

O'Connell v Manna

2011 NY Slip Op 33602(U)

November 15, 2011

Supreme Court, Suffolk County

Docket Number: 6574-05

Judge: Daniel Martin

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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY**

PRESENT:

HON. DANIEL MARTIN
_____ X

**PATRICIA A. O'CONNELL and
WALTER O'CONNELL,**

Plaintiff,

-against-

GENO MANNA, M.D., *Et al.*,

Defendants.
_____ X

INDEX NO.: 6574-05

AMENDED DECISION

Motion Dates: 7/14/10, 9/3/10, 10/14/10,
10/28/10, 10/29/10

Submitted: 1/11/11

Motion Sequence No.: 02 -MD
03 -MG
04 -MG
05 -MD
06 -MD

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The following named papers have been read on this motion:

Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

ORDERED that this motion (002) and these cross motions (003), (004), (005), (006) are consolidated for purposes of this determination; and it is further

ORDERED that this motion (002) by the defendants Julie Suarez, M.D., Julie Suarez, M.D., PLLC, Peter Yeu-Der Chang, M.D., Gastrointestinal Associates of Long Island, Mercy Medical Center, and Jeffrey Steven Novak, M.D., s/h/a Jeffrey Steven Novack, M.D., pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against each of them is denied as to Dr. Suarez, Dr. Pollack and Mercy Medical Center, and is granted as to Dr. Chang ,Dr. Novak and Gastrointestinal Associates of Long Island, and it is further

ORDERED that this cross motion (003) by the defendants Bruce Robins, M.D. and Interventional Cardiology Associates, P.C. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that this cross motion (004) by the defendant Winthrop University Hospital Association, d/b/a Winthrop University Hospital, pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against it is granted; and it is further

ORDERED that this cross motion (005) by the defendants Geno Manna, M.D. and Village Obstetrical Services, P.C. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is denied; and it is further

ORDERED that this cross motion (006) by the defendant Scott Edward Johnson, M.D. pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against him is denied.

In this action for medical malpractice commenced on behalf of the plaintiff, Patricia A. O'Connell, it is claimed that the defendants were negligent and otherwise departed from good and accepted standards of medical care in the care and treatment rendered to her, and failed to properly provide informed consent to her. A derivative claim has been interposed on behalf of the plaintiff's spouse, Walter O'Connell. It is claimed, that due to the negligence of the defendants herein, Patricia O'Connell suffered a perforated bowel, sepsis, peritonitis, respiratory distress, and a medically induced coma, and additionally required an

enterectomy resection of the small intestine with anastomosis, temporary colostomy, surgical resection of the bowel in three places, plastic surgery with skin grafting in the abdominal region, as well as other injuries as set forth in the plaintiff's verified bill of particulars.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (*Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1998]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 434 NYS2d 166 [2nd Dept 1980]; *Prete v Rafla-Demetrious*, 221 AD2d 674, 638 NYS2d 700 [2nd Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see, Fiore v Galang*, 64 NY2d 999, 489 NYS2d 47 [3rd Dept 1985]; *Lyons v McCauley*, 252 AD2d 516, 517, 675 NYS2d 375 [2nd Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; *Bloom v City of New York*, 202 AD2d 465, 465, 609 NYS2d 45 [2nd Dept 1994]). "Summary 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, 839 NYS2d 159 [2nd Dept 2007]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see, Lifshitz v Beth Israel Med. Ctr-Kings Highway Div.*, 7 AD3d 759, 776 NYS2d 907 [2nd Dept 2004]; *Domaradzki v Glen Cove OB/GYN Assocs.*, 242 AD2d 282, 660 NYS2d 739 [2nd Dept 1997]). "Summary 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, 839 NYS2d 159 [2nd Dept 2007]).

MOTION (002)

In support of motion (002), the defendants, Julie Suarez, M.D., Julie Suarez, M.D., PLLC, Peter Yeu-Der Chang, M.D., Gastrointestinal Associates of Long Island, Mercy Medical Center, and Jeffrey Steven Novak, M.D., have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answers and demands for discovery served by the moving defendants, the plaintiff's verified bills of particulars; partial, uncertified copies of plaintiff's medical records and reports; the unsigned transcripts of the examinations before trial of Patricia O'Connell dated October 16, 2006 and January 10, 2007, Walter O'Connell dated January 24, 2007 and March 20, 2007, and Geno Manna, M.D. dated September 28, 2007; the affidavit of Denise Baston, Director of Human Resources Operations for Mercy Medical Center; and the affirmations of Jeffrey Novak, M.D., Peter Y. Chang, M.D., and Henry Partridge, M.D. The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion. The partial, uncertified copies of the plaintiff's medical records and reports are not in admissible form pursuant to CPLR 3212 and are not considered on this motion.

Denise Baston, Director of Human Resources, Mercy Medical Center, has set forth in her affidavit that in January 2004, Dr. Julie Suarez, Dr. Peter Y. Chang, Dr. Jeffrey Steven Novak, Dr. Geno Manna, Dr. Stanley B. Pollack, and Dr. Roy Rubenstein were voluntary attending physicians at Mercy Medical Center. They were not employees of Mercy Medical Center or on the payroll. Mercy Medical Center did not control or direct their treatment decision. She continues that in January 2004, Dr. Robert W. Daly, Dr. Ira Fastlich, and Thomas Pizzuti were private attending radiologists at Mercy Medical Center. They were not on the Mercy Medical Center payroll. They were not employees of the Mercy Medical Center and Mercy Medical Center did not control or direct the treatment decisions made by them.

Dr. Peter Chang has set forth in his affidavit that he is a physician licensed to practice medicine in the State of New York and is board certified in thoracic surgery. He states that in January 2004, he was in private practice and maintained attending privileges at Mercy Medical Center, and was not an employee of the hospital. He offers his affidavit based upon a review of the relevant records concerning the care and treatment he rendered to Patricia O'Connell. He states that on January 15, 2004, Dr. Julie Suarez requested his consultation with Patricia O'Connell with respect to a diagnosed pleural effusion. He continues that Ms. O'Connell had developed sharp pain on swallowing and was unable to tolerate oral intake; therefore, an esophageal perforation was suspected, so a barium swallow was ordered. He states he assessed the patient's abdomen and documented it was soft and non-tender, there was no rebound and he found normal bowel sounds. Ms. O'Connell, he states, had been seen the previous day by Dr. Stanley Pollack, a general surgeon, who determined that there was no specific evidence of an intra-abdominal complication. Based upon Dr. Chang's examination, he recommended continued administration of antibiotics and to follow for the results of the barium swallow study. On January 16, 2004, he examined Ms. O'Connell again and recommended an upper endoscopy and gastroenterology consult because the radiologist interpreted the barium swallow as revealing no esophageal leak or perforation, but showing irregular mucosa at the distal esophagus. Dr. Chang states that as a thoracic surgeon, he is responsible for performing operations on the heart, lungs, esophagus, and other organs of the chest, and it was not, and is not, his practice to evaluate patients with respect to the possibility of

an intra-abdominal process or bowel perforation. He opines with a reasonable degree of medical certainty that his treatment of the patient was entirely consistent with the applicable standard of medical practice and did not constitute a departure from accepted standards of care. He further asserts that his treatment of the patient could not have proximately caused any of the claimed injuries.

Dr. Jeffrey Novak has set forth in his affidavit that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine with a sub-specialty in gastroenterology. On January 16, 2004, Dr. Julie Suarez requested a consultation with regard to Patricia O'Connell as she had an episode of dysphagia and an abnormal esophagram. Based upon his examination of the plaintiff, he concluded that an esophageal perforation was highly unlikely in that there was a lack of extrusion of barium during the upper gastrointestinal series, there was no antecedent vomiting, instrumentation, or foreign body ingestion. He ordered an endoscopy to further evaluate her condition; however, Ms. O'Connell declined to undergo the study at the hospital. On January 19, 2004, when he again saw her, she refused to undergo an endoscopy at Mercy Medical Center. Dr. Novak states that he explained the risks of undiagnosed lesions/cancers to her and she agreed to follow up with her physicians upon discharge. Thereafter, he had no further contact with her or her treating physicians. Dr. Novak states that prior to his involvement, Ms. O'Connell was seen on January 14, 2004 by Dr. Stanley Pollack, a general surgeon, and that he relied upon the determination by Dr. Pollack that there was no evidence of an intra-abdominal complication. It is Dr. Novak's opinion with a reasonable degree of medical certainty that his treatment of Ms. O'Connell was entirely consistent with, and did not depart from, the applicable standard of medical practice, did not constitute a departure from the accepted standards of care, and could not have proximately caused any of the claimed injuries.

Dr. Henry S. Partridge, the moving defendants expert in this cross motion (002), sets forth that he is licensed to practice medicine in the State of New York and is board certified in surgery. He states that in the fall of 2003, Patricia O'Connell complained of right lower quadrant discomfort and was referred to Geno Manna, M.D. A January 2003 CT scan revealed the presence of a possible 2 X 3 cm ovarian cyst on the right pelvic sidewall. A sonogram on October 28, 2003 was reportedly normal with no apparent ovarian cyst. On January 7, 2004, Dr. Manna performed laparoscopic surgery on Ms. O'Connell at Winthrop University Hospital but was unable to visualize the right ovary during the procedure. Dr. Partridge continues that Dr. Manna surgically freed a loop of bowel adhered to the side wall of the abdominal cavity. Ms. O'Connell was then discharged home. After several hours, however, she developed severe abdominal pain and informed Dr. Manna of her symptoms, including difficulty breathing. Dr. Manna recommended Sudafed for the breathing problem. She called Dr. Manna a second time on January 7, 2004, late at night, complaining of severe abdominal pain. Dr. Manna, Dr. Partridge states, then advised her to go to Winthrop University Hospital; but, the plaintiff elected to go to Stony Brook Hospital instead where a CT scan of the abdomen and pelvis was performed and interpreted as demonstrating ascites, secondary to the laparoscopy. Ms. O'Connell was given Morphine intravenously and discharged home on January 8, 2004 with a prescription for Vicodin for pain.

Dr. Partridge states that, thereafter, on January 13, 2004, Ms. O'Connell presented to Dr. Manna's office in respiratory distress with complaints of wheezing and difficulty breathing. She was referred to Dr. Andrew Peters who admitted her to the service of Julie Suarez, M.D. at Mercy Medical Center to rule out a pleural effusion. Upon admission to Mercy Medical Center, laboratory

studies revealed an elevated white blood cell and a chest x-ray revealed free air under the diaphragm and fluid in the cul de sac. Dr. Daly, the radiologist, determined that the free air under the diaphragm was consistent with the plaintiff's history of a recent laparoscopic surgery. He further noted evidence of bilateral pleural effusions, bibasilar infiltrates and/or atelectasis. Dr. Partridge continues that the radiologist, Dr. Fastlich, upon review of the CT scan of the abdomen and pelvis, determined that the moderate amount of free air within the abdomen and pelvis was attributable to the recent laparoscopic surgery. Dr. Suarez examined the plaintiff and requested surgery, pulmonary, gastroenterology and cardiology consults.

Dr. Partridge continues that Dr. Rubenstein performed the pulmonary consult. He noted there was abdominal tenderness and that her symptoms were worsening. Dr. Robin conducted the cardiology consult on January 14, 2004 and determined there was no indication for further cardiac work-up. He noted Ms. O'Connell's abdomen was soft and nontender with hypoactive bowel sounds. That same day, Dr. Pollack performed the surgery consult. His examination revealed mild diffuse abdominal distention with no localized tenderness and no guarding. He found no specific evidence of an intra-abdominal complication or pathology. When Dr. Peter Chang examined Ms. O'Connell on January 15, 2004 on a thoracic/vascular consult, he found her abdomen was soft and without tenderness and bowel sounds were normal. When Dr. Pollack examined her again on January 16, 2004, he too found she had no abdominal pain, and her abdomen was soft and nontender. Dr. Jeffery Novak saw her on January 16, 2004 on a gastroenterology consult and found mild right sided tenderness without rebound, guarding or appreciable masses. The January 16, 2004 esophagram revealed an irregularity of the distal esophagus. Ms. O'Connell, continues Dr. Partridge, refused the endoscopy and insisted upon being discharged from Mercy Medical Center. She was discharged by Dr. Suarez on January 20, 2004 with instructions to immediately follow-up with a gastroenterologist. Ms. O'Connell then went to Stony Brook University Hospital on January 22, 2004 where Dr. Smithy performed immediate exploratory surgery and repaired a perforation of her bowel. Dr. Partridge indicates Ms. O'Connell remained hospitalized at Stony Brook intubated, until April 2004, but does not indicate the reason for the intubation or the extended hospitalization.

It is Dr. Partridge's opinion with a reasonable degree of medical certainty that the treatment provided to Patricia O'Connell at Mercy Medical Center comported with good and accepted medical practice and did not proximately cause her injuries. While hospitalized at Mercy Medical Center, he states, Ms. O'Connell remained under the care and treatment of her private attending physicians, including the radiologists who were private attending radiologists. He states that the staff at Mercy Medical Center did not perform any acts or omissions that proximately caused injury to Ms. O'Connell and at all times followed the orders and directives of those attending physicians in accordance with good and accepted medical practice. Dr. Partridge continues that neither Dr. Novak, a gastroenterologist, Dr. Chang, a thoracic vascular surgeon, nor Dr. Suarez, an internist, had the duty to further investigate the source of the plaintiff's abdominal and pelvic pain or to determine whether exploratory surgery was indicated. Dr. Partridge states that it was not in the scope of Dr. Chang's specialty to evaluate the plaintiff for a possible intra-abdominal process. With regard to Dr. Novak, Dr. Partridge states that because Ms. O'Connell refused to have the endoscopy performed to rule out an esophageal perforation, Dr. Novak was not required to do anything else. Dr. Partridge continues that Dr. Suarez, as an internist, arranged for all the appropriate consultations in an effort to evaluate the source of her complaints and properly relied upon the determinations of those physicians, including Dr. Pollack, the general surgeon, with respect to any intra-abdominal process. He opines within a reasonable degree of medical certainty that Dr. Chang, Dr. Novak, Dr.

Suarez and Mercy Medical Center did not depart from good and accepted medical practice and did not proximately cause injury to the plaintiff.

The plaintiff's expert is a physician duly licensed to practice medicine in the State of New York and is board certified in internal medicine. The plaintiff's expert opines with a reasonable degree of medical certainty that a physician is required to take steps to ensure that the most serious potential causes of a patient's condition are ruled in or ruled out first to minimize the most serious consequences or the most serious disease process and/or illness responsible for the patient's condition. When the forty-eight year old plaintiff presented to Mercy Medical Center with complaints of difficulty breathing, shortness of breath, states the plaintiff's expert, pneumonia should have been ruled out in that the patient was status post laparoscopy. A chest x-ray, a CT of the chest and a CT of the abdomen and pelvis were obtained. The chest x-ray documented free air under the right diaphragm, consistent with a clinical history of recent laparoscopic surgery. There was also evidence of pleural effusions and bibasilar infiltrates and/or atelectasis. Thereafter, a CT pulmonary angiogram demonstrated small to moderate sized bilateral pleural effusions and bibasilar compressive atelectasis. The CT of the abdomen and pelvis revealed a moderate amount of free intraperitoneal air. The plaintiff's expert states that the radiologist, in contrast to the assertions made by Dr. Partridge in his affidavit, set forth that the air may be attributed to the recent laparoscopic surgery, and further specifically stated that the murky fluid within the cul de sac may represent hemorrhagic or infected fluid and that the possibility of an abscess collection could not be excluded. Based upon those findings, the radiologist recommended clinical correlation and close follow up. The plaintiff's expert states that the plaintiff had a critically high level of white blood cell count of 33.9 (normal 5-10.0).

The plaintiff's expert continues that the role of an attending physician in a circumstance such as this is to diagnose, monitor and treat the patient for whatever abnormalities are uncovered. The expert states the standard of care requires the physician to engage in the differential diagnosis process, which requires ordering appropriate laboratory and radiological diagnostic studies, consulting specialists when needed, and coordinating the consultant's findings, physical exams, diagnostic studies, etc. Continuing, the plaintiff's expert opines that the utilization of a consultant does not release an attending physician from responsibility, and if the attending is relying on a consultant's findings as a protection from liability, then the attending physician must actually act upon those findings and recommendations. The expert further adds that it is not within the standard of care to fail to follow the instructions of a consultant and then claim that you are not responsible simply because a consult was called.

The plaintiff's expert further states that when the plaintiff was discharged from Mercy Medical Center, she chose to have the EGD and sonogram of the esophagus done on an outpatient basis rather than as an inpatient, and did not refuse the testing as suggested by Dr. Partridge. The plaintiff's expert adds that neither of these tests were urgent and were unrelated to the diagnosis of the infectious process that was ultimately left undiagnosed. When the plaintiff was admitted to Stony Brook on January 22, 2004, she had an emergency open laparotomy which revealed a perforated bowel which caused her to go into respiratory failure and suffer multiple organ system failure. In addition to the exploratory laparotomy, she required various procedures including enterocutaneous fistula creation, small bowel resection, multiple abdominal washouts with incision and drainage of multiple abscesses, and split thickness skin grafts to the abdominal wall.

The plaintiff's expert opines that Dr. Suarez, M.D., Dr. Suarez, M.D., PLLC and Mercy Medical Center departed from accepted standards of care with regard to their care of the plaintiff in that the finding of a leukocytosis (elevated white blood cell count) in conjunction with the findings on radiographic studies required that Dr. Suarez order an infectious disease consult, and that Dr. Suarez departed from the accepted standards of care by failing to order the same which was a substantial contributing factor in causing injury to the plaintiff. The plaintiff's expert continues that Dr. Suarez permitted the patient's infectious disease to progress without identifying the cause of the infection and without properly treating it, thus, causing the plaintiff to sustain injuries, including numerous operative procedures and prolonged hospitalization. The plaintiff's expert opines that Dr. Suarez further departed from accepted standards of care in failing to follow the recommendation made by Dr. Novak on January 16, 2004 to conduct a further CT scan if the patient's white blood cell count remained elevated, which it did, and which, in fact, increased. Had Dr. Suarez conducted a further CT scan as recommended, the plaintiff's expert continues, it would have revealed further evidence of the plaintiff's intra-abdominal infectious disease process and abscess which would have required additional follow up, including draining the abscess. This, continues, the expert, would have allowed the source and pathogen of the plaintiff's infection to be discovered, and permitted appropriate treatment, including the administration of antibiotics specifically aimed at treating the pathogen and evacuation of any abscess.

The plaintiff's expert opines that Dr. Pollack departed from accepted standards of care in improperly reporting the results of the CT scan, failing to recognize the significance of the CT findings, and failing to determine the etiology of, and act upon the combination of, abnormal laboratory studies, abnormal radiological studies, and findings upon abdominal examination. Dr. Pollack improperly assumed that because the patient did not have rigidity and rebound that this was evidence that there was no abdominal process; however, states the plaintiff's expert, this inappropriate assumption resulted in the progression of the plaintiff's infectious disease.

The plaintiff's expert states that Mercy Medical Center failed to perform a CBC (complete blood count) on January 20, 2004, despite it being ordered by Dr. Suarez, and contributed to the plaintiff's injuries.

The plaintiff's expert has raised factual issues to preclude summary judgment as to Dr. Suarez, Mercy Medical Center, and Dr. Pollack. The conflicting medical opinions rendered by Dr. Partridge and the plaintiff's expert create factual issues for jury determination. However, the plaintiff's expert has not raised factual issue with regard to Dr. Chang or Dr. Novak.

Accordingly, summary judgment is denied as to Dr. Suarez, Dr. Pollack and Mercy Medical Center, and is granted as to Dr. Chang and Dr. Novak and Gastrointestinal Associates of Long Island and the complaint is dismissed as asserted against them.

MOTION (003)

In cross motion (003), the defendants Bruce Robin, M.D. and Interventional Cardiology Associates, P.C. seek summary judgment dismissing the complaint as asserted against them on the basis that they did not depart from the accepted standards of cardiology care and treatment. In support thereof, they have submitted, inter alia, an attorney's affirmation; the affidavit of their expert Paul E. Harnick, M.D.; copies of the summons and complaint, their answer, plaintiff's verified bill of particulars; uncertified copies of the plaintiff's medical records from Winthrop University

Hospital, Stony Brook Hospital, and Mercy Medical Center, which are not in admissible form pursuant to CPLR 3212 and are not considered; and the unsigned transcript of the examination before trial of Bruce Robin, M.D. which is not in admissible form pursuant to CPLR 3212 and is not considered on this motion.

Dr. Harnick has set forth that he is a physician licensed to practice medicine in the State of New York and is board certified in internal medicine and cardiovascular disease. Dr. Harnick submits this affidavit in support of Bruce Robin, M.D. and Interventional Cardiology Associates, P.C. He opines with a reasonable degree of medical certainty that they did not depart from good and accepted standards of cardiology care and treatment of Ms. O'Connell and that there is nothing that they did or did not do that proximately caused the injuries claimed by her. Dr. Harnick states that on January 7, 2004, Dr. Geno Manna performed the laproscopic lysis of adhesions and freed a loop of her bowel which was adhered to the side wall, and, after the surgery, Ms. O'Connell was discharged. Dr. Harnick relates Ms. O'Connell's history prior to her admission to Mercy Hospital on January 13, 2004. He states that Dr. Bruce Robin of Interventional Cardiology Associates, P.C. saw Ms. O'Connell for a cardiology consult on January 14, 2004 relative to her complaints of shortness of breath, and states that Dr. Robin ruled out a cardiac cause for her shortness of breath based on the echocardiogram findings, physical examination, EKG, laboratory tests, chest x-ray and CT results. Dr. Harnick states Dr. Robin was no longer involved in her care and treatment after that visit. Dr. Harnick opines, that based upon his review of the care and treatment rendered to Ms. O'Connell by Dr. Robin, it is his opinion that Dr. Robin correctly and appropriately ruled out a cardiac cause for her shortness of breath. Dr. Harnick states that once cardiac involvement was ruled out, that there was no basis for Dr. Robin to continue to be involved in her care and treatment. It is Dr. Harnick's opinion that based upon his review of the medical records, that Ms. O'Connell's condition was not related to any cardiac issue. He further opines that Dr. Robin was entitled to rely upon the determination of the other physicians who were treating Ms. O'Connell for her other medical conditions. Dr. Harnick concludes that the care and treatment rendered by Dr. Robin did not proximately cause the injuries claimed by the plaintiff.

Based upon the foregoing, it is determined that Dr. Robin and Interventional Cardiology Associates, PC have demonstrated prima facie entitlement to summary judgment dismissing the complaint against them. The plaintiffs have not submitted an expert affirmation in opposition and have failed to raise a factual issue to preclude summary judgment.

Accordingly, motion (003) is granted and the complaint of this action is dismissed as asserted against Dr. Bruce Robin and Interventional Cardiology Associates, PC.

MOTION (004)

In cross motion (004), Winthrop University Hospital Association, d/b/a Winthrop University Hospital, (Winthrop) seeks summary judgment dismissing the complaint asserted against it on the basis that it did not depart from good and accepted medical practice which proximately caused the plaintiff's injuries, and, that at all times, the plaintiff's care and treatment was directed by her private physicians. In support of this application, Winthrop has submitted, inter alia, an attorney's affirmation; the expert affidavit of Jennifer Wu, M.D.; copies of the summons and complaint, Winthrop's answer, and the plaintiff's verified bill of particulars; an uncertified copy of the Winthrop University Hospital record for the plaintiff and the Stony Brook record, which records are not in admissible form to be considered on a motion for summary judgment pursuant to CPLR 3212;

and the unsigned copies of the transcripts of the examinations before trial of Patricia O'Connell dated October 16, 2006, Walter O'Connell dated January 24, 2007 and Geno Manna, M.D. dated September 28, 2007, which are not in admissible form pursuant to CPLR 3212 and are not considered on this motion.

Dr. Jennifer Wu sets forth in her affidavit submitted on behalf of Winthrop University Hospital that she is a physician licensed to practice medicine in the State of New York and is board certified in the field of Obstetrics and Gynecology. Dr. Wu sets forth her opinion within a reasonable degree of medical certainty that the care and treatment rendered by the staff at Winthrop did not depart from good and accepted medical practice, and she sets forth the materials she reviewed as a basis for her opinion. Dr. Wu states that Dr. Geno Manna performed the laparoscopy on Ms. O'Connell to investigate her right lower quadrant abdominal pain and to confirm a diagnosis for the purpose of providing proper treatment. During the surgical procedure, states Dr. Wu, Dr. Manna, as the private attending physician, directed the resident who participated in the procedure under Dr. Manna's supervision. Dr. Wu states that it is the duty of the hospital staff and the residents to follow the orders, directives and instructions of the private attending physician. Dr. Wu continues that the procedure performed by Dr. Manna was not contraindicated and was within the accepted standard of medical practice to perform such procedure.

A resident who assists a doctor during a medical procedure, and who does not exercise 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 (*Munitz v Katiowitz*, 49 AD3d 511, 856 NYS2d 120 [2nd Dept 2008]). A private physician may be held vicariously liable for conduct of a resident physician where the resident is under the direct supervision and control of the private physician at the time of the conduct; the key is whether the resident exercises independent medical judgment (*Freeman v Mercy Medical Center*, 2008 NY Slip Op 31337U, 2008 Misc Lexis 10141 [Sup. Ct., Nassau County]). In the instant action, Dr. Wu demonstrated that the resident did not exercise any independent judgment. She has further demonstrated that the procedure performed by Dr. Manna was not inappropriate or contraindicated, and thus the resident was not liable for failing to intervene.

Based upon the foregoing, Winthrop Hospital has demonstrated prima facie entitlement to summary judgment dismissing the complaint asserted against it. The plaintiff has not submitted an expert affidavit or affirmation in opposition to this cross motion, and, therefore, has failed to raise a triable issue of fact to preclude summary judgment being granted to Winthrop.

Accordingly, cross motion (004) by Winthrop University Hospital is granted and the complaint is dismissed as asserted against it.

MOTION (005)

In motion (005), the defendants Geno Manna, M.D. and Village Obstetrical Services, P.C. seek summary judgment dismissing the complaint on the bases that they did not depart from accepted standards of care in the care and treatment rendered to the plaintiff, that informed consent was given to her, that the laproscopic surgery was not contraindicated, that Dr. Manna utilized proper and acceptable surgical technique, that there was no need to consult with a surgeon or other specialist when the adhesions were encountered during surgery, that the bowel perforation is a known risk of laparoscopic surgery, and that the medical records do not demonstrate that the

plaintiff's bowel was perforated during the surgery performed by Dr. Manna. In support of this motion, the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the moving defendants' answers, and the plaintiff's verified bill of particulars; unsigned copies of the transcripts of the examinations before trial of Patricia O'Connell dated October 16, 2006, October 17, 2006, and January 10, 2007, Walter O'Connell dated January 24, 2007, Julie Suarez, M.D. dated November 12, 2008, Scott Edward Johnson, M.D. dated July 11, 2008, and Stanley Pollack, M.D. dated December 17, 2009, which records are not in admissible form to be considered on this motion for summary judgment pursuant to CPLR 3212; the signed transcript of Geno Manna, M.D. dated September 28, 2007 and continued December 7, 2007; uncertified copies of the plaintiff's medical records; and the affirmation of the moving defendants' expert Robert Turoff, M.D.

Geno Manna, M.D. has set forth in his testimony that in 2004, he was the sole practitioner in Village Obstetrical Services, P.C. He is licensed to practice medicine in the State of New York; however, he is not board certified in obstetrics and gynecology, and has never sought board certification in any area of medical expertise. In 2004, he had admitting privileges at Mercy Medical Center and Winthrop University Hospital. In 2004, he performed about two to three laparoscopic procedures each month. There were times that a complication would arise during a laparoscopic procedure and he would obtain a surgical consultation during the procedure. When asked if he was qualified as an obstetrician/gynecologist to repair injuries to the intestine that might occur during a laparoscopic procedure, he responded that "I know how to repair injuries to the bowel."

Dr. Manna further testified that Patricia O'Connell had been his patient for many years. In October 1993, when she was thirty eight years of age, he performed a hysterectomy and removed her left fallopian tube. The left ovary had been previously removed in 1989. In January 2004, her right ovary was still in place, and on that date, he performed a laparoscopic procedure to determine the cause of her abdominal pain. As of December 13, 2003, he considered the possibility of an ovarian cyst or a problem with the bowel, but did not consider any other possibilities. Prior to the surgery, he did not refer her to see a gastroenterologist although he noted she had been previously treated for diverticulitis. He stated she had been seen earlier in the year by Dr. Smithy for a colonoscopy which was negative, so he did not see any point of having other studies done by a gastroenterologist. The December 2003 CAT scan revealed no specific findings. He stated the January 2003 sonogram indicated a hypodense right adnexal lesion which may represent an ovarian cyst. However, he stated, he never saw the films for either CAT scans or for the sonogram. Upon examination, he could palpate no specific mass but felt a "vague fullness" which he felt was some sort of cystic lesion or just some fullness in the bowel that gave the impression of fullness on bimanual examination. He stated that prior to performing her surgery, he explained to her what a laparoscopy was, that she would receive general anesthesia, and if he could not visualize the problem that he would then do an open procedure. She agreed to have the procedure done. He stated there were indications of a possible right ovarian cyst in the area of the right ovary based upon prior diagnostic tests. His preoperative diagnosis, he stated, was right adnexal mass-status post TAH (total abdominal hysterectomy), status post left oophorectomy.

Dr. Manna testified that when he performed the laparoscopy, he did not visualize her right ovary or an ovarian cyst, but found the small bowel was adhered to the pelvic side wall. He stated he had to lyse the adhesions to free the intestine and he did not observe any inflammation of the bowel when he performed the laparoscopy. He continued that there is not necessarily the possibility

that injury can occur to the small bowel when the adhesions are lysed, but it can happen. He testified that no perforation of Ms. O'Connell's bowel occurred during the laparoscopic procedure, and that hypothetically, had a perforation occurred, he would have called a general surgeon to evaluate it and the surgeon would determine what sort of repair was necessary. Because he examined the bowel after he freed it and saw no evidence of a bowel injury, he did not call for an intraoperative surgical consultation. He stated his postoperative diagnosis was that of extensive pelvic adhesions and that the 4 cm. loop of bowel that he released from the adhesion to the pelvic side wall was part of the small intestine. He continued that there were also significant adhesions of omentum to the anterior abdominal wall, that the right ovary could not be identified, and that there was no apparent ovarian cyst. He stated that he assumed that because the right ovary or a right ovarian cyst could not be found, that the 4 cm. loop of bowel that was adhered to the pelvic side wall was what was causing the CT findings of the right pelvic mass.

Dr. Manna continued that Dr. Elena Poloukhine, a resident in obstetrics and gynecology at Winthrop University Hospital, assisted him in surgery and dictated the operative note. It took both him and Dr. Poloukhine to insert a ten millimeter trocar through the abdominal wall into the peritoneal cavity as the abdomen had to be grasped and elevated as the trocar was introduced. They each grasped the skin on the side of the umbilicus and he used his left hand to introduce the trocar through the skin incision. The trocar, he continued, has an automatic safety mechanism that retracts the cutting edge as soon as it goes through the abdominal wall and no further resistance is felt. The trocar was removed from the sleeve covering it, the CO2 hose was connected to the sleeve, and the abdomen was insufflated to distend the abdominal wall so the viscera could be visualized. The insufflator, he continued, is on an automatic pressure regulated mechanism to maintain a constant pressure between 10 and 15. The laparoscope, which also has a camera, was then inserted. He stated Dr. Poloukhine assisted by holding instruments and they both held the scope at times during the procedure and discussed the images on the television screen which were sent from the laparoscope via fiber optic cable to the screen. He stated he was able to visualize the small intestine and the adhesions which were located in the right lower quadrant of the abdomen. After the visualization was obtained, he made a five millimeter skin incision two centimeters above the symphysis pubis in the midline with a scalpel and a five millimeter trocar was introduced through the skin by him. Since the laparoscope was in place, he was able to see exactly where the cutting edge of the trocar was coming through the peritoneal lining. He lysed, or separated all the adhesions that were attaching a portion of the small bowel to the pelvic side wall by manually operating the EndoShears without cautery inserted through the sleeve of the second trocar insertion. There was no bleeding during the dissection which took less than five minutes, and there were no complications encountered, he stated.

Dr. Manna continued that he determined that there was no damage to the small bowel loop that had been freed as he visualized it with the camera, but he could not see under the flat surface of the bowel just by looking at it. He also looked for a laceration of the bladder or of the bowel serosa. Dr. Poloukhine did not do any lysis of adhesions. He continued that the blunt probe was used by either him or Dr. Poloukhine to hold or gently push away any small intestine, and up to that point in the procedure, the blunt probe was the only instrument that touched the small bowel. He stated that, in general, but not in this specific case, there is a risk of the blunt probe causing damage to the bowel.

Dr. Manna testified that after Ms. O'Connell was discharged on January 7, 2004, she called and advised him she had abdominal discomfort. He did not recall if he told her to go to Winthrop

or if his office manager advised her pursuant to his direction. He did not recall if he received a second call from her, but stated he was contacted by a physician from Stony Brook Hospital emergency department, either late on January 7th or early January 8th, advising she presented with complaints of diffuse abdominal pain and had taken Darvocet with some relief. A CAT scan of the abdomen was taken at Stony Brook, but he did not make any effort to determine the result of the scan, he stated. He later received a fax with the results and felt the ascites and pain were normal postoperative findings as there were no peritoneal signs or fever, and he did not consider any other possibilities for her findings or complaints. He received no further contact from Ms. O'Connell until she came into his office on January 13, 2004. He stated that upon examination, he found she was in some respiratory distress with wheezing and difficulty breathing. He continued that he found some congestion at the bases of the lungs with bronchial breathing, for which he had her seen immediately by Dr. Andrew Peters, the internist in the next office. She was admitted to Mercy Medical Center to Dr. Suarez to rule out a pulmonary embolism. Dr. Suarez was taking over Dr. Peter's practice as he was in the process of retiring. He stated that the complaints which were the bases for her admission did not have anything to do with an intra-abdominal process.

Dr. Manna continued that upon admission to Mercy Medical Center on January 7, 2004, a chest x-ray and a CT scan of the abdomen and pelvis were done with contrast. He stated he spoke to Dr. Fastlich, the radiologist on staff at Mercy, but did not personally review the films and deferred to the radiologist for the interpretation. Dr. Manna testified that there is a possibility that a tear in the small intestine can cause free air and fluid to collect within the abdomen and pelvis, and that the diagnosis of peritonitis was left to the general surgeon, Dr. Stanley Pollack. He continued that peritonitis can cause respiratory problems but he was not aware it could cause pneumonia as that opinion was outside his specialty. He did not recommend a needle aspiration of the abdominal fluid and did not discuss it with any other physician. Dr. Manna further testified that Dr. Pollack told him that Ms. O'Connell did not have an abdominal pathology and that there was nothing indicative of a bowel injury, let alone a perforation, and he agreed with that opinion. He reviewed the note of Dr. Novak who saw her on a gastroenterology consult. Dr. Novak, he stated, recommended that the white blood count be monitored for an increase, and that the CT scan of the abdomen be repeated. He did not discuss with anyone the possibility of an esophageal problem and the recommendations by Dr. Novak. Ms. O'Connell was discharged on January 19, 2004.

Dr. Manna continued, that concerning her admission thereafter to Stony Brook University Hospital, the pathology report from the January 23, 2004 surgery at Stony Brook set forth a diagnosis of small intestine segmental resection small bowel perforation site with acute and chronic inflammation and granulation tissue resection at the margin of the remainder of the small bowel. Dr. Manna opined that "[a]s there was no indication of any bowel perforation, despite lengthy diagnostic procedures and clinical assessment in the immediate postoperative portion stay at Mercy, I think that what happened at Stony Brook in the course of the re-anastomosis to the bowel, and then when that broke down and he had to have further surgeries to do, he looked for a scapegoat." He then further testified that when the lower GI study was done (at Stony Brook) that maybe "they perforated with that."

Robert Turoff, M.D. has set forth in his affirmation that he is a physician licensed to practice medicine in the State of New York and is board certified in surgery. He set forth the materials he reviewed in rendering his opinion on behalf of Dr. Manna and Village Obstetrical Services, P.C., and states that his opinions are set forth with a reasonable degree of medical certainty. Dr. Turoff

opines that at all times Dr. Geno Manna and Village Obstetrical Services, P.C. did not deviate from the accepted standards of medical practice in any of the care and treatment rendered to Ms. O'Connell and that there was no departure that caused or contributed to any of the injuries alleged by the plaintiff. He set forth the care and treatment rendered to the plaintiff with regard to her election to undergo laparoscopic evaluation on January 7, 2004 at Winthrop University Hospital. He states she signed a consent form authorizing Dr. Manna to perform the procedure, acknowledging that she was advised of the risks and alternatives to the procedure. Dr. Turoff states that during the laparoscopic evaluation of the plaintiff's abdomen and pelvis, Dr. Manna found a 4 cm loop of bowel was adherent to the right pelvic sidewall and dissected the loop of bowel from the sidewall using endoshears without cautery. The right ovary could not be located during the procedure and no ovarian cyst was seen. Dr. Turoff continues setting forth the care and treatment and subsequent events leading up to the plaintiff's admission to Stony Brook University Hospital where Dr. Smithy performed a laparotomy procedure on her on January 22, 2004. Dr. Turoff states that Dr. Smithy described a possible small bowel perforation in his operative report. He states that Ms. O'Connell remained hospitalized at Stony Brook Hospital until April 16, 2004 and was on mechanical ventilation until early April 2004.

Dr. Turoff opines that there was a clear medical indication for the laparoscopic surgery performed by Dr. Manna on January 7, 2004 as evidenced by the findings on the CT scan of the abdomen on January 27, 2004 and December 10, 2003. He states that the normal pelvic ultrasound on October 28, 2003 did not rule out surgical pathology in the pelvis and that it was not a contraindication to the laparoscopic examination. Dr. Turoff states that Dr. Manna properly advised the plaintiff of the option to either live with the pain or undergo laparoscopic evaluation to determine the cause of her symptoms and to possibly remove any abnormal pathology. He further adds that the plaintiff elected to undergo the procedure, and signed the consent form. Therefore, Dr. Turoff opines, that an adequate informed consent was given, although he does not set forth what risks and complications of which the plaintiff was advised.

Dr. Turoff states that it was prudent on the part of Dr. Manna to conclude that the 4 cm loop of bowel was the lesion described on the previous CT scans which he dissected off the pelvic wall without the use of cautery. He continues that it was not necessary for Dr. Manna to proceed with the laparoscopy in an attempt to locate the ovary and possible ovarian cyst once he encountered the loop of bowel. He further opines that there was no indication for Dr. Manna to call for an intra-operative consultation with a surgeon or other specialist when he found the bowel loop. Dr. Turoff states that bowel perforation is an accepted risk of laparoscopic abdominal surgery, it does occur in laparoscopic abdominal surgery, and it is not in and of itself indicative of medical malpractice. Dr. Turoff states that the operative and medical records from Winthrop University Hospital do not contain evidence of bowel perforation or other injury to the bowel or other structures. Therefore, states Dr. Turoff, it is his opinion that Dr. Manna utilized proper and acceptable procedure and technique in the performance of the laparoscopy, although he does not set forth the proper procedure and technique or opine as to when the perforation occurred. He states that prior to her discharge after the laparoscopic procedure, that the plaintiff did not exhibit signs or symptoms of a bowel perforation; however, he does not set forth what those signs and symptoms would be and when they would present.

Dr. Turoff continues that when the plaintiff complained of abdominal pain later that evening after discharge, that she presented to Stony Brook Hospital emergency department where she was

seen by Dr. Johnson, and was discharged. He states that although the plaintiff's husband testified that he called Dr. Manna on January 10, 2004 and January 11, 2004, there is no documentation of such phone calls in the medical records, and Dr. Manna has no recollection of those calls. Dr. Turoff states that even if there were phone calls made to Dr. Manna, that there was no additional intervention warranted as Ms. O'Connell presented to Dr. Manna's office on January 13, 2004 with complaints that were only respiratory in nature. Dr. Manna, he states, then properly made arrangements for her to be seen by a pulmonary specialist. She was later admitted to Mercy Medical Center to the service of Dr. Suarez on that date, and Dr. Turoff states that Ms. O'Connell demonstrated no peritoneal signs or symptoms, although he does not indicate what those signs or symptoms would be. Dr. Turoff continues that there was no reason to believe she had a bowel injury or any intra-abdominal complication, and nevertheless, Dr. Manna noted that a surgical consult would be called to evaluate her abdomen. Thereafter, Dr. Pollack saw Ms. O'Connell on January 14, 2004 and January 16, 2004 and formed the impression that there her abdomen was negative. He states that Dr. Manna was justified in relying upon Dr. Pollack's impression. Dr. Turoff further states that because Ms. O'Connell did not exhibit any signs or symptoms of bowel perforation or other intra-abdominal complication, that there was no reason for him to order additional testing or surgery to look for the same. Dr. Turoff further opines that it is his opinion that there was no failure to diagnose any condition or injury alleged by the plaintiff and that the bowel perforation was not proximately caused by departures from accepted practice by Dr. Manna or Village Obstetrical Services, PC.

The plaintiff, in opposing this motion by Dr. Geno Manna and Village Obstetrical Services, P.C., has submitted the affirmation of her expert who is duly licensed to practice medicine in the State of New York and who is board certified in obstetrics and gynecology. The expert has set forth the materials reviewed and states opinions based upon a reasonable degree of medical certainty. It is the plaintiff's expert's opinion that Dr. Manna departed from accepted standards of care and that these departures were substantial contributing factors to the injuries suffered by the plaintiff.

The plaintiff's expert states that perhaps the most important principle to be reiterated, and as has been set forth by the plaintiff's other experts in their affirmations, is the concept of a differential diagnosis wherein a physician makes a list of the processes or diseases with the same or similar symptoms to those from which the patient is suffering by a systematic comparison contrasting the clinical findings. A physician must think of each of the possible causes for any particular patient's signs, symptoms and/or complaints, and systematically "rule out" (determine that the patient's condition is not caused by a particular disease process or illness) or "rule in" (determine that the patient's condition is caused by a particular disease process or illness) these possible causes through proper evaluation, which may include consultation by a specialist in one or more fields of medicine. A differential diagnosis is an affirmative duty on the part of a physician that requires affirmative steps to rule in or rule out any particular cause or causes. The plaintiff's expert continues that in terms of the differential diagnosis, the physician must consider the possibilities and appropriately rule in or rule out those possibilities in a manner that is least harmful and most helpful to a patient, and if the physician can confirm or rule out a particular diagnosis on the differential, the physician is obligated to do so pursuant to accepted standards of care. A physician is, likewise, obligated to consult with other specialists if that physician is not appropriately qualified to diagnose or treat any particular condition.

The plaintiff's expert continues that if a physician can safely conduct a work-up that is not

invasive as opposed to subjecting a patient to risks associated with invasive procedures, including laparoscopy, then that physician is required to exhaust all other methods of non-invasive work-up prior to resorting to invasive means; and similarly, if there are treatment options other than surgery options available, a physician is obligated to offer and utilize such options prior to performing surgery with the attendant risks thereof. Continuing, the plaintiff's expert states that as Dr. Manna himself concedes, an issue with the bowel had to be considered in light of the findings, and that Dr. Manna did consider an issue with the bowel or a possible right ovarian cyst; thus, Dr. Manna's differential diagnosis was that of a bowel problem or a right ovarian cyst. The plaintiff's expert states that the possibility of adhesions is to be considered in terms of a "bowel problem" in conjunction with the plaintiff's clinical picture and the radiological findings as any major abdominal or pelvic surgery may result in the formation of adhesions, and Ms. O'Connell had procedures in the past. The plaintiff's expert continues that symptoms caused by adhesions depend on the location of the adhesions and complications and include abdominal pain (sudden or chronic), and can be occasional or constant and of a cramping or pulling nature, and according to the Winthrop University Hospital record, Ms. O'Connell's pain was constant and of a cramping, burning, sharp nature consistent with pain from adhesions.

The plaintiff's expert opines that the best way to treat adhesions is to just wait it out as most symptoms will fade away over time. On the other hand, surgery, a quick way to treat adhesions by actually cutting these internal scars, frees up the stuck structures but can actually lead to further adhesions. Sometimes, surgery is necessary but should only be done in severe and debilitating symptoms, or to resolve intestinal obstruction, infertility or other complications. The plaintiff's expert continues that good and accepted practice requires that a physician must be sure that all conservative options have been considered prior to recommending and conducting surgery for lysis of adhesions or adhesiolysis. While the CT scan performed on December 10, 2003 indicated a lesion that may represent an ovarian cyst, a correlation with sonography was recommended, states plaintiff's expert. The expert continues that the sonogram of October 28, 2004 revealed a normal right ovary; therefore, Dr. Manna was under the obligation to offer the plaintiff the option of medical treatments prior to surgery, to have the plaintiff seen by a surgeon or gastroenterologist, or have the plaintiff undergo further studies that would be directed at determining whether she had an issue with the bowel. It is the plaintiff's expert's opinion that the surgery was not required at the time, and possibly never required with the determination of appropriate treatment options. Further, states the plaintiff's expert, Dr. Manna admittedly does not handle bowel issues, and, therefore, should not be operating thereon, and certainly not without discussing the possibility of an operation that would involve the lysis of adhesions and all the risks, alternatives and benefits, because Dr. Manna testified he does not treat bowel problems as a gynecologist. Thus, states the plaintiff's expert, Dr. Manna departed from accepted standards of care by not considering the significance of, not determining the etiology of, and not acting upon the plaintiff's signs and symptoms in the context of the laboratory studies and radiology studies prior to conducting the laparoscopy. It was also a departure from the standard of care not to send Ms. O'Connell to a general surgeon or gastroenterologist with an expertise in bowel adhesions, prior to conducting the laparotomy.

The plaintiff's expert further opines that Dr. Manna departed from accepted standards of care in attributing Ms. O'Connell's pain after surgery to normal post-op pain. Ms. O'Connell's complaints of severe, persistent pain unrelieved by Darvocet, Morphine and Dilaudid, should have raised Dr. Manna's suspicion of a possible perforation of the bowel. It was a departure from the standard of care to delay seeing Ms. O'Connell until four days after she was seen at Stony Brook

on an emergency basis rather than the next day because she had a surgical procedure, and because the CT scan conducted at Stony Brook had questionable findings and was not a complete study. The expert continues that because she did not have a fever is of no moment as she had taken Darvocet which also has antipyretic qualities and masks the fever. Additionally, her temperature was only taken once at Stony Brook. When Ms. O'Connell called Dr. Manna two times in the period between her discharge from Stony Brook and being admitted to Mercy Medical Center, the plaintiff's expert opines that Dr. Manna departed from the standard of care by not examining her or instructing her to go to the emergency room with specific instructions to have a bowel perforation ruled out.

The plaintiff's expert opines that when Ms. O'Connell presented to Mercy Hospital with an elevated white blood cell count, complaints of abdominal pain, right lower quadrant tenderness, diffuse abdominal distention, abdominal wall bruising, pleural effusions, and the CT scan findings of murky fluid collection within the region of the cul de sac, and free air within the abdomen and pelvis, all which raise the possibility of an intra-abdominal process or visceral leak, that Dr. Manna departed from the standard of care by not including a bowel perforation in his differential diagnosis. The plaintiff's expert further opines that Ms. O'Connell, who was not clinically stable, should not have been discharged from Mercy without a bowel perforation being properly ruled out. It was further a departure by Dr. Manna to rely on the incorrect findings of Dr. Pollack, contraindicated by the findings on the CT scan of free intraperitoneal air and murky fluid accumulation consistent with a pelvic abscess, as such findings required Dr. Manna to follow up on the test results, and if necessary, to get another surgical opinion. The plaintiff's expert further opines that it was a departure by Dr. Manna to rely on the absence of "peritoneal signs" as that reliance is an inappropriate basis upon which to rule out a bowel perforation in and of itself, and that the administration of antibiotics can mask or assuage the signs and symptoms of peritonitis to some degree. Further, opines the plaintiff's expert, the findings on CT scan unquestionably establish, along with the diagnosed leukocytosis, that Ms. O'Connell was indeed very ill with a bowel injury and the resultant infection, and should not have been discharged from Mercy.

The plaintiff's expert further opines that Dr. Manna did not provide informed consent to the plaintiff as he did not provide to her the two possible diagnoses, the possible treatments for these diagnoses, and the risks of the procedure he was planning to do, and Dr. Manna only offered the options: the cyst being removed or living with the pain. The expert continues that she should have been offered pain medications, and consultations with other specialists, should have been advised of his intention to lyse adhesions involving the bowel, and should have been specifically advised of the risks of that procedure.

The plaintiff's expert continues that on January 22, 2004, when Ms. O'Connell was admitted to Stony Brook, an immediate hospitalization was required for free air and intra-abdominal infection. An emergency open laparotomy revealed a "perforated viscus" which required a long hospital stay for the perforated bowel. During that admission, she also suffered respiratory failure, multiple organ system failure and underwent various procedures including exploratory laparotomy, enterocutaneous fistula creation, small bowel resection, multiple abdominal washouts with incision and drainage of multiple abscesses, and split thickness skin graft to the abdominal wall.

Here, the parties have adduced conflicting medical expert opinions concerning whether or not Dr. Manna and Village Obstetrical Services departed from accepted standards of care

proximately causing the plaintiff's injuries, raising factual issues and creating credibility issues which can only be resolved by a jury (*Bengston v Wang*, supra).

Accordingly, cross motion (005) is denied.

MOTION (006)

In motion (006), the defendant Scott Edward Johnson, M.D. seeks summary judgment dismissing the complaint on the basis that he did not depart from accepted standards of care in his care and treatment of Ms. O'Connell at the emergency department at Stony Brook University Hospital. In support of the application, the defendant Dr. Johnson, has submitted, inter alia, an attorney's affirmation; the affirmation of his experts Timothy Haydock, M.D., Jeffrey Hooker Newhouse, M.D. and Beatrice Brooks, M.D.; copies of the summons and complaint, the moving defendant's answer, and the plaintiff's verified bill of particulars; copies of the unsigned transcripts of the examinations before trial of Scott Edward Johnson, M.D. dated July 11, 2008, Patricia O'Connell dated October 16, 2006, October 17, 2006, and January 10, 2007, Walter O'Connell dated January 24, 2007 and March 20, 2007, Geno Manna, M.D. dated September 26, 2007 which are not in admissible form as required by CPLR 3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, supra; *McDonald v Maus*, supra; *Pina v Flik Intl. Corp.*, supra), nor are they accompanied by an affidavit pursuant to CPLR 3116, and, therefore, are not considered on this motion; and uncertified copies of the plaintiff's medical records which are not in admissible form pursuant to CPLR 3212.

Dr. Johnson's expert Dr. Jeffrey Hooker Newhouse, sets forth in his affirmation that he is a radiologist licensed to practice medicine in the State of New York and is board certified in radiology. It is his opinion with a reasonable degree of medical certainty that the CT images obtained at Stony Brook University Hospital on January 8, 2004 contain no specific or suggestive indication that Ms. O'Connell suffered from a bowel perforation or necrosis. Although it shows some free air and fluid in the abdomen, consistent with the earlier surgery, there is no evidence of pathology and no reason to conclude that her complaints of pain were related to anything other than typical post-operative pain, or that she required admission to the hospital, or being kept in the emergency department to follow.

Beatrice Brooks has set forth that she is licensed to practice medicine and is board certified in emergency medicine. She states that she was a resident at Stony Brook University Hospital and provided medical services to Ms. O'Connell on January 8, 2004 when the resident, Dr. DiGioia, transferred responsibility to her for those patients Dr. DiGioia had been responsible for, including Ms. O'Connell. She has set forth the care and treatment she provided to Ms. O'Connell and states that Ms. O'Connell was not in severe pain, and that her evaluation of the patient was consistent with the other data available at the time of discharge, and showed no evidence of the presence of a bowel perforation or other peritoneal pathology. However, it is noted that she does not express her opinions with a degree of medical certainty.

Dr. Timothy Haydock has set forth in his affirmation that he is a physician licensed to practice medicine in the State of New York and is board certified in emergency medicine. He sets forth his opinions with a reasonable degree of medical certainty and opines that the defendant Dr. Johnson did not depart from accepted standards of medical care and treatment with regard to the plaintiff. He does not set forth the records and materials upon which he bases his opinions. Dr.

Haydock set forth a brief history of the events prior to Ms. O'Connell's presentation with complaints of pain to the emergency department at Stony Brook University Hospital on January 7, 2004 at about 11:30 p.m., the evening following the surgery performed by Dr. Manna at Winthrop University Hospital. The attending physician in the emergency department at the time was Dr. Adam Singer. Dr. Natalie DiGioia was the resident on duty, and, about 12:40, spoke to Dr. Manna. Dr. Haydock sets forth that blood work, x-rays and a CT scan were ordered but he does not set forth with specificity the tests ordered.

Dr. Haydock states that a bowel perforation can occur when the integrity of the lining of the bowel is compromised to the extent that a hole is created between the bowel and the abdominal cavity which can result in bacterial infections and other serious medical complications, which complications he does not set forth. He continues that the perforated bowel can occur for many reasons, as well as through trauma, such as during surgery, including during laparoscopic surgery. He continues that a bowel perforation will manifest in various ways, including complaints of severe abdominal pain, nausea and vomiting, guarding or pain with palpation on rebound and rigidity of the abdomen. Although Dr. Haydock does not set forth the clinical, laboratory, or radiological presentations, he states that the best non-surgical modality to diagnose a bowel perforation is a CT of the abdomen. He adds that operative intervention can also be used to diagnose a perforated bowel. He indicates Ms. O'Connell's pain diminished over the course of the night in the emergency department, and indicates she was medicated for pain during Dr. Johnson's shift and again prior to discharge.

Dr. Haydock states that Dr. Singer and Dr. DiGioia initially planned to discharge Ms. O'Connell, but the discharge was delayed in order to evaluate the CT scan as the results were not available until some time during the late morning of January 8, 2004. In the interim, a change in personnel occurred wherein Dr. DiGioia was replaced by another resident, Dr. Beatrice Brooks, and Dr. Singer was replaced by the attending Dr. Scott Johnson. Dr. Manna was apprised of the CT scan results about 1:20 p.m, when they became available. Dr. Haydock continues that the CT showed air in the abdominal wall and ascites (fluid in the abdominal cavity), and not the presence of a bowel perforation. Dr. Brooks then examined Ms. O'Connell, and based upon the information provided to Dr. Johnson, Dr. Johnson agreed to discharge Ms. O'Connell. He states that upon her return home, her main complaints were fatigue and shortness of breath. Ms. O'Connell then returned to the care of Dr. Manna on January 13, 2004, presenting with weakness and shortness of breath for which she was seen by Dr. Andrew Peters, an internist in the office adjacent to Dr. Manna's. Dr. Peters then had Ms. O'Connell admitted to Mery Medical Center where she underwent numerous physical exams by various hospital personnel for the purpose of assessing her abdomen. None of these examinations, states Dr. Haydock, were indicative of a bowel perforation and no peritoneal signs were demonstrated, although he does not set forth the peritoneal signs.

Dr. Haydock opines that Ms. O'Connell was properly worked up in the emergency department at Stony Brook Hospital; that the care and treatment rendered to her, and the decision to discharge her, were consistent with good and accepted medical practice and were not the proximate cause of her injuries; that the CT scan obtained at Stony Brook Hospital on January 8, 2004 does not show significant pathology or that Ms. O'Connell suffered from a bowel perforation, although the CT scan reflects free air and fluid consistent with the laparoscopic surgical procedure the day before; and that it was reasonable to discharge her home as there was nothing that would warrant keeping her in the emergency department or admitting her to the hospital. Dr. Haydock

continues that with regard to Dr. Scott Johnson, it was not a departure from good and accepted medical and emergency department care for him to rely on the clinical picture of Ms. O'Connell provided by the attending Dr. Singer and the resident Dr. Brooks, as indicated in the medical records. He states that Ms. O'Connell's entire clinical picture, lab data and CT scan results were consistent with normal post-operative pain which could be expected to resolve spontaneously within 24 to 48 hours post-operatively. He continues that appropriate discharge instructions were given. Dr. Haydock further opines, that emergency surgery was not indicated at the time of her visit to the emergency department and only surgery may have revealed a perforation of the bowel.

Based upon the foregoing, it is determined that Dr. Newhouse's, Dr. Brook's and Dr. Haydock's opinions are conclusory and unsupported by the bases for many of the opinions expressed. The plaintiff's expert, in any event, has raised factual issue to preclude summary judgment.

The plaintiff's expert is a physician duly licensed to practice medicine and is board certified in internal medicine and infectious disease and emergency medicine. The affirmation sets forth the materials reviewed and the opinions expressed with a reasonable degree of medical certainty concerning the care and treatment of the plaintiff by Dr. Johnson. It is the plaintiff's expert's opinion that Dr. Scott Johnson departed from accepted standards of care during his treatment of Ms. O'Connell at Stony Brook Hospital while she was a patient in the emergency department on January 8, 2004. The plaintiff's expert opines that it was a departure from the standard of care for Dr. Johnson to have discharged Ms. O'Connell without having examined her himself and for having relied upon the examination conducted by Dr. Brooks in making his determination to discharge Ms. O'Connell. The plaintiff's expert states that none of these opinions are altered or affected by the fact that the residents at Stony Brook contacted Dr. Manna or that Dr. Singer and the residents saw Ms. O'Connell. The plaintiff's expert continues that Dr. Johnson had responsibilities and obligations to the patient apart from those of other care givers and he cannot shield himself from the liability for his own departures from the accepted standards of care by alleging the actions of others reflect the priority of his actions.

The plaintiff's expert opines that it was a departure from the standard of care for Dr. Johnson to assume that the patient's pain was simply a product of residual air from the laparoscopic procedure, and therefore, the patient did not have a perforation and could be discharged. It is further opined that the patient's pain was more consistent with a perforation rather than normal post-operative pain caused by an excess of CO₂ following a laparoscopy as she presented with pain on a scale of 10/10, documented as diffuse and in the right lower quadrant, and unrelieved by three Darvocet and significant amounts of pain medication administered in the emergency department. The plaintiff's expert continues that no one assessed the patient's pain level after the last recorded entries of 9:00 and 9:15 a.m. The expert states she was given Percocet prior to discharge along with a prescription for pain medication, and that the manufacturer's precautions for Morphine and Dilaudid, both which were administered in the emergency room, warned they may obscure the diagnosis or clinical course in patients with acute abdominal conditions.

With respect to the CT scan, it is the plaintiff's expert opinion that the findings of the CT scan did not provide an appropriate basis for Dr. Johnson to determine that there was no bowel perforation and that she was fit for discharge as the findings on the CT scan should have caused Dr. Johnson to have concluded that the patient may have a perforation requiring further investigation.

The presence of ascites required prompt, further investigation and work-up, states the plaintiff's expert, as ascites can represent intraluminal contents of the bowel, and, therefore, be suggestive of a bowel perforation. It is continued that the failure to recognize and investigate the significance of ascites was a departure from the standard of care. Additionally, states the plaintiff's expert, the CT scan was not a full and complete study and Dr. Johnson's reliance upon it was inappropriate as the wet read documents showed that the esophagus was dilated with contrast, reflecting that the patient had been given oral contrast, the appropriate agent to administer to properly evaluate a possible perforated bowel. The expert states that the patient was having difficulty with the transit of the contrast as the contrast was not making its way down to the abdomen. As such, opines the plaintiff's expert, Dr. Johnson should have recognized the possibility that the CT study was incomplete and insufficient to rule out a perforation. The CT scan report further set forth that the "evaluation of the abdominal viscera is limited" and documents extraperitoneal air, which the plaintiff's expert states is consistent with a bowel perforation.

It is the plaintiff's expert's further opinion that the failures by Dr. Johnson were substantial contributing factors in permitting the patient's condition to progress and to create further injuries sustained by the plaintiff, including the need for the numerous operative procedures and prolonged hospitalization. The plaintiff's expert continues that if Dr. Johnson had not departed from the standards of care as he did, that the patient would have been admitted to the hospital for further work-up, that she would have had appropriate consultations including an infectious disease consult, and that the injury to the patient's viscus would have been diagnosed and appropriately and timely treated, resulting in the eradication of the infectious disease process due to the delayed diagnosis and treatment causing peritonitis, sepsis and the devastating sequella therefrom.

Here, summary judgment is not appropriate as the parties have adduced conflicting medical expert opinions concerning whether or not Dr. Scott Johnson departed from accepted standards of care proximately causing the plaintiff's injuries, raising factual issues and creating credibility issues which can only be resolved by a jury (*Bengston v Wang*, supra).

Accordingly, cross motion (006) is denied.

So Ordered.

Dated: November 15, 2011
Riverhead, NY


HON. DANIEL MARTIN, A.J.S.C.