad negligently provided assistance to Dr. Chao during the August 19, 1999 surgery. Plaintiff also contends that Dr. Matteson was negligent with respect to the assistance that he rendered to Dr. Taff during the exploratory laparotomy performed on her on January 10, 2000 and in failing to take proper care of her and to diagnose her condition thereafter. Plaintiff also alleges that the Hospital staff failed to properly care for and/or to properly diagnosis her and to properly communicate postoperative symptoms and signs.

Movants' Contentions

In support of their motion, movants rely upon an affirmation submitted by Dr. Barry Rubin, a board certified urologist, who reviewed plaintiff's medical records, the Hospital records and the deposition testimony and who opines that Dr. Matteson and the Hospital did not depart from good and accepted medical practice and did not proximately cause plaintiff's claimed injuries. More specifically, Dr. Rubin alleges that as a resident and surgical assistant, Dr. Matteson had limited responsibilities in working under the guidance of Dr. Taff and that plaintiff does not establish that Dr. Matteson failed to follow the directions and

instructions of Dr. Taff or that Dr. Matteson was negligent in his participation in the surgery. In this regard, Dr. Rubin concludes that the left ureteral obstruction was caused by the growth of fibrotic tissue rather than by any purported negligence or intraoperative injury. Similarly, Dr. Rubin opines that there were no post-operative findings that establish that the care rendered to plaintiff was consistent with an intra-operative injury to the ureter. Moreover, since plaintiff's kidney function had returned to normal on February 9, 2000, any elevated levels of nitrogen or creatinine could not be due to abnormal kidney function or ureteral obstruction. Dr. Matteson further claims that he had no responsibility to follow up with respect to plaintiff's complaints after the surgery. Rather, he was only required to document postoperative symptoms and complaints and to monitor lab and other clinic findings.

Movants also argue that the Hospital is not vicariously liable for any alleged negligent acts or omissions of Drs. Chao and Taff, since these physicians were private attending physicians, so that any alleged negligence cannot be imputed to the Hospital. Movants further argue that plaintiff's reference to any alleged negligence of the Hospital's "nursing and medical staff" is insufficient to raise a triable issue of fact, since the nursing staff did, in fact, meet the standard of accepted care. Moreover, plaintiff has not identified any particular member of the staff or any specific alleged act of malpractice. Dr. Rubin is also of the opinion that Drs. Hosty and Delshad were not negligent in assisting Dr. Chao when he performed the exploratory laparotomy and left oophorectomy on August 19, 1999, since during the course of the surgery, Dr. Chao encountered multiple adhesions, so that dissection

and lysing was necessary, and there is no evidence presented by plaintiff that Drs. Hosty and/or Delshad did not follow the instructions and directions given by Dr. Chao.

Plaintiff's Contentions

In opposition to this motion, in reliance upon the affirmation from her expert gynecologist/obstetrician submitted in opposition to Dr. Chao's motion, along with a second affirmation from an unidentified expert urologist, plaintiff argues that issues of fact exist with regard to whether Drs. Hosty and Delshad, for whom the Hospital is responsible, departed from accepted medical practice by transacting her left ureter during surgery on August 19, 1999. With regard to Drs. Hosty and Delshad, plaintiff's allegations are the same as those discussed with regard to her claim that Dr. Chao departed from accepted medical practice during the August 19, 1999 surgery. Accordingly, these allegations will not be further discussed herein.

With regard to Dr. Matteson, plaintiff's expert urologist argues that Drs. Taff and Matteson departed from accepted medical practice during and after the January 10, 2000 surgery by causing plaintiff's right ureter to become obstructed and by failing to timely discover the injury. More specifically, the expert opines that following the surgery on January 10, 2000, plaintiff had scant to no urine output from her Foley catheter, as well as an increase in temperature and elevated BUN and serum creatinine, along with a loss of appetite, vomiting, cramps and bladder spasms, which symptoms support a finding that her right ureter was injured during the operation. Moreover, a renal scan of the right kidney

taken on January 4, 2000 revealed no evidence of hydronephrosis, while a renal scan taken on February 10, 2000 revealed an injury that caused the kidney to become obstructed during the surgery. The expert is also of the opinion that the right kidney could not have become obstructed as a result of adhesions, since during the first surgery, the adhesions were lysed and incised. Finally, a May 12, 2000 laparotomy described a ureteral obstruction due to encasement in fibrotic tissue, which does not prove or disprove that the right ureter was injured during surgery on January 10, 2000.

Movant's Reply

In reply, movants reiterate their assertion that identifying and isolating the left ureter was not the duty of either Dr. Hosty or Dr. Delshad. In addition, plaintiff's expert does not dispute movants' contention that these doctors followed the directions of Dr. Chao during the surgery.

With regard to Drs. Taff and Matteson, movants argue that plaintiff improperly assumes departure from accepted medical standards from the existence of an injury. In addition, it is argued that plaintiff's pain, fever spikes, alleged decreased urine output and abnormal BUN and creatinine levels are not indicative of an intraoperative right ureteral injury.

Discussion

As must first be noted in addressing plaintiff's claims as against the Hospital, it is well established that the affiliation of a doctor with a hospital or other medical facility, not

amounting to employment, is not sufficient, standing alone, to impute the doctor's negligent conduct to the hospital or facility (*see e.g. Hill v St. Clare's Hospital*, 67 NY2d 72, 79 [1986], citing *Ruane v Niagara Falls Mem. Med. Center*, 60 NY2d 908 [1983]; *McDermott v Torre*, 56 NY2d 399 [1982]; accord *Sampson v Contillo*, 55 AD3d 588, 590 [2008]; *Keitel v Kurtz*, 54 AD3d 387, 390 [2008]). Accordingly, the Hospital demonstrated its prima facie entitlement to judgment as a matter of law on the issue of its vicarious liability with regard to Drs. Chao and Taff by establishing that neither was an employee (*Geffner v North Shore Univ. Hosp.*, ___ AD3d ___, 2008 NY Slip Op 10124, 3 [2008] [defendant hospital established its prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff's decedent was treated only by private attending physicians who were not its employees and, thus, it could not be held vicariously liable for any alleged malpractice]). In so holding, the court notes that although a hospital may nonetheless be found liable where it "represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent" (*Contu v Albert*, 18 AD3d 692, 693 [2005], citing *Hill*, 67 NY2d at 81 n 5), plaintiff does not allege that she believed that either of these doctors were agents of the Hospital.

Similarly, the Hospital cannot be held liable for any alleged acts of negligence on the part of its nurses or other staff members. In so holding, the court recognizes that:

"A claim of professional negligence requires proof that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury (*see, Amsler v Verrilli*, 119 AD2d 786). It is clear that, when an

attending physician gives direct and explicit orders to hospital staff, nurses are not authorized to unilaterally depart from them, and, thus, a hospital is normally protected from tort liability if its staff follows orders (*see, Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265).”

(*Georgetti v United Hosp. Medical Ctr.*, 204 AD2d 271, 272 [1994]). Stated differently, “[i]t is fundamental that a hospital nursing staff’s primary duty is to follow the attending physician’s orders unless such orders are clearly contraindicated by normal practice” (*Sledziewski v Cioffi*, 137 AD2d 186, 190 [1988], citing *Toth*, 22 NY2d at 255, 265, n 3]).

In this case, plaintiff fails “to present medical evidence to refute the opinion of the Hospital’s expert that no independent acts of negligence were committed by any employees of the Hospital or, alternatively, to identify an action or omission by an identified employee of the hospital which caused the plaintiff’s injury” (*Rizzo v Staten Is. Univ. Hosp.*, 29 AD3d 668, 669 [2006], citing *Alvarez*, 68 NY2d 320; *see generally Martinez v La Porta*, 50 AD3d 976, 977 [2008] [defendant hospital should have been granted summary judgment where it established, prima facie, that its employees followed the orders of the attending physician, and that the nurse who assisted in the delivery did not commit any independent acts of negligence]).

Similarly, a hospital will not be held liable for the medical malpractice of assisting physicians who are employees of the hospital where there is no evidence that the doctor exercised independent medical judgment in the treatment of a plaintiff, or should have prevented the alleged departures committed by the attending physician (*see generally Welch*

v Scheinfeld, 21 AD3d 802 [2005] [defendant hospital was properly granted summary judgment where there was no evidence that the physicians who assisted the private attending physician in the subject birth deviated from any of his directions]; *Cook v Reisner*, 295 AD2d 466 [2002] [plaintiffs failed to raise a triable issue that the private physician's directions so greatly departed from normal practice that the doctor employed by the hospital who assisted in the surgery, and by extension the hospital, should be held liable for failing to intervene]; *Roseingrave v Massapequa Gen. Hosp.*, 298 AD2d 377 [2002] [summary judgment was properly granted to physicians who assisted plaintiff's private attending physician during surgery where there was no evidence that the attending physicians exercised independent medical judgment]).

Herein, plaintiff fails to raise an issue of fact with regard to whether Drs. Matteson, Hosty and/or Delshad played an active role in the procedures at issue or that Drs. Taff's and/or Chao's directions so greatly departed from normal practice that these doctors or the Hospital should be held liable for failing to intervene (*Muniz v Katlowitz*, 49 AD3d 511, 513-514 [2008], citing *Cook*, 295 AD2d at 467; *Welch*, 21 AD3d at 808; *Soto v Andaz*, 8 AD3d 470, 471-472 [2004]). Similarly, plaintiff fails to raise an issue of fact with regard to whether Drs. Matteson, Hosty and/or Delshad deviated from any of Drs. Taff's or Dr. Chao's directions (*see e.g. Welch*, 21 AD3d at 807-808, citing *Soto*, 8 AD3d at 471; *Filippone*, 253 AD2d at 618). Hence, the Hospital cannot be held liable for the alleged malpractice of Drs. Hosty, Delshad and/or Matteson.

With regard to Dr. Matteson's liability, individually, it is well settled that "[a] resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*Soto*, 8 AD3d at 471 [citations omitted]). Accordingly, as discussed above, Dr. Matteson cannot be found liable on this basis. Further, even assuming that Dr. Matteson was responsible for plaintiff's care and/or treatment following her surgery, "[a] plaintiff cannot rebut a defendant physician's showing that he or she was not negligent and defeat a motion for summary judgment by offering an expert's affidavit containing general allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice" (*Luu*, 2008 NY Slip Op 10135 at 1-2). Herein, in opposition to the motion by the Hospital and Dr. Matteson, the affidavit of the plaintiff's expert fails to raise a triable issue of fact, as it contains only conclusory and unsupported allegations (*see e.g. Worthy v Good Samaritan Hosp. Med. Ctr.*, 50 AD3d 1023, 1024 [2008]; *Ennd v Kopp*, 48 AD3d 740, 741 [2008]; *Posokhov v Oselkin*, 44 AD3d 921, 921 [2007]; *see also Kaplan v Karpfen*, ___ AD3d ___, 2008 NY Slip Op 10200, 1 [2008] [plaintiffs failed to raise a triable issue of fact in opposition to defendants' demonstration of entitlement to summary judgment where their experts' opinions that the infant plaintiff suffered traumatic brain injury either during birth or shortly thereafter were conclusory and speculative]; *Zak v Brookhaven Mem. Hosp. Med. Ctr.*, 54 AD3d 852, 853 [2008] [in order

to establish a prima facie case of liability in a medical malpractice action, a plaintiff is required to show that the alleged deviation was a substantial factor in producing the injury]; *Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396, 397 [2007] [summary judgment was properly granted where although plaintiff's expert opined that the infant's neurologic conditions were the result of complications arising during his birth and were consistent with an intrauterine injury, he did so in conclusory fashion without specific analysis, which was insufficient to raise any issue of fact]; *DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 523 [2004] [summary judgment was properly granted where plaintiff failed to present a nonspeculative basis for a finding that any act or omission of the medical defendants was the proximate cause of any injury to him]).

Finally, plaintiff's conclusory claims that Drs. Taff and Matteson failed to recognize the significance of plaintiff's post operative complaints, thereby inferring that conducting proper diagnostic testing would have led to earlier detection of her condition, is also based upon pure speculation and unsupported assumptions, and is therefore insufficient to raise an issue of fact (*see generally Shahid v New York City Health & Hosp. Corp.*, 47 AD3d 800 [2008]). More specifically, plaintiff's expert fails to identify what course of treatment Drs. Taff and Matteson should have followed or what test or tests should have been performed and, in addition, fails to explain how plaintiff's injuries would have been less severe with an earlier diagnosis, thus failing to raise a triable issue of fact regarding the competent producing cause of her injuries (*see e.g. Rebozo v Wilen*, 41 AD3d 457, 459 [2007], citing

Jonassen v Staten Is. Univ. Hosp., 22 AD3d 805, 806 [2005]; *Dellacona v Dorf*, 5 AD3d 625 [2004]; *Dixon v Freuman*, 175 AD2d 910, 911 [1991]; *see also Bumbaca v Bonanno*, 39 AD3d 577, 579 [2007] [summary judgment was properly granted where plaintiff's expert's statement that defendant physicians failed to timely diagnose plaintiff's infection during follow-up examinations, and, upon diagnosing the infection, treated it with antibiotics instead of surgery, were insufficient to raise a triable issue of fact because the affidavit failed to point to any symptoms which defendant should have recognized as indicative of an infection, did not state what medical procedures would have revealed the infection earlier and did not indicate why the infection should have been treated with surgery instead of antibiotics]; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [2006] [defendants should have been granted summary judgment where plaintiff's expert offered only conclusory assertions and mere speculation that her cancer would have been discovered earlier and would not have spread if appellants had more aggressively pursued her and expedited and tracked her follow-up visits more actively]; *Bullard v St. Barnabas Hosp.*, 27 AD3d 206, 206 [2006] [complaint was properly dismissed where defendant doctors' expert submissions demonstrated, prima facie, that decedent was predisposed to decubitus in his heels as a result of numerous medical conditions and plaintiff's expert offered only conclusory assertions and speculation that an earlier diagnosis and treatment of the heel decubitus would have avoided the eventual bilateral amputation]; *McCarthy v St. Joseph's Med. Ctr.*, 16 AD3d 243, 243-244 [2005] [summary judgment was properly granted where no issue of fact was found

to exist as to whether the decedent's injuries or death were caused by defendant's alleged 12-hour delay in evaluating him, since plaintiff's expert's opinion was not supported with scientific data or other medical facts and otherwise failed to adequately address defendant's prima facie showing that the decedent's post-operative impairments and ultimate death were caused by chronic liver disease]).

Accordingly, the motion by the Hospital and by Dr. Matteson for summary judgment is granted and the complaint and all cross claims against them are dismissed.

Dr. Taff

Plaintiff's Claims

Plaintiff contends that the action as against Dr. Taff stems from a surgical procedure performed on January 10, 2000 during which Dr. Taff injured her right ureter, causing it to become obstructed. Plaintiff also alleges that thereafter, Dr. Taff negligently failed to determine that he injured her during surgery and that he failed to repair the injury, despite plaintiff's diminished urine flow, rising BUN and rising serum creatinine levels.

Dr. Taff's Contentions

In reliance upon plaintiff's medical records, his deposition testimony and his own affidavit, Dr. Taff provides a detailed summary of the care that he rendered to plaintiff and opines that his treatment of her was within accepted standards of care and that he caused no harm or injury to her, so that he refutes any possible claim of causation between his care and the injuries alleged by plaintiff. More specifically, Dr. Taff contends that he appropriately

irrigated the nephrostomey on December 7, 1999; properly evaluated plaintiff pre-operatively; and on January 10, 2000, properly performed the surgery on her left-sided renal system that was indicated, which was not the cause of the subsequent right sided symptoms. He further avers that when plaintiff complained of excessive urination on January 31, 2000, he ordered a renal scan, which was performed on February 7, 2000 and showed impaired right renal function. Plaintiff was again admitted to the Hospital on February 9, 2000 to evaluate this condition, when a percutaneous nephrostomy was performed on the right kidney.

Dr. Taff further avers that when plaintiff was readmitted to the Hospital on May 12, 2000, the neocystotomy and end-to-end reanastomosis that he performed were similarly appropriate and proper and that he fully informed her of the potential risks and complications of the procedures. On May 22, 2000, plaintiff's staples were removed and x-rays were taken. On July 13, 2000, the right ureteral stent was removed. Dr. Taff accordingly concludes that plaintiff suffered no injury or harm due to the treatment that he rendered to her and that he did not depart from acceptable standards medical of care. He is also of the opinion that plaintiff's impaired right renal function was unrelated to the treatment of her left renal system and that plaintiff fails to establish causation.

In the alternative, Dr. Taff argues that plaintiff has totally ignored the discovery directed in the order dated May 9, 2008 and that if his motion is not granted, plaintiff should be ordered to comply with this order.

Plaintiff's Contentions

In opposition to Dr. Taff's motion, in reliance upon the same expert affirmation submitted in opposition to the motion by the Hospital and Dr. Matterson, plaintiff argues that movant does not meet his burden of proof in establishing entitlement to summary judgment. In this regard, plaintiff first argues that Dr. Taff cannot rely upon his own self-serving affidavit. In addition, plaintiff argues that although it is undisputed that she suffered an injury to her right ureter after the surgery of January 10, 2000, Dr. Taff completely fails to address this surgery. Similarly, he fails to address plaintiff's claim that he failed to timely diagnosis and correct plaintiff's condition, notwithstanding her complaints of pain, diminished urine output and elevated BUN an serum creatinine levels. In addition, plaintiff testified at her deposition that she had a urostomy bag on right side after the surgery and she was advised by an unidentified person that Dr. Taff "had a hard time and slipped up."

Plaintiff further argues that she has complied with all discovery demands.

Dr. Taff's Reply

In reply, Dr. Taff argues that he is entitled to rely upon his own affidavit to make a prima facie showing of entitlement to summary judgment and that his affidavit is sufficiently detailed to support his motion. Dr. Taff further avers that plaintiff's affidavits in opposition rely upon surmise and conjecture, and are hence inadequate to defeat his motion. In addition, he contends that the redacted expert affirmation submitted by plaintiff should not be considered on the ground that there has been no attestation by the physician regarding his or

her qualifications and training.

Discussion

Herein, the court finds that Dr. Taff makes a prima facie showing entitlement to summary judgment by establishing that he did not depart from the accepted standard of care in the medical community. In opposition, plaintiff's expert submits an affirmation that describes the care rendered to her in detail, but alleges, in a conclusory manner, that Dr. Taff injured plaintiff's right ureter during the January 10, 2000 surgery. As discussed above with regard to Dr. Matteson's motion for summary judgment, such an affirmation is insufficient to refute Dr. Taff's prima facie showing of entitlement to summary judgment (*see e.g. Kaplan*, 2008 NY Slip Op 10200; *Luu*, 2008 NY Slip Op 10135; *Worthy*, 50 AD3d at 1024; *Ennd*, 48 AD3d at 741 [2008]; *Posokhov*, 44 AD3d at 921; *Feliz*, 38 AD3d at 397; *Rodriguez*, 28 AD3d 357; *DeFilippo*, 10 AD3d at 523). In this regard, the court further notes that "[t]he opinion of plaintiffs' expert that a departure existed because there was an injury is not sufficient because evidence of injury alone does not mean that there was negligence on the part of respondents" (*Johnson v St. Barnabas Hosp.*, 52 AD3d 286, 288 [2008], *lv denied* 11 NY3d 705 [2008], citing *Landau v Rappaport*, 306 AD2d 446, 447 [2003]).

More specifically, although the expert relies upon the symptoms exhibited by plaintiff after the surgery to argue that Dr. Taff failed to attach proper significance to her complaints, the affirmations fail to identify any departures from accepted medical standards during the operation that would cause any injury to plaintiff, as was discussed more fully above in

addressing plaintiff's claims as against Dr. Matteson (*see generally Zak*, 54 AD3d at 853 [in order to establish a prima facie case of liability in a medical malpractice action, a plaintiff is required to show that the alleged deviation was a substantial factor in producing the injury]). Similarly, the assertion that plaintiff exhibited symptoms that indicate that the right ureter was functioning properly on January 4, 2000, before the surgery, but not on February 7, 2000, after the surgery, likewise fails to establish that the procedure performed by Dr. Taff on January 10, 2000, instead of the adhesions to which plaintiff was prone, was the proximate cause of any subsequent injury (*see e.g. Rebozo*, 41 AD3d at 459; *Bumbaca*, 39 AD3d at 579; *Bullard*, 27 AD3d at 206; *McCarthy*, 16 AD3d at 243-244). Finally, plaintiff's unsubstantiated testimony that an unidentified person in the Hospital told her that Dr. Taff "slipped up" is not competent evidence of malpractice (*see generally Mosberg v Elahi*, 80 NY2d 941, 942 [1992] [in medical malpractice actions, expert medical opinion evidence is required to demonstrate merit]; *Walker v City of New York*, 46 AD3d 278, 281 [2007] [where the gravamen of the action is medical malpractice, a plaintiff must submit the affidavit of a medical expert to demonstrate the merits of the action]).

Accordingly, Dr. Taff's motion for summary judgment is granted. Implicit in this holding is the conclusion that a defendant may establish a prima facie entitlement to summary judgment in a medical malpractice action based upon his or her own affidavit if such affidavit is detailed, specific, and factual in nature indicating that his or her treatment of plaintiff did not depart from good and accepted medical practice (*see e.g. Swezey v*

Montague Rehab & Pain Mgt., ___ AD3d ___, 2009 NY Slip Op 676 [2009]; *Nyrell Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2008]; *Starr*, 44 AD3d at 648; *Gargiulo v Geiss*, 40 AD3d 811, 812 [2007]; *Juba v Bachman*, 255 AD2d 492 [1998], *lv denied* 93 NY2d 809 [1999]). Hence, contrary to plaintiff’s contention, an affidavit of an independent medical expert is not required here (*see e.g. Thomas v Richie*, 8 AD3d 363, 364 [2004], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Toomey v Adirondack Surgical Assoc.*, 280 AD2d 754 [2001]).

Further, the court finds that Dr. Taff’s contention that plaintiff’s expert affirmation should not be considered is meritorious. In the first instance:

“It is now settled that a party may successfully oppose a summary judgment motion without disclosing the names of the party’s expert witnesses. In opposition to such a motion the party defending against a summary judgment motion may serve the movant with a redacted copy of its expert’s affirmation as long as an unredacted original is provided to the court for its in camera inspection.”

(*Marano v Mercy Hosp.*, 241 AD2d 48, 50 [1998]; *accord Mattis v Keen, Zhao*, 54 AD3d 610, 611 [2008] [CPLR 3101(d)(1)(i)¹ permits a party to omit the names of medical experts in an action for medical malpractice]).

¹ CPLR 3101(d)(1)(i) provides that:

“In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.”

It is equally well settled, however, as held by the Appellate Division, Second Department, that:

“[D]efendants in medical malpractice actions are presumptively entitled to a statement of the plaintiff’s expert’s qualifications in ‘reasonable detail’ (CPLR 3101[d][1][i]), as the statute commands, and that the plaintiffs in such cases may avoid compliance with this obligation only upon production of proof sufficient to sustain findings (a) that there is a reasonable probability that such compliance would lead to the disclosure of the actual identity of their expert or experts, and (b) that there is a reasonable probability that such disclosure would cause such expert or experts to be subjected to ‘unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice’ (CPLR 3103 [a]).”

(*Thomas v Alleyne*, 302 AD2d 36, 38 [2002]). Herein, since plaintiff fails to make this showing, the affirmations of her experts are not in admissible form.

In so holding, however, this court recognizes that the insufficiency of the affirmations may be easily cured by requiring the plaintiff to provide the defendants with the omitted information (*see e.g. Einheber v Bodenheimer*, 12 Misc3d 1177A [2006]; *Arellano v New York City Health & Hosps. Corp.*, 5 Misc3d 1016A [2004], citing *Muniz v Our Lady of Mercy Med. Ctr.*, 2003 NY Slip Op 50910[U] [2003]; *Scher v St. Luke's-Roosevelt Hosp.*, NYLJ, Jan. 28, 2003, at 18, col 4). Accordingly, while not condoning plaintiff’s failure to comply with the requirements of CPLR 3101(d)(1)(i), in view of the above holding that the affirmations are insufficient to raise an issue of fact sufficient to warrant denial of Dr. Taff’s

motion for summary judgment, granting plaintiff leave to submit a supplemental affidavit would serve no purpose herein.²

Conclusion

For the above stated reasons, Dr. Chao's motion for summary judgment is denied. The motions by the Hospital, Dr. Matteson and Dr. Taff for summary judgment are granted and the complaint and all cross claims against them are dismissed. The remaining causes of action are severed and shall continue. That branch of Dr. Taff's motion seeking to compel further discovery is denied as moot.

The foregoing constitutes the order and decision of this court.

E N T E R



J. S. C.

² While plaintiff's expert's affirmations are similarly insufficient with regard to the motions made by Drs. Chao and Matteson and by the Hospital, these defendants did not raise this argument. Moreover, as is the case with regard to Dr. Taff, even if this objection had been raised, the court's findings would not be altered, so that no purpose would be served by permitting plaintiff to correct the omission.