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SHORT FORM ORDER

INDEX No. 06-4013
CAL. No. 11-01864MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 013 - MD # 016 - MG
014 - MD # 017 - MG
015 - MD

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JOHN ROMANO and KIMBERLY ROMANO,

Plaintiffs,

- against -

SETH PERSKY, M.D., LONG ISLAND DIGESTIVE DISEASE CONSULTANTS, P.C., JOHN T. MATHER MEMORIAL HOSPITAL OF PORT JEFFERSON, NEW YORK, INC., and RICHARD J. DRANITZKE, M.D.,

Defendants.

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Upon the following papers numbered 1 to 98 read on this motion and cross motions for summary judgment and to discontinue by stipulation ; Notice of Motion/ Order to Show Cause and supporting papers (013) 1 - 18; 19-20 ; Notice of Cross Motion and supporting papers (014) 21-35; (015) 36-63; (016) 64-72; (017) 73-80 ; Answering Affidavits and supporting papers 81-87; Replying Affidavits and supporting papers 88-93 ; Other 94-95; 96-98; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (013) by the plaintiffs John Romano and Kimberly Romano for summary judgment on the issue of liability as against defendant Seth E. Persky, M.D., and for further order awarding sanctions against the defendants Seth E. Persky, M.D. and John T. Mather Memorial Hospital of Port Jefferson, New York for spoliation of evidence, are denied in their entirety; and it is further

Hospital of Port Jefferson, New York for spoliation of evidence, are denied in their entirety; and it is further

ORDERED that this motion (014) by the defendant Richard J. Dranitzke, M.D. for summary judgment dismissing the complaint as asserted against him is denied as academic in view of the decision rendered herein in motion (017) granting Dranitzke's further motion for an order discontinuing the action and dismissing the complaint as asserted against him, and it is further

ORDERED that this motion (015) by defendant John T. Mather Memorial Hospital of Port Jefferson, New York for summary judgment dismissing the complaint as asserted against it is denied as academic in view of the decision rendered herein in motion (016) granting Mather's further motion for an order discontinuing the action and dismissing the complaint as asserted against it; and it is further

ORDERED that this unopposed motion (016) by the defendant John T. Mather Memorial Hospital of Port Jefferson, New York pursuant to CPLR 3217 (b) for an order discontinuing the action as asserted against it on the basis that the plaintiffs by stipulation, dated February 21, 2012, have voluntarily discontinued the action against it, and no cross claims having been interposed against movant by any of the defendants herein, the motion is granted and the complaint is dismissed with prejudice as against it; and it is further

ORDERED that this unopposed motion (017) by the defendant Richard J. Dranitzke, M.D. pursuant to CPLR 3217 (b) for an order discontinuing the action as asserted against it on the basis that the plaintiffs by stipulation, dated February 28, 2012, have voluntarily discontinued the action against him and no cross claims having been interposed against movant by any of the defendants herein, the motion is granted and the complaint is dismissed with prejudice as against him.

In this medical malpractice action, it is alleged that on or about November 4, 2005, the defendants Seth Persky, M.D., Long Island Digestive Disease Consultants, and John T. Mather Memorial Hospital departed from good and accepted standards of care and treatment during the performance of an endoscopy and colonoscopy on the plaintiff, John Romano, causing him to suffer an approximate ten centimeter tear of the esophagus. The plaintiff further alleges that defendant Richard Dranitzke, M.D. departed from good and accepted standards of care in the performance of the subsequent thoracotomy to repair the perforated esophagus, causing him to suffer a pneumothorax, damage to his phrenic nerve causing paralysis of his diaphragm on the left side, and a fifteen day hospitalization at Mather Hospital. John Romano also alleges that the defendants failed to provide informed consent for the procedures with regard to risks, complications, consequences, and dangers related to the care, treatment, and procedures performed, including the risks of a tear in the esophagus, pneumothorax, and phrenic nerve damage, and paralysis of the diaphragm. A derivative cause of action has been asserted on behalf of Kimberly Romano, plaintiff's spouse.

In motion (013), the plaintiffs, John Romano and Kimberly Romano, seek summary judgment on the issue of liability against defendant Seth E. Persky, M.D., and sanctions against the defendants Seth E. Persky, MD. and John T. Mather Memorial Hospital of Port Jefferson, New York (Mather Hospital) based upon their alleged spoliation of evidence. In motion (014), Richard J. Dranitzke, M.D. seeks summary judgment dismissing the complaint asserted against him. In motion (015), Mather Memorial Hospital seeks summary judgment dismissing the complaint as asserted against it. In motions (016) and

(017), Mather Memorial Hospital and Richard Dranitzke, M.D. both seek a discontinuance of the action asserted against them.

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 (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [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 [1980]). The opposing party 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 [2d Dept 1981]).

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 [2d Dept 1998], *app denied* 92 NY2d 818 [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 (see Derdiarian v Felix Contracting Corp., 51 NY2d 308 [2d Dept 1980]; Prete v Rafla-Demetrious, 221 AD2d 674 [2d 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 [3d Dept 1985]; Lyons v McCauley, 252 AD2d 516 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475 [1998]; Bloom v City of New York, 202 AD2d 465 [2d Dept 1994]).

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 [2d Dept 2004]; Domaradzki v Glen Cove OB/GYN Assocs., 242 AD2d 282 [2d 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 [2d Dept 2007]).

In support of motion (013) by the plaintiffs for summary judgment against Seth E. Persky, M.D., and for sanctions based upon the spoliation of evidence by Seth E. Persky, M.D. and Mather Hospital, the plaintiffs have submitted, inter alia, an attorney's affirmation; a copy of the supplemental summons and amended complaint; a copy of the answers served by defendant Persky and Long Island Digestive Disease Consultants, P.C., Mather Hospital, and Richard J. Dranitzke, M.D.; a copy of a letter dated September 27, 2005 to Dr. David Goldstein from defendant Persky; an affidavit dated November 15, 2008 by Seth E. Persky, M.S.; a copy of the plaintiff's operative report from Mather Hospital, dated November 4, 2005; a copy of the signed and certified deposition transcript of Wandrua Foster on behalf

of Mather Hospital, dated March 19, 2005, and continued April 9, 2009; a certified transcript of the examination before trial of Seth Persky, M.D. with an affidavit for the errata sheet; a copy of the affidavit of Gerald Salen, M.D., plaintiff's expert; plaintiff's exhibit 2, an e-mail from defendant Persky to mgordon@matherhospital.org; certified copy of the continued transcript of examination before trial of Seth E. Persky, M.D. dated December 17, 2998 with an affidavit by defendant Persky for the errata sheet; consent form dated November 4, 2005; Mather Hospital record excerpt; unsigned and uncertified partial transcript of the examination before trial of John Romano dated June 14, 2007; and a signed and certified transcript of the examination before trial of Mary Scannell on behalf of Mather Hospital, dated July 13, 2009. The unsigned and uncertified transcript of John Romano is not in admissible form (see Martinez v 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2d Dept 2008]; McDonald v Maus, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; Pina v Flik Intl. Corp., 25 AD3d 772 [2d Dept 2006]), is not accompanied by an affidavit or proof of service pursuant to CPLR 3116, and is not considered on this motion.

Seth E. Persky, M.D. testified to the extent that he is engaged in private practice as a gastroenterologist with board certification in internal medicine. He has worked for Long Island Digestive Diseases Consultants since 2001, and has been a shareholder in that S corporation since 2005. He is an attending physician with privileges at Mather Hospital. Dr. Persky testified that John Romano became his patient on September 27, 2005, having been referred by Dr. Goldstein, an internist, for difficulty swallowing, acid reflux, and chronic intermittent rectal bleeding. He also complained of a chronic cough, some tightness in his throat or in his lungs, and an occasional shortness of breath. The procedures for a colonoscopy and an upper endoscopy, with possible dilation upon findings at the time of the procedure, were discussed with Mr. Romano. The risks and benefits of the procedures are given together. Dr. Persky testified that he advised Mr. Romano that there is a small risk of bleeding and always a risk of perforatione during an endoscopy or colonoscopy, which may require surgery. He did not discuss a thoracotomy procedure, the surgery for repairing a puncture, nor did he discuss phrenic nerve damage, or diaphragm paralysis with him. The risks were not laid out in numerical terms. He continued that upper endoscopy perforations are really very rare. When the dilator is inserted into the esophagus, it creates a linear force to the entire wall of the esophagus as it is advanced down.

Dr. Persky testified to his experience with endoscopies, and dilation with balloon dilators such as Maloney and Savory dilators, with and without fluoroscopy. This is an x-ray technique which provides internal visualization during a procedure. He now only utilizes balloon and Savory dilators. He described an endoscopy procedure and stated he generally takes a photograph of any abnormalities and the gastroesophageal junction during the procedure. The photographs are placed in the patient's chart for future reference. He takes no video of the procedure. He usually conducts the endoscopy under general anesthesia. If he encounters a Schatzki ring, he usually dilates it with a 54-French dilator by inserting it 50 to 60 centimeters, experiencing a certain amount of resistence. Dr. Persky testified that Mather Hospital has Savory dilators that go up to 60-French.

Dr. Persky performed the endoscopy, dilation, and colonoscopy on Mr. Romano on November 4, 2005 at Mather Hospital in the endoscopy suite under general anesthesia administered by Dr. David Paul. He saw Mr. Romano in the endoscopy room for about five minutes before the procedure. When Mr. Romano signed the consent form, he was not under the effects of anesthesia. The consent provided for a colonoscopy, possible biopsy, possible polypectomy, upper endoscopy, possible biopsy. Dilation was not indicated on the consent form, although Dr. Persky testified that he discussed dilation with Mr.

Romano at his office. Dr. Persky stated that the consent form permitted him to expand the procedure to include dilation, based upon the clinical presentation and endoscopic findings. He stated that dilation is included on the consent form when a dilation is actually planned. The consent form did not list perforation as a risk, but Dr. Persky stated that he discussed it with Mr. Romano. The procedure commenced at 1:05 p.m. and lasted eighteen minutes. Present during the procedure were Dr. Paul, Paul Habek the certified registered nurse anesthesiologist, Mary Scanell, the nurse, and Wandrua Foster, the endoscopy technician.

Dr. Persky testified that during the endoscopy, he noticed patches of redness in the esophagus and stomach, which he biopsied while viewing it on the TV screen. He then examined the duodenum, withdrew the endoscope, looked backwards while retracting the endoscope, and observed the Schatzki's ring in Mr. Romano's esophagus. Given Mr. Romano's symptoms, he decided to do a Savory dilation with a lubricated 54 French dilator. He did not recall any unusual resistance in passing the dilator, and encountered no difficulties. The procedure was completed, and the dilator and guide wire were removed. He did not know if performing the biopsy prior to the dilation of the Schatzki ring increased the risk of perforation during the dilation, but thought it was possible. He described the Schatzki ring which he found as small, involving ten to twenty percent of the lumen of the esophagus. The colonoscopy procedure was completed. Instructions and orders were given to the nurses concerning Mr. Romano's care and follow-up instructions. When he finished the procedure, he dictated an operative report immediately.

Dr. Persky testified that at about 3:00 p.m., he received a telephone call at his office from a nurse, Peggy Suave, advising that Mr. Romano was complaining of upper abdominal burning, preceded by a transient drop in blood pressure. Dr. Paul, the anesthesiologist, notified him at 4:45 p.m. and he obtained an x-ray for Mr. Romano which revealed free air under the diaphragm. He instructed Dr. Paul to immediately contact Dr. Dranitzke, and Dr. Coman, who was at Mather, to see Mr. Romano. Dr. Persky saw Mr. Romano about 6:00 p.m. and stated that he appeared lethargic. Mr. Romano was advised that he had a perforation of the esophagus and that Dr. Dranitzke would be repairing the esophageal tear via a thoracotomy. A ten centimeter longitudinal tear or perforation, at the distal esophagus where the esophagus ends at the gastroesophageal junction, was found by Dr. Dranitzke. Dr. Persky testified that this tear in the esophagus occurred during the dilation when he performed the endoscopy, but he did not know exactly how or when. He further testified that it was not standard to go back with the scope after performing a Savory dilation. He continued that it was not the standard of care to perform the dilation using a smaller dilator, and working up to a larger size when dilating a Schatzki's Ring. Mr. Romano was intubated and on a respirator following surgery to repair the perforation.

Seth E. Persky, M.D. set forth in his affidavit dated February 15, 2008, that he is a physician licensed to practice medicine in New York and that Mr. Romano was informed of all relevant risks and potential complications, including a perforation of his esophagus during the endoscopic procedure. Dr. Persky continued that he is not a thoracic surgeon, as is Dr. Dranitzke, and thus is not in the position to criticize the care rendered by Dr. Dranitzke. He added that he is not aware of nursing protocols at Mather Hospital, and that any question concerning the nursing care is inappropriate.

Gerald Salen, M.D., the plaintiff's expert, avers that he is a physician licensed in New Jersey and New York, and is board certified in gastroenterology and internal medicine. He set forth the records and materials reviewed, and offers his opinion within a reasonable degree of medical certainty only as to Dr.

Seth Persky. It is Dr. Salen's opinion that Dr. Persky departed from good and accepted practice and was negligent in his care and treatment of John Romano on November 4, 2005, and that those departures caused John Romano to suffer an esophageal perforation, a preventable life threatening complication, that required him to undergo emergency surgery which led to additional complications, including phrenic nerve damage and partial diaphragm paralysis. He stated that Dr. Persky acknowledged that the perforation occurred during the dilation procedure, and that Dr. Persky testified that he had been trained only to use a 54 French Savory dilator on all patients when dilating a Schatzki ring. Dr. Salen refers to the Savory dilator used by Dr. Persky as a Savary-Gillard dilator, and stated that such dilator has been utilized for this type of procedure for forty five years. However, he disagreed with Dr. Persky that a single large dilator, particularly one as large as 18mm in diameter, is appropriate in all cases to treat a Schatzki ring. Dr. Salen continued that a 54 French Savary dilator (18mm) is very large, and, in his own experience, has rarely used a dilator greater than a 48 French dilator (16mm) when performing this type of procedure.

Dr. Salen stated that the standard of care for dilating a stricture such as Mr. Romano had, is to incrementally increase the size of the dilators with careful and deliberate technique so as to achieve the best result and expose the patient to the lowest risk of perforation, which is a very serious complication. The proper technique would have included using approximately three to six different dilators until the proper level of resistance and dilation was obtained from the stricture. Dr. Salen continued that using one large diameter dilator was a departure from the standard of care. Dr. Salen further opined that it was a departure from good and generally accepted standards of care to perform a dilation procedure of a ring or stricture immediately after two pinch biopsy procedures in that area of the esophagus, as it left Mr. Romano more susceptible to esophageal perforation during the subsequent dilation procedure. Dr. Salen continued that the accepted practice and progression of treatment was that, if upon visualizing the stenosis, and Dr. Persky properly concluded it was medically necessary to proceed to dilation, he should have done so using the proper dilation procedure before proceeding to a pinch biopsy in the same area.

Dr. Salen stated that Dr. Persky did not inform Mr. Romano that a biopsy prior to dilation could have increased his risk of perforation. He noted Mr. Romano's history of chronic acid reflux for approximately ten years, and intermittent dysphagia relating to the Shatzki ring, which he controlled by avoiding large pieces of meat. Dr. Salen stated that Dr. Persky's operative report indicated a postoperative diagnosis of gastritis and esophagitis. He continued that to perform a biopsy in that area of the esophagus that was already inflamed, and then proceed to dilation, was also a departure from the good and accepted standard of care, based upon the lack of severity of Mr. Romano's complaints prior to the procedure. Dr. Salen also opined that had Dr. Persky not deviated from the accepted standards of care, that Mr. Romano would not have suffered the esophageal perforation, and would not have been exposed to the additional surgical complications sustained during the repair of that perforation by Dr. Dranitzke, which included surgical damage to the phrenic nerve on the left, partial diaphragm paralysis on the left side, and elevation of the left hemidiaphragm. Dr. Salen continued that it is his opinion that this surgical damage to the left phrenic nerve caused a collapse of the left lung.

Dr. Persky has opposed plaintiffs' application with medical articles, and an affirmation by his expert physician who affirms that he is licensed to practice medicine in New York and is board certified in internal medicine and gastroenterology. Dr. Persky's expert set forth the medical records and materials which he reviewed, and opined within a reasonable degree of medical certainty that Dr. Persky adhered to the standard of care on November 4, 2005, when he performed the upper endoscopy and

dilation of the Schatzki ring on Mr. Romano. He continued that while Mr. Romano may have suffered a perforated esophagus as a result of the treatment by Dr. Persky, such perforation was not the result of malpractice by Dr. Persky, but was one of the risks attendant to the procedure undertaken and consented to by the plaintiff. Dr. Persky's expert further opined that Dr. Persky followed the standard of care when he utilized one single large caliber Savary dilator to treat the Schatzki's ring in plaintiff's esophagus after performing two pinch biopsies in the proximate area.

Dr. Persky's expert based his opinion on his experience as a practitioner and a teacher, as well as medical literature in the field of gastrointestinal endoscopy. He stated that according to James L. Greskreutz, M.D. and Chung H. Kim, M.D. of the Mayo Clinic, symptomatic patients with Schatzki's rings can be treated with either endoscopic dilation or surgical resection. Because surgical outcome is not always favorable with a failure rate as high as 40%, dilation provides the best chance of success when compared to surgery. The defendant's expert further stated that medical literature confirms that a "single large bore bougie (with a diameter of at least 16 mm) was more likely to forcefully dilate a Schatzki's ring than gradual dilation with bougies (dilators on increasing size, and hence result in better long term efficacy of dilation)." He continued that while Dr. Salen advocates the gradual dilation method, according to the Mayo clinic, "a single large dilator should be the treatment of choice for Schatzki's ring."

Dr. Persky's expert further opined that Dr. Persky's treatment of dilating the esophagus after performing two pinch biopsies in the same area was well within the accepted standard of care, and not malpractice as the plaintiff alleges, nor was it the proximate cause of the perforation of the plaintiff's esophagus on November 4, 2005. He stated that according to the American Society for Gastrointestinal Endoscopy, "[p]inch biopsies of the esophagus do not preclude dilation during the same procedure.... It is frequent practice and appears safe to perform dilation immediately after mucosal biopsy of the esophagus." As he noted from his review of Dr. Persky's deposition transcripts, and affidavit of February 15, 2008, and the plaintiff's signed consent to the procedure, that Dr. Persky obtained the plaintiff's informed consent to the procedures performed on November 4, 2005, particularly in view of the surgical alternative to dilation, which did not present a favorable chance of success.

Based upon the foregoing, it is determined there are factual issues raised which preclude summary judgment, including, but not limited to, whether or not incremental dilation of the Schatzki's ring was the standard of care, whether incremental dilation would have prevented perforation of the esophagus, whether or not such dilation should have been performed before or after the pinch biopsies, and whether dilating the esophagus after the pinch biopsies proximately caused the perforation. Factual issue has also been raised concerning whether or not proper informed consent was provided to Mr. Romano prior to his procedure.

Accordingly, that branch of plaintiffs' motion (013) which seeks summary judgment against defendant Seth Persky, M.D. is denied.

The plaintiffs seek sanctions against Dr. Persky and Mather Hospital based upon the alleged spoliation of evidence, namely, the photographs alleged to have been taken by Dr. Persky during the surgery. Plaintiff's expert, Dr. Salen, states that Dr. Persky acknowledged it was his usual and customary practice to capture photograph images with his endoscope when he performs procedures, and that he has not produced such images. He continued that it is the standard of care to take at least four photographs

during an upper endoscopy without a biopsy, and because Dr. Persky performed dilation and two biopsies, there should be intra-operative pictures of the areas biopsied, as well as the lesion that was dilated. Intra-operative photographs, he stated, combined with an operative report, create a complete medical record of the condition of the patient, and the absence of intra-operative photographs is a departure from the generally accepted standard.

Mary Scannell testified to the effect that she is a registered nurse working at Mather Hospital. She was working with Dr. Persky; Dr. Paul, the anesthesiologist; Paul Habek, the nurse anesthetist; Elizabeth Conneally, a registered nurse; and Wandrua Foster, a nurse's aide, on November 4, 2005 when Mr. Romano had his endoscopy procedure. She assisted Dr. Persky during the endoscopy procedure. She testified that the equipment used by Dr. Persky permitted intra-operative photographs. She did not know if Dr. Persky took photographs during the procedure on November 4, 2005, and she did not see any. She continued, that as a routine, he takes photographs and attaches them to his notes, which become part of the hospital chart.

Wandrua Foster testified to the extent that she has been employed by Mather Hospital as a nurse's aide since 2001. She testified that she assisted Dr. Persky between thirty and fifty times prior to Mr. Romano's procedure. She continued that the endoscope functions to permit the surgeon to take a picture which is apparent on the monitor during the procedure. The number of pictures taken appears on the monitor. There is also a function on the endoscope to print pictures. If there are four pictures taken, they will be automatically printed. If there are less than four pictures, they are printed manually. At the end of the procedure, the printed pictures are given to the physician. She did not know what happens to the pictures after they are given to the surgeon. She stated that some doctors keep a copy, and some place it in the hospital record. Ms. Foster could not remember whether Dr. Persky took pictures during the upper endoscopy performed on John Romano, whether there were pictures printed out, or whether Dr. Persky reviewed any pictures after the endoscopy.

Dr. Persky continued in his affidavit, that he does not remember whether or not photographs were taken intra-operatively, and that he has no photographs either in his office record or in the hospital record. It is his custom and practice, however, to take photographs during the procedure. Dr. Persky testified that it was his standard to take pictures, but he did not remember if he did. Pictures are taken during the endoscopy, but not during the dilation. He generally brings the pictures from the hospital to his office and keeps the photographs in his chart.

Dr. Persky's expert stated that it is not the standard of care during an upper endoscopy to take photographs, but is merely a custom and practice. He added that Dr. Persky's failure to take any photographs during the procedure on November 4, 2005 did not proximately cause the perforation, nor did it in any way hide or obfuscate the fact that John Romano did indeed suffer a perforation of the esophagus on that date.

"Spoliation is the destruction of evidence. Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence... before the adversary has an opportunity to inspect them. Dismissal is a viable remedy for loss of a key piece of evidence that thereby precludes inspection. Drastic sanctions are not necessarily unduly harsh sanctions

intentionally, nonintentionally, or negligently destroyed any photographs. While the plaintiffs argue that Dr. Persky departed from the standard of care in either not taking photographs of the endoscopy procedure, or in not maintaining such photographs, plaintiffs' expert has not demonstrated that the photographs, or absence thereof, were the proximate cause of the perforation of the plaintiff's esophagus. Thus, no basis upon which sanctions for spoliation of evidence has been established by the plaintiffs.

Accordingly, that branch of motion (013) which seeks sanctions based upon Dr. Persky's spoliation of evidence is denied.

The defendants John T. Mather Memorial Hospital of Port Jefferson, New York by motion (016) and defendant Richard J. Dranitzke, M.D., by motion (017) now move to discontinue the action as asserted against them pursuant to CPLR 3217 (b) on the basis that the plaintiff has by stipulations of discontinuance, dated respectively, February 21, 2012 and February 28, 2012, discontinued the actions against them. Both motions being unopposed and no cross claims having been interposed against either Dranitzke or Mather and in the absence of a showing of prejudice or other special circumstances, the motions are granted.

Accordingly, motion (016) by Mather Hospital and motion (017) by Richard Dranitzke, M.D. are granted, and the complaint as asserted against them is dismissed with prejudice.

In view of the foregoing, motion (014) by defendant Richard J. Dranitzke, M.D. and motion (015) by the defendant John T. Mather Memorial Hospital of Port Jefferson, New York for summary judgment dismissing the complaint are denied as academic.

Dated: July 13, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION