

Fitzsimons v Fradella
2011 NY Slip Op 30875(U)
March 30, 2011
Supreme Court, Nassau County
Docket Number: 4049/09
Judge: Ute W. Lally
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3**

**Present: HON. UTE WOLFF LALLY
Justice**

**CHRISTINE FITZSIMONS,

Plaintiff,**

-against-

**FRANCINE D. FRADELLA, D.O., MICHAEL E.
KHALIFE, M.D., NASSAU SURGICAL
ASSOCIATES, P.C., CARLENE MONDESIR,
M.D., and WINTHROP-UNIVERSITY
HOSPITAL ASSOCIATION,**

Defendants.

MD, MG

**Motion Sequence #2, #3
Submitted February 7, 2011**

INDEX NO: 4049/09

The following papers were read on these motions for summary judgment:

Notice of Motion and Affs.....	1-3
Affs in Opposition.....	4&5
Affs in Reply.....	6&7
Memorandum of Law.....	8-8a
Second Notice of Motion and Affs.....	9-12
Affs in Opposition.....	13-17
Affs in Reply.....	18-19

This motion by defendants, Michael E. Khalife, M.D., and Nassau Surgical Associates, P.C. for an Order: (1) pursuant to CPLR 3212(a) granting them leave to file and serve the instant motion for summary judgment within 60 days of service of plaintiff's last supplemental Bill of Particulars, detailing new allegations, but subsequent to the expiration of the Court's 60 day deadline upon good cause shown; and (2) pursuant to CPLR 3212(e),

granting partial summary judgment in their favor dismissing plaintiff's claims which exceed the scope of defendants' legal duty to the plaintiff including her claim that the defendants preoperatively failed to obtain her informed consent and medical history and plaintiff's claim that defendants failed to perform various post-operative acts is granted.

This motion by defendants, Carlene Mondesir, M.D. and Winthrop University Hospital Association for an Order, pursuant to CPLR 3212, granting summary judgment in their favor dismissing the plaintiff's complaint in its entirety as asserted against them is denied.

This is a medical malpractice action in which the plaintiff, Christine Fitzsimons ("Fitzsimons") alleges that she sustained severe and permanent personal injuries as a result of defendants' negligence during her treatment for an ovarian cyst. As best as can be determined from the papers herein, the facts are as follows:

On September 17, 2007, at the referral of her primary care physician due to a urinary tract infection, plaintiff was first seen by defendant Francine D. Fradella, D.O. ("Dr. Fradella"). Dr. Fradella referred the plaintiff for a pelvic sonogram and bloodwork, prescribed antibiotics and sent a urine culture to be analyzed. Subsequently, on October 31, 2007, plaintiff returned to Dr. Fradella's office where she was seen by the physician assistant who noted complaints of persistent urinary burning. Apparently, the urine culture sent on September 17, 2007, could not be found at the laboratory. Consequently, the culture was repeated. On December 20, 2007, plaintiff returned to Dr. Fradella's office at which time Dr. Fradella charted that a sonogram taken on December 6, 2007 revealed a left ovarian cyst that was not present on the prior sonograms. In response, Dr. Fradella recommended a follow up sonogram in January with possible treatment with birth control

pills if the cyst persisted. On January 28, 2008, plaintiff returned to Dr. Fradella to review the results of the follow up sonogram taken on January 16, 2008. This sonogram revealed a slight increase in size of the cyst from the prior sonogram. Consequently, Dr. Fradella scheduled plaintiff for a laparoscopic ovarian cystectomy, and prescribed birth control pills and a repeat sonogram prior to surgery.

On February 27, 2008, plaintiff underwent a repeat pelvic sonogram which found no significant interval change in the left ovarian cyst from the prior sonogram.

The 20 year old plaintiff was admitted to Winthrop University Hospital ("Winthrop" or "Hospital") on March 5, 2008 for a laparoscopic cystectomy by defendant Dr. Fradella her private attending gynecologist who had voluntary staff privileges at Winthrop.

Defendant, Carlene Mondesir, M.D. ("Dr. Mondesir") was the senior gynecological resident and a Winthrop employee on the date of plaintiff's procedure. Upon presentation to the Hospital, Dr. Mondesir took plaintiff's past medical history, while another resident performed a physical examination. Dr. Fradella then obtained surgical consent while plaintiff was in the operating room holding area, where the consent form listed the potential procedures, including laparoscopic removal of an ovarian cyst, possible oophorectomy (surgical removal of ovaries) and possible laparotomy (surgery opening the abdomen). Plaintiff signed this form and Dr. Fradella countersigned it at that time. The laparoscopic assisted cystectomy was started by Drs. Fradella and Mondesir. Up until this point in time, neither Dr. Khalife nor any other physician associated with him, treated, spoke with, diagnosed any condition or even met with the plaintiff.

Drs. Fradella and Mondesir began the procedure by attempting to place a HUMI manipulatory intra-vaginally, but this was abruptly changed to an Acorn Manipulator after

it was noted that the hymen was intact. It is unclear as to whether Dr. Fradella or Dr. Mondesir performed this action. Dr. Fradella then made an incision in the umbilicus and placed a trocar with lighting apparatus in the peritoneal cavity for visualization. Insufflation, or the introduction of gas, in the pelvic cavity, was performed to allow visualization of the pelvis at which point Dr. Fradella noted large areas of bowel adhesions to the interior sidewall of the pelvis bilaterally. Dr. Fradella then made two incisions on the right and left lower abdomen and used blunt trocars for visualization on the left side and a blunt probe on the right side. In using a blunt probe, Dr. Fradella noted adhesions completely fixing the omentum to the peritoneum and ranging from the left side of the pelvis all the way around to the right. While Dr. Mondesir was holding the camera and the adhesions were visible on the screen, Dr. Fradella performed lysis of the adhesions by both blunt and sharp dissection, releasing the omentum, which was removed from the pelvis.

Plaintiff was placed in a further Trendelenburg position, where Dr. Fradella visualized diffuse extensive bowel adhesions which made visualization of the uterus or ovaries impossible. Dr. Fradella then stopped the procedure and requested a surgical consult, ultimately being advised that defendant Michael E. Khalife, M.D. ("Dr. Khalife") was available. Dr. Khalife then entered the operating room, where Dr. Fradella informed him that plaintiff had unexpected adhesions of the bowel and omentum which obstructed visualization of the ovaries.

According to the Hospital records, when Dr. Khalife arrived at the operating table, he assumed the position of right handed surgeon. Dr. Fradella stood on the plaintiff's left side and took over Dr. Mondesir's job of holding instruments. Dr. Mondesir stepped away from the operating room table for the entire period that Dr. Khalife performed surgery on

the plaintiff with assistance provided by Dr. Fradella.

At this point in the procedure, a fourth incision and trocar port was introduced on plaintiff's right abdomen, to increase visualization, although both Drs. Khalife and Fradella deny placing that incision or trocar. Dr. Khalife then, using blunt dissection, performed lysis of the bowel adhesions on the left side of plaintiff's abdomen to release the bowel and allow visualization of the left ovary and fallopian tube. After freeing the bowel, Dr. Fradella visualized the ovary in the left lower quadrant, which did not appear to be "normal looking," being encased in a large cystic mass. Dr. Khalife then, with Dr. Fradella's assistance, dissected and excised the abscessed cystic mass of the left side of plaintiff's abdomen that he described as acutely infected and inflamed, but did not remove it. Dr. Khalife, at that point, left the operating room and the remainder of the procedure was performed by Drs. Fradella and Mondesir.

Drs. Fradella and Mondesir then took approximately one hour to remove the ovary and tubes from plaintiff's pelvic cavity. The first attempt was through the periumbilical port, but being unable to do so, Drs. Fradella and Mondesir then extended the incision in the right lower quadrant and, after further manipulation, were able to remove the ovary and tube via an Endobag. The trocars were removed under visualization and hemostasis was assured. The surgical site was then closed and plaintiff was sent to the recovery room.

The Winthrop records contain a postoperative note authored by Dr. Mondesir at 4:30 p.m., which notes a slightly distended abdomen, sinus tachycardia, a heart rate of 104, and a blood pressure of 120/70. An ECG performed on March 5, 2008, the date of plaintiff's procedure, at 7:09 p.m. revealed a "Borderline ECG", sinus tachycardia, with a possible left atrial enlargement. According to the records, Dr. Mondesir was the only physician who

examined plaintiff postoperatively on March 5, 2008.

On March 6, 2010, at 6:20 a.m., Dr. Mondesir then again examined plaintiff and noted complaints of abdominal pain and tenderness, with a heart rate of 95 and falling, hypotensive blood pressure levels of 107/64. Dr. Mondesir then ordered continued pain management and an advanced diet as tolerated. Also on March 6, 2010 at what appears to be "4p" or 4 p.m., Dr. Fradella examined the plaintiff and noted mild abdominal distension while questioning the etiology of the cyst for "future treatment."

On March 7, 2010, Dr. Mondesir again examined plaintiff and noted an "episode of tachycardia" the night before with positive abdominal distension and abdominal tenderness. Dr. Mondesir also determined plaintiff had a temperature of 99.8, a heart rate of 116, and a low blood pressure of 118/73. Dr. Mondesir then ordered continued pain management and a regular diet while "encouraging ambulation." An ECG performed on March 7, 2010 at 9:52a.m. revealed an "abnormal ECG" (as opposed to a "Borderline ECG" noted on March 5, 2010) with sinus tachycardia and possible "inferior ischemia." On March 7, 2010, in an untimed note, Dr. Fradella examined plaintiff and noted gaseous abdominal distension with positive flatus and toleration of a regular diet. Dr. Fradella then discharged plaintiff with instructions to follow up at her office.

Dr. Fradella's next contact with plaintiff was on March 10, 2008, at her office, although plaintiff and her family claim that they left Dr. Fradella several telephone messages on March 8, 2008 and March 9, 2008.

At the March 10, 2008 visit, plaintiff reported not feeling well since the surgery, including swelling and a low grade fever. Examination revealed low blood pressure of 106/70, positive flatus, positive bowel movement and positive bowel sounds in all four

quadrants. Plaintiff denied nausea or vomiting and reported tolerating a regular diet. Dr. Fradella then referred plaintiff for a CT scan to check for infection and perform a CBC and metabolic panel. She prescribed antibiotics and encouraged plaintiff to drink water and ambulate.

On March 11, 2008, plaintiff again presented to Dr. Fradella's office with her mother and aunt. Dr. Fradella again directed a CT scan to be performed to determine whether there was an infection. Plaintiff, however, instead went to the Emergency Room at North Shore University Hospital at Manhasset ("North Shore").

At North Shore, plaintiff again became tachycardic and was admitted to the ICU. After undergoing exploratory surgery, plaintiff was diagnosed with a perforated terminal ileus and fecal peritonitis. During the course of a nine day admission, plaintiff underwent two surgical procedures at North Shore to repair the perforation and remove the fecal matter from her abdomen.

It remains unclear to this Court as to who defendant Nassau Surgical Associates, P.C. ("Nassau Surgical") is in this matter. Having said that, it is clear that said defendant is represented in this action by the same counsel as defendant Michael E. Khalife, M.D.

By separate motions, defendants, Dr. Khalife and Nassau Surgical, and, defendants Dr. Mondesir and Winthrop, each seek summary judgment dismissal of the plaintiff's medical malpractice claims as asserted against them. In addition, Dr. Khalife and Nassau Surgical also seek leave to file and serve the instant motion for summary judgment within 60 days of service of plaintiff's last supplemental Bill of Particulars, detailing new allegations, but subsequent to the expiration of the Court's 60 day deadline upon good cause shown. Dealing first with the timeliness of Dr. Khalife and Nassau Surgical's motion

at hand, this Court herewith grants said defendants' application to file and serve the instant motion for summary judgment.

Pursuant to CPLR 3212(a), a party may not make a summary judgment motion more than 120 days after filing a Note of Issue unless it obtains "leave of court on good cause shown." The term "good cause" under CPLR 3212(a) means "a satisfactory explanation for untimeliness rather than simply permitting meritorious non-prejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648). However, local Nassau Court rules shorten this deadline to 60 days after the filing of the Note of Issue. When local court rules promulgated by the Supreme Court shorten the deadline to file a summary judgment motion to 60 days as a case management tool, "courts have the discretion to disregard a self-imposed deadline for filing a summary judgment motion to accommodate a genuine need" (*Hernandez ex. rel. Hernandez v 620 West 189th Ltd. Partnership*, 7 Misc. 3d 198 [Sup. Ct. New York 2005]). This "genuine need," however, does not mean "good cause as contemplated by CPLR 3212(a)" and it may include entertaining the merits of a belated motion if filed "within the 120 day ceiling and, consistent with a court's traditional exercise of discretion, the absence of prejudice to the party opposing the belated motion" (*Id.* at 199).

Moreover, when there is discovery outstanding since the filing of the Note of Issue, a party demonstrates "good cause" for their delay in filing a motion for summary judgment when this late discovery is germane to the party's motion (*Brill v City of New York*, *supra* at 655; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129; *Sclafani v Washington Mut.*, 36 AD3d 682).

In this case, this Court's Preliminary Conference Order directed the plaintiff to provide separate and distinct Bills of Particulars as to each defendant within "30 days" of all defendant depositions, or August 2, 2010. On August 4, 2010, defendants, Dr. Khalife and Nassau Surgical, sent plaintiff's counsel correspondence demanding plaintiff provide various outstanding discovery, including this Supplemental Bill of Particulars, pursuant to this Court's Order. On August 5, 2010, plaintiff instead filed the Note of Issue and Certificate of Readiness, forcing the defendants to move to vacate the Note of Issue and, *inter alia*, extend defendants' time to file dispositive motions for 60 days from the date plaintiff provided the outstanding discovery. Subsequently, on September 28, 2010, plaintiff served, by regular mail, a second supplemental Bill of Particulars as to Dr. Khalife and Nassau Surgical, with the effective date of service being October 3, 2010. In these documents, plaintiff alleged two new theories of recovery against the defendants including Khalife's alleged failure to review the plaintiff's medical history prior to being called into the operating room, and that Khalife and Nassau Surgical failed to conduct a post operative examination.

In light of the fact that these new allegations are obviously germane to defendants' motion for summary judgment and should have been provided pursuant to this Court's Order by August 2, 2010, and further, in light of the fact that plaintiff has failed to demonstrate any prejudice with respect to the defendants' "belated" motion, this Court herewith grants defendants' application to make the instant summary judgment motion.

Turning next to the merits of defendants' motions, it is noted that "[o]n a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact” (*Sheppard-Mobley v King*, 10 AD3d 70, 74, *aff’d. as modified*, 4 NY3d 627, *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Id.*). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, *supra*). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*Demishick v Community Housing Management Corp.*, 34 AD3d 518).

“The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage” (*Ramsay v Good Samaritan Hosp.*, 24 AD3d 645, 646; *Thomason v Orner*, 36 AD3d 791; *DiMitri v Monsouri*, 302 AD2d 420). “In a medical malpractice action, the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by showing the absence of a triable issue of fact as to whether defendant physician [and/or hospital] were negligent” (*Taylor v Nyack Hospital*, 18 AD3d 537). Thus, a moving defendant doctor or hospital has “the initial burden of establishing the absence of any departure from good and accepted medical malpractice or that the plaintiff was injured thereby” (*Id.*; *Chance v Felder*, 33 AD3d 645 *quoting Williams v Sahay*, 12 AD3d 366, 368).

The elements of a malpractice action are often litigated on the basis of affidavits presented on a motion for summary judgment. In opposition, however, the plaintiff must submit evidentiary facts or materials that rebut the *prima facie* showing that the physician

was not negligent in treating the patient, so as to demonstrate the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, *supra*; *Baez v Lockridge*, 259 AD2d 573; *Juba v Bachman*, 255 AD2d 492). General allegations of malpractice that are merely conclusory in nature and not supported by competent evidence tending to establish the essential elements of the claim are insufficient to defeat the motion (*Alvarez v Prospect Hosp.*, *supra*; *Holbrook v United Hosp. Medical Center*, 248 AD2d 358). Instead, the plaintiff is required to present some statement of expert medical opinion to demonstrate the viability of a theory of liability (*Alvarez v Prospect Hosp.*, *supra*; *Straton v Orange County Dept. of Social Services*, 217 AD2d 576). For the sake of clarity, this Court will address each motion separately and in turn.

Dr. Khalife and Nassau Surgical's Motion

Notably, plaintiffs' opposition to defendants' Dr. Khalife and Nassau Surgical's motion is limited to defendants' application for leave to file a late motion for summary judgment. Plaintiff does not oppose the substantive motion for summary judgment dismissing plaintiff's medical malpractice claims as asserted against them. Nevertheless, even where there is no opposition to a motion for summary judgment, the Court is not relieved of its obligation to ensure that the movants have demonstrated their entitlement to the relief requested (*see Zecca v Ricciardelli*, 293 AD2d 31).

In that regard, it is noted that as against defendant Dr. Khalife and Nassau Surgical, plaintiff alleges the following: Dr. Khalife failed to obtain plaintiff's informed consent for the subject procedure; Dr. Khalife failed to obtain a medical history prior to scrubbing in intraoperatively at Dr. Fradella's request; and Dr. Khalife failed to undertake various acts postoperatively even though plaintiff was admitted to Winthrop as Dr. Fradella's patient and

she remained Dr. Fradella's patient throughout the course of her admission.

"Malpractice is professional negligence and medical malpractice is the negligence of a doctor" (PJI 2:150). Thus as a threshold matter, and prior to entertaining whether plaintiff has established a *prima facie* case of liability against the defendants Dr. Khalife and Nassau Surgical, this Court must first determine whether said defendants owed a duty of care to the plaintiff. Generally, whether a physician owed a duty of care to the plaintiff is legal question, not a question of medical expertise (*Koepfel v Park*, 228 AD2d 288; *Sawh v Schoen*, 215 AD2d 291). Consequently, expert affidavits are not necessary in moving for summary judgment based upon lack of duty, since the duty owed by a consulting physician is a question of law, not medicine.

In this case, plaintiff's three theories of negligence applicable to Dr. Khalife all exceed the scope of any duty Dr. Khalife owed to the plaintiff.

Informed Consent: Under Public Health Law §2805(d)(1), "lack of informed consent" is defined as "the failure of the person providing the professional treatment...to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical...practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." Where, as here, a patient is treated in a hospital by a private physician, the duty to obtain the patient's informed consent rests with the private physician (*Salandy v Bryk*, 55 AD3d 147; *Sita v Long Island Jewish-Hillside Medical Center*, 22 AD3d 743). Further, the referring physician's receipt of an informed consent may satisfy a treating physician's obligation to obtain informed consent where the treating physician failed to advise the patient of the risks, benefit and alternatives to the treatment (*Sangiuolo v Leventhal*, 132 Misc.2d 680

[Sup. Ct. New York 1986]). Inasmuch as the facts are undisputed in this case that Dr. Khalife had no contact with and did not even know plaintiff's identity until Dr. Fradella requested his assistance, and inasmuch as Dr. Fradella requested Dr. Khalife's assistance only after plaintiff had been placed under anesthesia and she was therefore incapable of receiving any information or giving consent, clearly, defendant did not owe the plaintiff any duty to obtain her informed consent for the procedure.

Failure to Obtain Prior History and Failure to Act Post Operatively: "[A]lthough physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient" (*Wasserman v Staten Island Radiological Associates*, 2 AD3d 713). In such cases, "it is necessary...to consider the circumstances under which these physicians provided care to plaintiff to determine if a duty existed" while also remaining cognizant that a "single examination" by a physician does "not create a further duty on his part to personally supervise" the plaintiff, nor does "it render him responsible" for the plaintiff's subsequent care (*Dombroski v Samaritan Hosp.*, 47 AD3d 80; *Arias v Flushing Hosp. Medical Center*, 300 AD2d 610). The evidence in this case is clear. Dr. Fradella made the decision to operate on the patient. Dr. Fradella saw the patient before the surgery. Dr. Fradella did the sonogram on her before the surgery. Dr. Fradella took her in for the surgery. Dr. Khalife was consulted because the findings during the surgery were not what Dr. Fradella expected and she could not proceed with the surgery safely. Dr. Khalife, with Dr. Fradella's assistance excised the cystic mass from the left side of plaintiff's abdomen but did not remove it. Dr. Khalife then left the operating room and the remainder of the procedure was

performed by Drs. Fradella and Mondesir. Thus, in this case, where Dr. Khalife the attending physician was consulted for a limited purpose – to “excise the cystic mass” from the plaintiff’s abdomen – it is plain that the scope of his duty as a medical practitioner was limited (see e.g., *Dombroski v Samaritan Hospital, supra*; *Mosezhnik v Berenstein*, 33 AD3d 895; *Wasserman v Staten Island Radiological Associates*, 2 AD3d 713). A physician’s participation in surgery does not give rise to a duty to supervise or participate in the patient’s post operative care where the physician did not undertake to supervise the case and the patient has a primary care physician (*Bettencourt v Long Island College Hosp., Inc.*, 306 AD2d 425). In this case, since Dr. Khalife did not undertake a larger medical function beyond assisting Dr. Fradella, in the middle of a procedure and at her request, he will not be charged with the wider duty of conducting an independent investigation into plaintiff’s general medical history, beyond the information provided by the physician controlling plaintiff’s care, Dr. Fradella. Moreover, Dr. Khalife’s mere participation in the surgery at issue did not create a further duty on his part to personally supervise or participate in the plaintiff’s postoperative medical care or treatment subsequent to his limited participation.

Therefore, in light of defendants’ Dr. Khalife and Nassau Surgical’s *prima facie* showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v Prospect Hosp., supra*). Plaintiff has failed to advance any opposition to defendants’ *prima facie* showing and therefore defendants Dr. Khalife and Nassau Surgical’s motion to dismiss plaintiff’s medical malpractice claims as asserted them is granted.

Dr. Mondesir and Winthrop's Motion

As against Dr. Mondesir and Winthrop, plaintiff alleges that in performing the March 5, 2008 surgical procedure, Dr. Mondesir failed to, *inter alia*, properly and carefully introduce trocars into plaintiff's abdomen, failed to timely and properly identify and preserve the plaintiff's bowel and failed to timely and properly position the plaintiff during surgery. In relation to the post operative care, plaintiff claims that Dr. Mondesir failed to review plaintiff's abnormal EKG, failed to determine the etiology of plaintiff's abnormal EKG and T-Wave abnormality, failed to determine the etiology of the plaintiff's increasing abdominal pain and failed to determine the etiology of plaintiff's hypotension prior to plaintiff's discharge from Winthrop. As against the defendant Hospital, plaintiff's claims are predicated upon a theory of vicarious liability. Plaintiff alleges that the Hospital is also liable under theories of negligent hiring, negligent retention and negligent supervision of the defendant, Dr. Mondesir.

It is well settled that a hospital may not be held liable for injuries suffered by a patient who is under the care of a private attending physician chosen by the patient where the resident physicians and nurses employed by the hospital merely carry out the orders of the private attending physician, unless the hospital staff commits "independent acts of negligence or the attending physician's orders are contradicted by normal practice" (*Cerny v Williams*, 32 AD3d 881; see also *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79; *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265).

In a medical malpractice action, the moving defendant bears the burden of proving the absence of any departure from good and accepted standards of medical practice, or even in the presence of said departures that the plaintiff was injured thereby (*Swezey v*

Montague Rehab & Pain Mgt., P.C., 59 AD3d 431, 433; *Larsen v Loychusuk*, 55 AD3d 560). In pursuance of its *prima facie* burden of proof, the moving defendant is required to address the factual allegations set forth in the plaintiffs' bill of particulars with reference to the moving defendant's alleged acts of negligence and the injuries suffered with competent medical proof (*Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*). It is only after the movant has carried its *prima facie* burden that the nonmoving party is required to submit competent proof in opposition for the purpose of establishing the presence of material issues of fact (*Id.*).

Here, defendants, Dr. Mondesir and Winthrop, have failed to establish their *prima facie* entitlement to judgment as a matter of law.

The crux of defendants' argument is that Dr. Mondesir was not involved in the surgery. Defendants maintain that at all times that Dr. Mondesir was at the operating table, Dr. Fradella supervised the assistance provided by Dr. Mondesir and that all actions taken by Dr. Mondesir during the surgery were solely at the direction of the private attending physician, Dr. Fradella. Defendants submit that there is nothing in the record that suggests that Dr. Mondesir exercised any independent medical judgment while assisting Dr. Fradella. Nor did Dr. Fradella's directions and medical judgment so greatly depart from normal practice that Dr. Mondesir should have intervened. Defendant also maintain that as plaintiff has failed to establish a *prima facie* case of medical malpractice liability against Dr. Mondesir, any claims against Winthrop must also fail as a result.

In support of their motion, defendants submit, *inter alia*, the expert opinion of Gary L. Mucciolo, M.D., a physician board certified in the field of Obstetrics and Gynecology, who opines, in pertinent part, as follows:

7. ...It is my opinion within a reasonable degree of medical certainty that Dr. Fradella, as the attending surgeon supervised and directed any actions taken by Dr. Mondesir during this phase of the surgery and that no acts and/or omission caused or contributed to the claimed bowel injury during this part of the procedure.
8. It is evident that Dr. Mondesir was not involved in the surgery during the time that Dr. Khalife operated on the plaintiff along with Dr. Fradella. At all times that Dr. Mondesir was at the operating table Dr. Fradella supervised the assistance provided by Dr. Mondesir. Furthermore, all actions taken by Dr. Mondesir during the surgery were solely at the direction of the private attending physician, Dr. Fradella. While Dr. Mondesir was assisting Dr. Fradella both surgeons were able to visualize the images produced by the laparoscopic camera on a monitor. There is no evidence that Dr. Mondesir used any cutting instruments. It is customary and the standard of care for residents to assist in surgeries such as this, under the supervision of an attending physician and at her direction. Dr. Mondesir's participation as an assistant surgeon was within the accepted standard of medical care as she acted only at the direction and under the supervision of the private attending physician, Dr. Fradella, who independently made all surgical decisions. I hold this opinion to a reasonable degree of medical certainty.
9. Nothing in the records suggests that Dr. Mondesir exercised any independent medical judgment while assisting Dr. Fradella. Nor did Dr. Fradella's directions and medical judgment so greatly depart from normal practice that Dr. Mondesir should have intervened. I hold this opinion to a reasonable degree of medical certainty.
10. The sworn deposition testimony by Dr. Fradella also confirms that Dr. Fradella followed her private patient during the entire post operative period. Dr. Fradella saw and examined the plaintiff on each post operative day and personally discharged her patient on 3/7/08. Dr. Fradella testified that she assumed responsibility for the plaintiff's care throughout her admission up to the time of discharge. The hospital records reflect that the plaintiff did not have any signs, symptoms, clinical findings or complaints suggestive of bowel perforation during the entire hospital admission...
11. It is my opinion within a reasonable degree of medical certainty that the plaintiff's post operative course while a patient at [Winthrop] was not indicative of bowel perforation and there were no clinical findings that required medical intervention. The records indicate that Dr. Fradella was fully aware of the plaintiff's clinical picture and it was appropriate and within the standards of accepted medical practice to discharge the plaintiff on 3/7. At the time of discharge the plaintiff had no complaints other than soreness and

fatigue. As the private attending physician Dr. Fradella was charged within coordinating and making decisions as to plaintiff's care and directed the staff at Winthrop who appropriately followed her Orders...It is my opinion within a reasonable degree of medical certainty that there was no act and/or omission by any [Winthrop] staff or Dr. Mondesir during the plaintiff's admission that caused or contributed to the claimed injuries...The staff at Winthrop properly acted in consultation with and at the direction of Dr. Fradella. I hold this opinion to a reasonable degree of medical certainty. At no time, during the March 5, 2008 hospital admission, did any of the actions of Dr. Fradella depart from the standard of care so as to require any of the Winthrop staff to intervene and question her judgment. I hold this opinion to a reasonable degree fo medical certainty.

14. There is no evidence in the chart of any departure from any medical or nursing standard of care, on the part of Winthrop University Hospital, that proximately caused the injured alleged by the Plaintiff in the Complaint and Bill of Particulars. I hold this opinion to a reasonable degree of medical certainty.
15. Therefore, based on my review of the medical records, Bills of Particulars, Deposition transcripts and my many years of experience, it is my opinion, to a reasonable degree of medical certainty that Winthrop University Hospital, through its staff including Dr. Mondesir did not depart form good and accepted nursing and/or medical practice. I hold this and all opinions stated herein to a reasonable degree of medical certainty.

Even when read and considered in totality, this Court finds that the defendants have failed to sustain their *prima facie* burden.

Primarily, defendants Dr. Mondesir and Winthrop fail to offer any admissible evidence that Dr. Mondesir did not exercise independent judgment or that he conformed to the applicable standard of care of good medical practice. Although a resident who assists a doctor during a medical procedure and follows all directions of that doctor while not exercising any independent medical judgment cannot be held liable for malpractice, Dr. Mondesir has failed to submit any evidence of such a factual situation in this case (*Soto v Andaz*, 8 AD3d 470, 471; *Muniz v Katlowitz*, 49 AD3d 511, 513). Indeed Dr. Fradella's testimony is silent as to whether Dr. Mondesir followed all directions or exercised

independent judgment. The records themselves are, at best, ambiguous on the point since it appears certain vital information, such as tachycardia and low blood pressure, appear several times in Mondesir's notes without appearing in Dr. Fradella's notes.

Further, the expert affirmation of Dr. Gary Mucciolo falls short of establishing defendants' *prima facie* entitlement to judgment as a matter of law. Here, the plaintiff alleged in her bill of particulars that in performing the March 5, 2008 surgical procedure, Mondesir failed to properly and carefully introduce trocars into plaintiff's abdomen, failed to timely and properly identify and preserve the plaintiff's bowel and failed to timely and properly position the plaintiff during surgery. In relation to the post operative care, plaintiff claims that Mondesir failed to review plaintiff's abnormal EKG, failed to determine the etiology of plaintiff's abnormal EKG and T-Wave abnormality, failed to determine the etiology of the plaintiff's increasing abdominal pain and failed to determine the etiology of plaintiff's hypotension prior to plaintiff's discharge from Winthrop.

The defendants' expert's affirmation failed to address any and all of these allegations, and his opinions were conclusory as to the allegations that the hospital and Dr. Mondesir deviated from the accepted standard of care.

Dr. Mucciolo also fails to address the standard of care in a circumstance such as the one presented in this case where the patient undergoes a laparoscopic procedure and it is discovered that she had extensive adhesions involving the bowels which required lysing prior to the continuation of the procedure. The failure by Dr. Mucciolo to address what the standard of care would require under these circumstances renders his opinion insufficient to make a *prima facie* showing of entitlement to judgment as a matter of law.

Consequently, this Court is precluded from awarding summary judgment to Winthrop and Dr. Mondesir (*LaVecchia v Bilello*, 76 AD3d 548; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005; *Vincini v. Insel*, 1 AD3d 351).

Finally, while neither determinative nor dispositive on the issue of their *prima facie* burden, this Court nevertheless notes that Dr. Mondesir fails to submit her own affidavit in support of her instant motion for summary judgment attesting to the issue that she did not exercise any independent judgment and that she simply followed Dr. Fradella's directions.

Therefore, this Court finds that the defendants Dr. Mondesir and Winthrop's failure to make a *prima facie* showing of entitlement to judgment as a matter of law requires a denial of their motion, regardless of the sufficiency of the opposing papers (*Id.*).

Dated: March 30, 2011


 UTE WOLFF LALLY, J.S.C.

TO: Duffy & Duffy, Esqs.
 Attorneys for Plaintiff
 1370 RXR Plaza, West Tower, 13th Floor
 Uniondale, NY 11556

Harris Beach PLLC.

Attorney for Defendants Michael E. Khalife, MD and Nassau Surgical Associates
 100 Wall Street, 23rd Floor
 New York, NY 10005

Bower & Lawrence, PC

Attorneys for Defendants Winthrop University Hospital and Carlene Mondesir, MD
 261 Madison Avenue
 New York, NY 10010

Mitchell J. Angel, PLLC

Attorney for Defendant Francine D. Fradella, DO
 170 Old Country Road
 Mineola, NY 11501

ENTERED

APR 07 2011

NASSAU COUNTY
 COUNTY CLERK'S OFFICE