

Loper v Garely

2011 NY Slip Op 32640(U)

September 27, 2011

Supreme Court, Suffolk County

Docket Number: 07-17535

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2-17-11 (#004)

MOTION DATE 2-14-11 (#005, #006, #007)

MOTION DATE 4-27-11 (#009)

ADJ. DATE 6-20-11

Mot. Seq. # 004 - MG; CASEDISP # 007 - MG
005 - MG # 009 - XMD
006 - MG

-----X
SUSAN LOPER and WILLIAM LOPER,

Plaintiffs,

SUSAN LOPER and WILLIAM LOPER

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- against -

ALAN D. GARELY, M.D., WOMEN'S
CONTEMPORARY CARE ASSOCIATES,
WINTHROP UNIVERSITY HOSPITAL,
CHRISTOPHER CARLEO, M.D., ROY
STEIGBIGEL, M.D., ERICA POSNIAK, M.D.
and ZENGMIN YAN, M.D.,

Defendants.
-----X

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Upon the following papers numbered 1 to 85 read on these motions for summary judgment and cross motion to compel; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; 23 - 28; 29 - 45; 46 -63; Notice of Cross Motion and supporting papers 80 - 85; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the unopposed motions (004) by the defendants Erica Posniak, M.D. and Zengmin Yan, M.D., (005) by the defendant Roy Steigbigel, M.D., (006) by the defendant Christopher Carleo, M.D., and (007) by the defendants Alan D. Garely, M.D. and Women's Contemporary Care Associates for summary judgment are consolidated for the purposes of this determination and are decided together with the cross motion (009) by the defendants Alan D. Garely, M.D. and Women's Contemporary Care Associates; and it is further

ORDERED that the motion (004) by the defendants Erica Posniak, M.D. and Zengmin Yan, M.D. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is granted; and it is further

ORDERED that the motion (005) by the defendant Roy Steigbigel, M.D. for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him and amending the caption to reflect that he is not a party defendant is granted; and it is further

ORDERED that the motion (006) by the defendant Christopher Carleo, M.D. for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him is granted; and it is further

ORDERED that the motion (007) by the defendants Alan D. Garely, M.D. and Women's Contemporary Care Associates for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them is granted; and it is further

ORDERED that the cross motion (009) by the defendants Alan D. Garely, M.D. and Women's Contemporary Care Associates for an order directing the plaintiffs to appear within 45 days with counsel or proceed pro se after the granting of the request of their counsel to be relieved as counsel or, in the alternative, dismissing the action is denied as moot.¹

This is an action to recover damages, personally and derivatively, for the defendants' alleged negligent diagnosis and treatment of the plaintiff Susan Loper. The plaintiff, then 54 years old, had arrived at the emergency room of Stony Brook University Hospital (Stony Brook) on the evening of November 29, 2005 with complaints of one week of intermittent sharp and stabbing flank pain and diarrhea. One week before she had undergone a total abdominal hysterectomy and related procedures which were performed by the defendant Alan D. Garely, M.D. (Dr. Garely) at Winthrop University

¹The motion (008) by the plaintiffs' former counsel for leave to withdraw as attorney pursuant to CPLR 321 (b)(2) was granted by order of this Court dated May 11, 2011. Said order stayed proceedings until June 20, 2011 at which time the plaintiffs were expected to proceed pro se if they had not retained new counsel. As of the rendering of this determination, the plaintiffs have not appeared with new counsel and have not submitted any opposition to the instant motions and cross motion.

Hospital (Winthrop).² She was examined and treated by the defendant Christopher Carleo, M.D. (Dr. Carleo) at the Stony Brook emergency room. Dr. Carleo ordered a non-contrast CT scan of the abdomen and pelvis and a radiology resident performed a “wet” read of the scan and reported it to Dr. Carleo. Dr. Carleo diagnosed the plaintiff with left flank pain and a urinary tract infection, secondary to status post abdominal/bladder repair, and discharged the plaintiff with pain medication, as needed, and an antibiotic. The plaintiff returned to the emergency room and was admitted to Stony Brook in the morning of November 30, 2005 with complaints of severe left side flank pain, nausea, vomiting and fever. She was treated by the attending physician, the defendant Roy Steigbigel, M.D. (Dr. Steigbigel), who ordered an ultrasound of the plaintiff’s kidneys. The ultrasound was performed on November 30, 2005 by the defendant Dr. Zengmin Yan (Dr. Yan), a radiologist. The defendant Dr. Erica Posniak, M.D. (Dr. Posniak), a radiologist, and a different radiology resident reviewed the prior day’s CT scan in the evening of November 30, 2005 and the resident dictated the final report which was issued and signed off by Dr. Posniak. The plaintiff was discharged from Stony Brook on December 5, 2005 and was subsequently re-admitted on December 13, 2005.

The plaintiffs allege that as a result of the negligent diagnosis and treatment of Dr. Garely and Women’s Contemporary Care Associates (Women’s Care) between June 27, 2005 and December 30, 2005 and the Stony Brook defendant physicians from November 29, 2005 through December 5, 2005, the plaintiff sustained injuries including injuries to her left ureter, pelvic hematomas and seromas, left hydronephrosis and hydroureter, repeat hospital admissions, left percutaneous nephrostomies, stent placements, and infections. The complaint alleges a cause of action for medical malpractice based on negligence, a cause of action for medical malpractice based on lack of informed consent, and a cause of action for loss of services.

The Stony Brook defendants Dr. Posniak, Dr. Yan, Dr. Steigbigel and Dr. Carleo move for summary judgment dismissing the complaint as against them on the ground that their treatment and care of the plaintiff at Stony Brook did not deviate or depart from good and accepted medical practice and, in any event, did not proximately cause the plaintiff’s alleged injuries. In support of their respective motions they submit, among other things, the pleadings, bills of particulars, deposition testimony of the parties, their own and expert affidavits, and the plaintiff’s Stony Brook records. The defendants Dr. Garely and Women’s Care also move for summary judgment dismissing the complaint as against them on the grounds that Dr. Garely’s treatment, surgery and care of the plaintiff at Winthrop did not deviate or depart from good and accepted medical practice and did not proximately cause the plaintiff’s alleged injuries. They submit, among other things, the pleadings, bills of particulars, deposition testimony of the parties, Dr. Garely’s own affidavit, and the plaintiff’s records from Women’s Care and from Winthrop.

“On a motion for summary judgment in a medical malpractice action, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby” (*Germaine v Yu*, 49 AD3d 685, 686, 854 NYS2d 730 [2d Dept 2008], quoting *Shahid v New York City Health & Hosp. Corp.*, 47 AD3d 800, 801, 850 NYS2d 519 [2d Dept 2008]; see *Masilotti v Kornel*, 71 AD3d 841, 842, 895 NYS2d 836 [2d Dept 2010]). Where a defendant

²The action was discontinued, with prejudice, against the defendant Winthrop University Hospital pursuant to a stipulation dated November 3, 2008 signed by counsel for all the parties.

doctor makes a prima facie showing that there was no departure from good and accepted medical practice, as well as an independent showing that any departure that may have occurred was not a proximate cause of the plaintiff's injuries, the burden then shifts to the plaintiff to rebut the defendant's showing by raising a triable issue of fact as to both the departure element and the causation element (*see Stukas v Streiter*, 83 AD3d 18, 25, 918 NYS2d 176 [2d Dept 2011]; *Swezey v Montague Rehab & Pain Mgt.*, 59 AD3d 431, 433, 872 NYS2d 199, 202 [2d Dept 2009]; *Myers v Ferrara*, 56 AD3d 78, 864 NYS2d 517 [2d Dept 2008]). General allegations which are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325, 508 NYS2d 923 [1986]; *Rebozo v Wilen*, 41 AD3d 457, 838 NYS2d 121 [2d Dept 2007]).

With respect to the defendant radiologist Dr. Posniak, the plaintiffs allege that she was negligent in, among other things, the performance, interpretation and reporting of the findings of the non-contrast CT scan of the abdomen and pelvis performed on November 29, 2005; failing to recommend or perform contrast studies; failing to advise the attending physicians that a urinary tract obstruction could not be excluded; failing to perform appropriate follow-up exams and radiographic studies prior to discharge; failing to recommend and perform contrast and/or nuclear tests including CT scan of the abdomen and pelvis with contrast, retrograde pyelogram, and renal scans; and negligently allowing, causing and substantially contributing to the delay in diagnosis of the plaintiff's genitourinary blockage, damage, hydronephrosis, hydroureter, and internal hematomas and seromas thereby delaying the treatment of said conditions.

Regarding the defendant radiologist Dr. Yan, the plaintiffs allege that he was negligent in, among other things, failing to use information concerning the plaintiff's past medical and surgical history and events when interpreting and reporting a pelvic ultrasound on November 30, 2005; misinterpreting the diagnostic studies performed which led to contraindicated and/or inadequate treatment of antibiotic therapy alone; failing to diagnose the plaintiff with left hydronephrosis and left hydroureter; failing to perform appropriate contrast studies; and failing to timely recommend urology, nephrology, interventional radiology, and nuclear medicine tests and consultations.

The defendants Dr. Posniak and Dr. Yan submit the affirmation dated January 10, 2011 of their expert radiologist Dr. David A. Fisher who reviewed the CT and ultrasound images and the related reports as well as the deposition testimony of the defendant physicians. Dr. Fisher states that the radiology resident properly reported to Dr. Carleo following the "wet" read that there were no stones or abscesses but that there was a "prominent left collecting system." In addition, Dr. Fisher states that his own review of the CT scan taken on November 29, 2005 revealed that the plaintiff had mild left hydronephrosis with mild left hydroureter constituting the "prominent left collecting system." Dr. Fisher also states that the deposition testimony of Dr. Posniak indicates that her interpretation of the CT images was correct including "fullness of the left kidney" and the left ureter "being prominent." However, Dr. Fisher notes that the CT report prepared by the resident contained an error, that there was "no hydronephrosis" found on the CT evaluation. Dr. Fisher opines within a reasonable degree of medical certainty that the plaintiff's treatment was not impacted in any way by said final report based on Dr. Carleo's testimony that he did not see said report since it was dictated and issued after his discharge of the plaintiff and the deposition testimony of Dr. Steigbigel that the final CT report had no impact on his

care and treatment of the plaintiff because he had more current information, the ultrasound report of November 30, 2005. Dr. Fisher also notes that the ultrasound findings of Dr. Yan of mild hydronephrosis without any kidney stones mirror his own findings on independent review. Dr. Fisher opines within a reasonable degree of medical certainty that Dr. Yan's report contains an accurate examination of the kidneys with a correct impression of the study, well within the standards of good radiological practice. He indicates that based upon Dr. Yan's report and the examination of Dr. Steigbigel, the plaintiff was admitted to Stony Brook for conditions that included pyelonephritis and mild hydronephritis. In conclusion, Dr. Fisher opines within a reasonable degree of medical certainty that neither Dr. Posniak nor Dr. Yan created, caused or worsened the plaintiff's condition.

A defendant may be liable for ordinary negligence based on his or her failure to communicate significant medical findings to a patient or her treating physician (*Mosezhnik v Berenstein*, 33 AD3d 895, 898, 823 NYS2d 459 [2d Dept 2006]; see *Bennett v Long Is. Jewish Med. Ctr.*, 51 AD3d 959, 859 NYS2d 470 [2d Dept 2008]; *Glasheen v Long Is. Diagnostic Imaging*, 303 AD2d 365, 756 NYS2d 589 [2d Dept 2003], *lv denied* 100 NY2d 512, 767 NYS2d 393 [2003]; *Yaniv v Taub*, 256 AD2d 273, 683 NYS2d 35 [1st Dept 1998]; *Caracci v State*, 178 AD2d 876, 577 NYS2d 925 [3d Dept 1991]). Dr. Fisher established that any negligence by Dr. Posniak in failing to communicate the findings in the November 29, 2005 CT scan was not, as a matter of law, a proximate cause of the plaintiff's injuries (see *id.*). Dr. Fisher also established that Dr. Yan did not see or interpret the November 29, 2005 CT scan and that his diagnosis based on his reading of the November 30, 2005 ultrasound was accurate. In the absence of any personal involvement in the interpretation of the November 29, 2005 CT scan, the preparation of the report or the supervision of the resident who prepared the report, there is no basis for a malpractice claim against Dr. Yan, even assuming some act of malpractice by Dr. Posniak could be demonstrated (see *Yaniv v Taub*, 256 AD2d at 273-274). Thus, the defendants Dr. Posniak and Dr. Yan established that any failure to initially diagnose left hydronephrosis and hydroureter in the CT scan report of November 30, 2005 did not proximately cause or worsen the plaintiff's injuries (see *Covert v Walker*, 82 AD3d 824, 825, 918 NYS2d 209 [2d Dept 2011]; *Breland v Jamaica Hosp. Med. Ctr.*, 49 AD3d 789, 854 NYS2d 209 [2d Dept 2008]).

Moreover, the defendants Dr. Posniak and Dr. Yan made a prima facie showing of entitlement to judgment as a matter of law with respect to the cause of action for medical malpractice based on lack of informed consent inasmuch as the plaintiffs are not alleging that the plaintiff's injuries resulted from an affirmative violation of her physical integrity in the absence of informed consent with respect to said defendants (see *Brady v Westchester County Healthcare Corp.*, 78 AD3d 1097, 1099, 912 NYS2d 104 [2d Dept 2010]; *Schel v Roth*, 242 AD2d 697, 698, 663 NYS2d 609 [2d Dept 1997]; Public Health Law § 2805-d). In opposition, the plaintiffs failed to raise a triable issue of fact since they did not oppose the motion (see *Brady v Westchester County Healthcare Corp.*, 78 AD3d at 1099). Therefore, the defendants Dr. Posniak and Dr. Yan are granted summary judgment dismissing the complaint as against them.

The plaintiffs' allegations in their bill of particulars with respect to Dr. Steigbigel include failure to obtain relevant information and records from the plaintiff's prior surgery and hospitalization at Winthrop; failure to perform immediate blood tests, urinalysis and blood and urine cultures; failure to order and perform appropriate radiology, contrast and/or nuclear studies; failure to perform or cause to

be performed urology tests and consultations, document their findings, and appreciate their significance; failure to timely identify and alleviate genitourinary dysfunction, blockage, damage, hydronephrosis and hydroureter, internal hematomas, cysts and seromas; failure to properly diagnose and determine the etiology of the dilated collecting system and blockage; failure to perform a stent placement and/or percutaneous nephrostomy to avoid pain, suffering, infection, renal and pelvic damage and their sequelae; failure to respond to electrolyte imbalances and to appreciate the risk of cardiac complications with electrolyte imbalances; and failure to properly obtain gynecology, urology, radiology, interventional radiology, nuclear medicine, and infectious disease consultations; and negligently communicating an incorrect diagnosis of pyelonephritis.

Dr. Steigbigel submitted his own affidavit dated January 5, 2011 in support of his motion for summary judgment. He explains in his affidavit that he is Board Certified in Internal Medicine and in the subspecialty of Infectious Diseases, that he is an attending physician at Stony Brook, and that he reviewed the records of the plaintiff's admissions to Stony Brook. According to Dr. Steigbigel, the plaintiff's past medical history, which included three surgeries, was not significant to her presentation on November 30, 2005, when he examined the plaintiff after a resident examined her. Both he and the resident noted that the plaintiff had costovertebral angle tenderness on the left, and Dr. Steigbigel states that renal (kidney) disease should be strongly suspected in such cases. He also states that based on the resident's differential diagnosis of pyelonephritis or pelvic abscess or kidney stone, the antibiotic Cipro was properly continued to treat bacterial infection, Flagyl was added, and a renal and pelvic ultrasound was ordered.

Dr. Steigbigel explains that following the examination it appeared that the plaintiff's pyelonephritis was resolving with some hydronephrosis, swelling of the ureter, and that the treatment plan was to possibly drain the fluid observed on the CT scan only if there was no improvement in her condition and a fever developed. He states that he wanted to rule out an abscess in her pelvis so he ordered a CT scan with contrast, ordered blood cultures and urine cultures, and he arranged for a gynecology and urology consult. According to Dr. Steigbigel, the results of the CT scan with contrast performed on December 2, 2005 were consistent with left pyelonephritis and mild left hydronephrosis inasmuch as there was a small collection of fluids below the intra-abdominal wall, likely post-operative changes from her hysterectomy, and a small amount of air in her urinary bladder, related to the Foley catheter. He informs that the plaintiff was seen by a urologist on December 4, 2005 to evaluate the hydronephrosis seen on the renal scan, no renal obstruction was demonstrated, and the plaintiff was advised that if her pain persisted, to have a repeat CT scan, and that the plaintiff was seen by a gynecologist the next day who believed that the pain was unrelated to a gynecological problem. Dr. Steigbigel states that he also saw the plaintiff on December 5, 2005 and that she had no pain, even on palpation, and no fever, that she was to be discharged with a follow up with her gynecologist, and that he recommended that the plaintiff have a repeat CT scan and ultrasound in 2 to 4 weeks to re-evaluate the collection of blood or fluid which was likely due to her hysterectomy.

Addressing the allegations of negligence against him, Dr. Steigbigel asserts that he knew that the plaintiff had undergone a total abdominal hysterectomy and the sonograms and CT scans gave a complete and clear picture of what was going on within the plaintiff without the need for her records from Dr. Garely or Winthrop. In addition, he asserts that all of the relevant consults and tests were

performed and that when the plaintiff was discharged on December 5, 2005, she had none of the alleged conditions of an injured left ureter and pelvis, hematomas, seromas, hydronephrosis, hydroureter, percutaneous nephrostomies, pleural effusions, unstable angina, hypotassemia, hyponatremia or T-wave changes. Dr. Steigbigel opines that his treatment of the plaintiff was at all times in accordance with good and accepted medical standards and opines within a reasonable degree of medical certainty that his treatment was not a factor in causing injury to the plaintiff.

With respect to Dr. Carleo, the plaintiffs allege in their bill of particulars that he was negligent in, among other things, failing to properly diagnose and determine the proper etiology of a dilated collecting system and blockage; failing to appreciate hydronephrosis and hydroureter and to ascertain the correct etiology of said conditions; incorrectly diagnosing the plaintiff as having pyelonephritis; failing to timely identify and alleviate urologic system blockage, damage and/or dysfunction; failing to perform an immediate stent placement and/or percutaneous nephrostomy to avoid pain, suffering, and renal and pelvic damage; failing to determine the source of the hematuria, hydronephrosis and infection; and failing to timely perform blood and urine counts, chemistries and cultures, and to repeat the same.

By his affidavit dated January 13, 2011, Dr. Carleo indicates that he is Board Certified in Emergency Medicine, is an assistant professor in the Department of Emergency Medicine at Stony Brook, and that he treated the plaintiff in the Stony Brook emergency room on November 29, 2005. He explains that the plaintiff had undergone an exploratory laparotomy, hysterectomy, bladder wall repair, and rectocele repair at Winthrop seven days earlier. Dr. Carleo states that he noted upon examination of the plaintiff that she had positive bowel movements and the passage of gas since the surgery, positive urine output, no blood in her urine (hematuria), no history of renal stone disease, and a history of being "discharged postoperative day one." According to Dr. Carleo, his examination of the plaintiff revealed positive suprapubic tenderness and bilateral lower quadrant tenderness without rebound or guarding, and positive left flank tenderness but negative costovertebral angle tenderness. He explains that his impression was abdominal/flank pain or possible renal stone or urinary tract infection, that the urinalysis was consistent with an infection, and that a CT scan was ordered. He further explains that the findings of the CT scan were negative for stone or abscess and positive for a prominent left collecting system that was likely indicating postoperative changes. In conclusion, Dr. Carleo opines within a reasonable degree of medical certainty that the fact that the plaintiff was voiding and the CT scan findings were negative for stones ruled out ureteral obstruction or injury or hydronephrosis such that additional renal studies or consultations with urology or gynecology or nuclear medicine were not warranted and a collecting system, consistent with her recent surgery, could resolve on its own. In addition, he opines that the plaintiff's signs and symptoms were accurately recorded and that the appropriate tests were ordered including a complete metabolic panel, urinalysis and CT scan. He also opines that it was within the standard of care to discharge the plaintiff with a follow up appointment on December 6, 2005 with her surgeon and treating gynecologist Dr. Garely and with an antibiotic prescribed for her urinary tract infection. Dr. Carleo further opines that his failure to obtain the plaintiff's prior medical records was not a departure as there was sufficient information obtained to adequately treat her and determine whether admission was necessary.

Here, Dr. Steigbigel and Dr. Carleo each made a prima facie showing of entitlement to judgment as a matter of law by proffering their own affidavits, in which they opined, to a reasonable degree of

medical certainty, that the care and treatment that each provided to the plaintiff did not depart from good and accepted medical practice (*see Belak-Redl v Bollengier*, 74 AD3d 1110, 903 NYS2d 508 [2d Dept 2010]; *Tuorto v Jadali*, 62 AD3d 784, 878 NYS2d 457 [2d Dept 2009]). Inasmuch as the plaintiffs failed to oppose the motion, the defendants Dr. Steigbigel and Dr. Carleo are granted summary judgment dismissing the cause of action for medical malpractice based on negligence as against them (*see Groeger v Col-Les Orthopedic Assoc., P.C.*, 149 AD2d 973, 973-974, 540 NYS2d 109 [4th Dept 1989]). Since the plaintiff failed to raise a triable issue of fact with respect to the issue of proximate cause, the defendants Dr. Steigbigel and Dr. Carleo are also entitled to summary judgment on the cause of action sounding in lack of informed consent (*see Graziano v Cooling*, 79 AD3d 803, 913 NYS2d 302 [2d Dept 2010]). The caption is amended to reflect that Dr. Steigbigel is not a party defendant.

Regarding Dr. Garely, the plaintiffs allege in their bill of particulars that he was negligent in, among other things, failing to obtain and record a complete and accurate genitourinary history and review of systems prior to the plaintiff's surgery on November 22, 2005; failing to perform a complete genitourinary work up in order to properly plan the surgery including ultrasound, CT scan of the pelvis, urodynamics and/or indicated contrast studies; failing to advise the plaintiff of surgical alternatives and risks and benefits; failing to request a urology consult prior to surgery or urology surgical assistance during surgery; failing to take all indicated precautions to avoid collateral organ injury including but not limited to passing ureteral catheters for identification; causing injury to the left ureter; failing to advise the plaintiff of complications or potential complications of surgery; prematurely discharging the plaintiff after surgery; failing to provide the plaintiff with appropriate follow up dates; and failing to communicate with the Stony Brook physicians.

Dr. Garely indicates in his affidavit dated January 10, 2011 that he is Board Certified in Obstetrics and Gynecology and that from 2002 to 2009 he was the Chief of Urogynecology and Pelvic Reconstructive Surgery at Winthrop. He states that he provided urogynecological treatment and care to the plaintiff from June 27, 2005 through December 2005. Dr. Garely opines to a reasonable degree of medical, surgical and urogynecological certainty that the surgery that he performed on the plaintiff on November 22, 2005 was indicated, properly and competently performed, and that no injury allegedly caused by him was in any way due to a deviation from the standard of medical/surgical care on his part. He explains that he performed ongoing evaluations of the plaintiff's urogynecological condition prior to the surgery, annexing his reports in support, and details his advice to her and discussions of the risks of injury to the urinary tract, bladder and bowel. Dr. Garely informs that he obtained the plaintiff's consent and then performed a supracervical abdominal hysterectomy, abdominal sacrocolpopexy, abdominal paravaginal repair, burch retropubic urethropexy, cystourethroscopy, placement of on-q pain catheter pump and temporary insertion of ureteral stent. He refers to his attached operative report and asserts that during the surgery he and his assistants made a conscious effort to protect the plaintiff's bladder, bowel, ureters and other areas and that they inspected the ovaries and tubes confirming that they were completely normal. He notes that he inspected the plaintiff's bladder with a 70 degree cystoscope and that there was no evidence of injury to the bladder, urethra, or ureters and that there were no complications during surgery. Dr. Garely also informs that they ruled out the possibility of an obstruction through the placement and removal of a stent after no flow was observed on the left side of the ureter, that intraoperative inspection by repeat cystoscopy revealed no bleeding or slowness of ureteral stream, and that by the end of the surgery there was bilateral flow. According to Dr. Garely,

there was an uneventful post-operative course and the plaintiff was discharged on November 23, 2005.

Dr. Garely continues to explain that he first learned through a call from the plaintiff on December 3, 2005 that the plaintiff had gone to Stony Brook and that she was constipated and feeling pain, which are common symptoms of the surgery, and that he told the plaintiff to increase her medication and to see him at the Winthrop emergency room if her pain was severe, which the plaintiff declined to do. He states that he told her to come to his office and to bring the Stony Brook CT scan results with her. According to Dr. Garely, the plaintiff came to see him at his office on December 9, 2005, without the Stony Brook CT scan, and he believed that she was doing better and instructed her to get a repeat CT scan in a month and to follow up with him in a few days. Dr. Garely informs that she never returned and he never obtained the Stony Brook CT scan results. He also states that in late December 2005 he was informed by Dr. Albert Kim that the plaintiff had consulted with him on December 14, 2005 and that an examination and diagnostic testing had revealed a left total ureteral obstruction, hydronephrosis, and pyelonephritis, that a nephrostogram had been performed, that the plaintiff had been admitted to John T. Mather Memorial Hospital (Mather), and that he had placed a percutaneous nephrostomy to decompress her kidney. Dr. Garely indicates that he discussed the plaintiff's rare condition with Dr. Kim and hypothesized that the plaintiff suffered a vascular injury to a small segment which did not manifest itself until a few weeks after surgery. He further states that he learned through discovery in this action that in January 2006 the plaintiff eventually underwent surgery at Mather to reimplant her ureter and for the placement of a stent, which was permanently removed on March 22, 2006. Dr. Garely opines that any injury to the plaintiff was not apparent or diagnosable in the exercise of good and accepted surgical care during the November 22, 2005 surgery, adding that the plaintiff sought treatment from a number of providers who performed multiple diagnostic studies, none of which revealed the ureteral obstruction. He asserts that an inadvertent ureteral injury is a known complication of any urogynecological surgery, that the plaintiff was informed of said risk, and that it does not indicate substandard surgical practice. Dr. Garely concludes by opining that he and the defendant Women's Care rendered medical and urogynecological treatment and care to the plaintiff that was completely consistent with good and accepted standards of medical, surgical, and urogynecological care and that nothing that he did or failed to do was a departure from said standard of care.

Here, Dr. Garely established his prima facie entitlement to judgment as a matter of law by submitting, inter alia, his own deposition testimony, the deposition testimony of other defendant physicians, medical records, and his affidavit which was detailed, specific, and factual in nature indicating that his treatment of the plaintiff did not depart from good and accepted medical practice and that the inadvertent ureteral injury that the plaintiff may have suffered was a known risk of the surgery that occurs in the absence of malpractice (see *Joyner-Pack v Sykes*, 54 AD3d 727, 729, 864 NYS2d 447 [2d Dept 2008]; *Bengston v Wang*, 41 AD3d 625, 626, 839 NYS2d 159 [2d Dept 2007]; *Thomas v Richie*, 8 AD3d 363, 364, 777 NYS2d 758 [2d Dept 2004]). Although the plaintiff has certain separate allegations against the defendant Women's Care concerning its negligence in, among other things, its hiring and/or supervising physician personnel and support staff; failing to use history forms; failing to have and use office systems for appointments and missed appointments, follow up visits, and post-operative visits; failing to correspond by mail and/or telephone with the plaintiff at all indicated times; and failing to make and obtain appropriate, complete and proper medical records, there is no evidence in the record to support said allegations (compare *Johnson v Peloro*, 62 AD3d 955, 956, 880 NYS2d 129

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[2d Dept 2009]). In addition, the defendants Dr. Garely and Women's Care established their prima facie entitlement to summary judgment dismissing the cause of action to recover damages for lack of informed consent (*see, Luu v Paskowski*, 57 AD3d 856, 858, 871 NYS2d 227, 230 [2d Dept 2008]). The plaintiffs failed to oppose the motion by Dr. Garely and Women's Care and to raise a triable issue of fact (*see Moore v St. Luke's Roosevelt Hosp. Ctr.*, 60 AD3d 828, 874 NYS2d 389 [2d Dept 2009]; *see also Groeger v Col-Les Orthopedic Assoc., P.C.*, 149 AD2d at 974). Therefore, the defendants Dr. Garely and Women's Care are granted summary judgment in their favor dismissing the complaint as against them.

Furthermore, inasmuch as the first and second causes of action which seek damages on behalf of the plaintiff Susan Loper must be dismissed, the third derivative cause of action must also be dismissed *see Cabri v Park*, 260 AD2d 525, 688 NYS2d 248 [2d Dept 1999]; *see also Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563, 567, 884 NYS2d 131 [2d Dept 2009]).

Finally, the cross motion by the defendants Dr. Garely and Women's Care for an order directing the plaintiffs to appear within 45 days with counsel or proceed pro se after the granting of the request of their counsel to be relieved as counsel or, in the alternative, dismissing the action is denied as moot in light of the foregoing.

Accordingly, the motions for summary judgment are granted, the cross motion to compel or dismiss is denied as moot, and the action is dismissed in its entirety.

Dated: _____

9/27/11



THOMAS F. WHELAN, J.S.C.