

**Lormel v Macura**

2012 NY Slip Op 30259(U)

February 3, 2012

Supreme Court, Richmond County

Docket Number: 10238/04

Judge: Joseph J. Maltese

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

---

**Index No. 10238/04  
Motions No.: 10, 11, and 12**

**LORRAINE LORMEL; and  
BRIAN LORMEL,**

*Plaintiffs*

*against*

**JERZY MACURA, M.D.; and  
STATEN ISLAND UNIVERSITY HOSPITAL,**

*Defendants*

---

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**The following items were considered in the review of the following motions and cross-motion for summary judgment and the motion for sanctions:**

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1 & 2
Notice of Cross-Motion and Affidavits Annexed	3
Answering Affidavits	4, 5, 6 & 7
Replying Affidavits	8, 9 & 10
Exhibits	Attached to Papers

**Upon the foregoing cited papers, the Decision and Order on these Motions and Cross-Motions is as follows:**

The motion for summary judgment made by the defendant Jerzy Macura, M.D. is granted. The motion for summary judgment made by the defendant Staten Island University Hospital (“SIUH”) is denied. The cross-motion made by the plaintiffs Lorraine Lormel and Brian Lormel for summary judgment and sanctions for spoliation of evidence by SIUH is denied.

**Facts**

On August 2, 2001, Dr. Macura, assisted by Jeffrey Nicastro, M.D., a non-party, performed a duodenal switch bariatric surgery to treat the morbid obesity of the plaintiff, Lorraine Lormel. Immediately following the plaintiff’s surgery, Dr. Macura left for a planned vacation, leaving the

care of the plaintiff in the hands of Dr. Nicastro. On August 3, 2001, the plaintiff complained of hiccoughs. She developed abdominal pain on August 4, 2001. An upper gastrointestinal series with Gastrografin was done on the same day. The study showed clips and staples in the left upper quadrant and surgical drains compatible with the plaintiff's recent bypass surgery. The films also showed clips in the right upper quadrant compatible with a previous cholecystectomy. Under fluoroscopic guidance, the plaintiff received two gulps of Gastrografin for the study. Multiple spot films were taken. No leakage was seen at the anastomotic site, but the Gastrografin remained in the stomach pouch and did not pass the site of her duodeno-gastric anastomosis. After twenty minutes, the Gastrografin was removed by inserting a nasogastric tube.

On August 5, 2001, the plaintiff had fever reaching a maximum of 103.9 degrees Fahrenheit. Whether the temperature was taken orally, rectally, or by the tympanic membrane was not stated. Her fever continued on August 6, 2001. A computerized tomographic scan of the abdomen and pelvis was obtained on August 7, 2001. Pertinent findings on the CT scan showed compressive atelectasis at the left lung base with free air and contrast between the spleen and diaphragm. On August 7, 2001, the patient underwent urgent surgical repair of an anastomotic leak. Thereafter, the plaintiff had an extended hospital stay and was not discharged until September 10, 2001. The plaintiff states she suffered multiple injuries as a result of her surgeries and hospitalization.

The relevant Gastrografin study was initially preserved by SIUH. However, SIUH presents an affidavit that, on an unstated date, an employee of SIUH released the films to Dr. Carolyn Raia, a radiologist who had performed the Gastrografin study. Only two films remained in the file, and copies of those two films were released to the plaintiff.

### **Discussion**

This is an action founded upon medical malpractice. "On a defense motion for summary judgment, the defendant medical provider has the burden of establishing the absence of any

departure from good and accepted medical practice or that the plaintiff was not injured thereby.”<sup>1</sup> “In opposition [to a defendant’s motion for summary judgment], a plaintiff must submit evidentiary facts or materials to rebut the defendant’s prima facie showing, so as to demonstrate the existence of a triable issue of fact.”<sup>2</sup> “Expert opinion evidence from a party defendant which bears a strong factual relationship to the alleged injury requires an expert response from the plaintiff that the practice deviates from accepted medical standards if the plaintiff is to avoid summary judgment.”<sup>3</sup> Here, the plaintiff cross-moves for summary judgment, and must sufficiently establish the cause of action to warrant the court directing judgment in favor of the plaintiff.<sup>4</sup> Thus, the plaintiff has the burden of tendering sufficient evidence to preclude material issues of fact.<sup>5</sup> Once the plaintiff has made a showing of sufficient evidence, the burden shifts to the opposing party to put forth admissible evidence to establish a triable issue for the fact finder.<sup>6</sup>

#### **Dr. Macura’s motion for summary judgment is granted**

The plaintiff’s complaint states that Dr. Macura failed to test for leaks from the suture line during the plaintiff’s intra-operative procedure and was unavailable while on vacation following the procedure. Here, the defendant Dr. Macura presents an affidavit on his own behalf. In his affidavit Dr. Macura details the process he followed prior to the plaintiff’s admission to the

---

<sup>1</sup>*Rebozo v. Wilen*, 41 AD 3d 457, 458 [2d Dept 2007]; *quoted in Deutsch vs. Chaglassian*, 71 AD 3d 718, 719 [2d Dept 2010].

<sup>2</sup>*Deutsch v. Chaglassian*, 71 AD 3d at 719.

<sup>3</sup>*Wind v. Cacho*, 111 AD 2d 808 [2d Dept 1985]; *and Bills v. Africano*, 132 AD 2d 935 [4th Dept 1987].

<sup>4</sup>CPLR § 3212 (b); *and see also Rotuba Extruders, Inc. v. Ceppos*, 46 NY 2d 223, 231 [1978], *quoting Moskowitz v. Garlock*, 23 AD 2d 943, 944 [1965]; *and Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003].

<sup>5</sup>*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

<sup>6</sup>*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980].

hospital and during the plaintiff's surgical procedure. Dr. Macura states he left New York for a six day scheduled vacation and left the plaintiff in care of his co-surgeon Dr. Nicastro on August 2, 2001, shortly after performing the plaintiff's surgery. Dr. Macura describes the care he rendered to the plaintiff before, during and immediately after surgery. He affirms that his care, including transfer to another physician while vacationing, was within the bounds of good and accepted medical practice. The defendant has met his burden of presenting proof in admissible form that shows there was no departure from good and accepted medical care.

In opposition to Dr. Macura's motion for summary judgment, the plaintiff presents two expert opinions. One opinion is from a radiologist and another from a surgeon. The plaintiff's experts' opinions fail to refer to Dr. Macura explicitly or implicitly. The radiological expert opinion is that the Gastrografin swallow of August 4, 2010 should have been followed up with additional radiological studies to show the suspected leak at the suture line. The surgical expert's affidavit presented by the plaintiff states that performing surgery was indicated on August 4, 2010. However, Dr. Macura was not available to request additional radiological studies, nor to perform the surgery on that date. The plaintiff's experts do not state that Dr. Macura's absence on vacation was not within the bounds of good and accepted medical practice. In the plaintiff's complaint, it is stated that intra-operative testing should have been performed to confirm the integrity of the suture line. However, neither expert opinion addresses that claim. Therefore, the defendant Dr. Macura has offered an expert opinion that he acted within the bounds of good and accepted medical practice and there is no opposing expert opinion from the plaintiff that Dr. Macura deviated from that standard of care. Neither of the plaintiff's experts' opinions address Dr. Macura's actions during surgery or his absence on vacation as substantial factors in the plaintiff's injuries. Consequently, the motion made by Dr. Macura for summary judgment is granted.

**The motion for summary judgment made by SIUH is denied**

The plaintiff's complaint states that SIUH committed malpractice by violating an order to provide nothing by mouth, that SIUH failed to properly evaluate the plaintiff radiologically, and

that SIUH failed to take action to address signs and symptoms of peritonitis during the period of August 4 to 6, 2001. The complaint also alleges that a diagnostic procedure utilizing Gastrografin given through an esophageal-gastric tube was improperly performed and appropriate subsequent testing, such as an immediate computerized tomography of the abdomen, was not recommended or performed.

SIUH crossmoves for summary judgment and offers an expert medical opinion stating in detail that all tests were performed and reported in a timely manner. Explicitly, SIUH asserts that the Gastrografin study and CT scan were performed and reported appropriately once the procedures were ordered. In opposition, the plaintiff's expert radiologist states that the hospital forwarded only two films for his review and that these two films were only a portion of the films taken on the Gastrografin study. The plaintiff's radiologist states that the films he viewed are poor in quality and that the films are inadequate to exclude a leak of Gastrografin material at the anastomotic site. According to this expert, an alternative study should have been immediately suggested by the radiologist reading the films at the hospital. Furthermore, according to the plaintiff's radiologist, the poor quality of the study and the failure to report limitations of the study to responsible physicians were departures from the standard of care. Moreover, the plaintiff's surgical expert's opinion is that Gastrografin studies are notoriously unreliable, and that the absence of reliability should have been communicated to the physicians responsible for the care of the plaintiff.

Generally, a hospital is not liable when it's employees follow a clear and explicit order given by the patient's attending physicians unless it would be unreasonable for an individual of ordinary prudence to follow the order.<sup>7</sup> Resident physicians and other professional staff at SIUH also cared for the plaintiff. SIUH affirms that it followed the instructions of the plaintiff's attending physicians, Dr. Macura and Dr. Nicastro. SIUH further affirms that Carolyn Raia, M.D. interpreted the Gastrografin study. According to SIUH, Dr. Raia was a staff physician who

---

<sup>7</sup>*Toth v Community Hospital at Glen Cove*, 22 NY 2d 255, 265 [1968]; and *Salandy v Bryk*, 55 AD 3d 147, 165 [2d Dept 2008].

was not in the employ of SIUH. The relationship between Dr. Raia and SIUH is otherwise not stated and the relationship between Dr. Raia and any other physicians named or not named in this action is not stated. Additionally, the plaintiff's action against Dr. Raia has been discontinued. The plaintiff does not assert a relationship between Dr. Raia and SIUH, nor do the plaintiff's experts affirm that following the orders of Dr. Macura, Dr. Nicastro and Dr. Raia was unreasonable. SIUH states that Dr. Raia and not SIUH was responsible for failing to place a cautionary qualification on the Gastrografin study and SIUH was not responsible for any alleged delay in surgery. Consequently, whether SIUH should have appended a cautionary statement revealing the inadequate quality of the study, should have immediately advised Dr. Nicastro of the limits of such a Gastrografin study in visualizing that which was sought, and should have imposed a cautionary advisement appended to Dr. Raia's radiographic interpretation of that study, are each issues of fact that needs to be determined by a finder of fact. Accordingly, the motion for summary judgment made by SIUH is denied.

#### **The plaintiffs' crossmotion for summary judgment is denied**

The plaintiff crossmoves for summary judgment against Dr. Macura and against Staten Island University Hospital. The crossmotion for summary judgment against Dr. Macura is denied as being moot because summary judgment is granted to Dr. Macura. The expert opinions offered by both of the plaintiff's experts state that the Gastrografin study was inadequate. The opinion of the plaintiff's surgical expert notes the lack of a cautionary qualification of the Gastrografin study, indicating that the study was inadequate. According to this expert, this resulted in delayed corrective surgery, and the delay in corrective surgery was a substantial factor in increasing the severity of the plaintiff's complications and injuries. Therefore, the plaintiff has borne the initial burden moving for summary judgment against SIUH. However, an issue of fact has been found as to whether SIUH should have followed alleged unreasonable orders of Dr. Raia who unreasonably failed to include a cautionary statement of inadequacy on the Gastrografin study, who unreasonably failed to notify Dr. Nicastro of the allegedly inadequate study, and who failed to recommend an alternative study. If these omissions were unreasonable for a reasonably prudent healthcare facility, SIUH may be liable even if they followed the

instructions of the physicians who gave the orders and instructions. Accordingly, the crossmotion for summary judgment made by the plaintiff is denied, and neither the plaintiff nor SIUH is entitled to summary judgment against the other party.

### **The plaintiff's motion for sanctions against SIUH is denied**

The plaintiff moves for sanctions based upon spoliation. The plaintiff asserts that individual images from the Gastrografin study were missing. Despite the plaintiff's assertion that SIUH has a statutory obligation under Public Health Law to preserve the plaintiff's x-rays, it is actually the plaintiff who must bear the burden. In order to find spoliation, the loss of key evidence must be due to negligence or intent.<sup>8</sup> Therefore, here, the plaintiff may assert negligence in the performance of a specific duty owed by the hospital to preserve x-rays.<sup>9</sup> There has been no representation by the plaintiff's experts that releasing the original and only copy of the films to the radiologist who interpreted them was not within the limits of good and accepted medical practice for a healthcare provider. Therefore, the plaintiff has not established negligence by SIUH in failing to preserve the plaintiff's x-rays. Moreover, there is no representation that the films were intentionally denied to the plaintiff.

Additionally, to claim spoliation, the plaintiff must show that the lost material was essential to a case, or that the absence of the evidence was prejudicial.<sup>10</sup> Those films that were available were stated to be of insufficient quality for evaluation of, and inherently were the wrong type of study to evaluate the condition they were intended to visualize. The plaintiff's surgical expert's opinion specifically states that the x-rays obtained were not the proper x-rays to show the findings that the physicians sought. According to the plaintiff's radiologist's expert opinion, it is

---

<sup>8</sup>*Barahona v. Trustees of Columbia Univ. in City of N.Y.*, 16 AD 3d 445, 445-446 [2d Dept 2005]; quoting *Baglio v. St. John's Queen's Hosp.*, 303 AD 2d 341, 342 [2d Dept 2002].

<sup>9</sup>*Hyrniak v. Nathan Littauer Hospital Assoc.*, 86 AD 2d 699 [3d Dept 1982]; and see also *Barbato v. Livingston*, 18 Misc. 3d 1123A [Supr. Ct., Nassau Cty 2008].

<sup>10</sup>*Dennis v. City of New York*, 18 AD 3d 599, 600 [2d Dept 2005].

not the films *per se*, but rather the absence of a precautionary warning, and absence of a recommendation that alternative studies be done that is the basis for claiming medical malpractice. In rendering an opinion, the plaintiff's surgical expert indicates that the missing x-rays are not essential to the plaintiff's case. That expert's contention is that even if the films were available and were able to be read, they would still be the wrong x-rays to have been taken. Therefore the radiological evaluation that was performed would have been inadequate, even without further x-rays to evaluate, and independently of whether the films were of adequate quality or were even available or not available. Consequently, the absence of any one of these x-rays is not prejudicial since the plaintiff does not rely upon them to assert malpractice. There has been no negligence or intent that resulted in failing to provide these films to the plaintiff, and the absence of the films is not prejudicial or even material to the plaintiff's case.

Moreover, SIUH affirms that the x-rays were last in the possession and control of the non-party, Dr. Raia who apparently is not employed by SIUH and who has been released from this action. Since Dr. Raia is a non-party, she may not be responsible for spoliation.<sup>11</sup> Therefore, there can be no sanction for spoliation in this action.

Accordingly, it is hereby:

ORDERED, that the motion made by the defendant Jerzy Macura, M.D. for summary judgment against the plaintiffs Lorraine Lormel and Brian Lormel is granted and the name of Jerzy Macura, M.D, shall be stricken from the caption; and it is further

ORDERED, that the motion made by the defendant Staten Island University Hospital for summary judgment against the plaintiffs Lorraine Lormel and Brian Lormel is denied; and it is further

---

<sup>11</sup>*Ortega v. City of New York*, 9 NY 3d 69, 82-83 [2007].

ORDERED, that the cross-motion made by the plaintiffs Lorraine Lormel and Brian Lormel for summary judgment against the defendants Jerzy Macura, M.D. and Staten Island University Hospital is denied; and it is further

ORDERED, that the cross-motion made by the plaintiffs Lorraine Lormel and Brian Lormel seeking sanctions for spoliation against the defendant Staten Island University Hospital is denied; and it is further

ORDERED, that the remaining parties shall return for a conference to **DCM Part 3 at 130 Stuyvesant Place, Third Floor on February 29, 2012 at 9:30 AM.**

ENTER,

DATED: February 3, 2012

---

Joseph J. Maltese  
Justice of the Supreme Court