

Locasto v Lucente

2013 NY Slip Op 31088(U)

May 10, 2013

Sup Ct, Richmond County

Docket Number: 100370/09

Judge: Joseph J. Maltese

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

Calendar Nos.: 3566-007

2643-008

3666-009

LOUIS LOCASTO,

Index No.: 100370/09

Plaintiff,
against

**DECISION
HON. JOSEPH J. MALTESE**

**RICHARD LUCENTE, D.O., JOHN LUCENTE, F.N.P.,
JOSEPH J. GIOVINAZZO, M.D., SI FAMILY PRACTICE
ASSOCIATES, P.C., HEALTHCARE ASSOCIATES IN
MEDICINE, P.C., and STATEN ISLAND UNIVERSITY
HOSPITAL,**

Defendants.

The following papers numbered 1 to 7 were fully submitted on the 8th day of March, 2013.

Papers
Numbered

Notice of Motion for Summary Judgment of Defendant HEALTHCARE ASSOCIATES IN MEDICINE, P.C., with Supporting Papers and Exhibits (dated December 7, 2012) _____	1
Notice of Cross Motion for Summary Judgment of Defendant JOHN LUCENTE, F.N.P. with Memorandum of Law, Supporting Papers and Exhibits (dated December 18, 2012) _____	2
Notice of Cross Motion for Summary Judgment of Defendant JOSEPH J. GIOVINAZZO, M.D., with Supporting Papers and Exhibits (dated December 19, 2012) _____	3
Affirmation in Opposition of Plaintiff LOUIS LOCASTO with Memorandum of Law, Supporting Papers and Exhibits (dated February 11, 2013) _____	4
Reply Affirmation of Defendant HEALTHCARE ASSOCIATES IN MEDICINE, P.C. (dated February 25, 2013) _____	5
Reply Affirmation of Defendant JOSEPH J. GIOVINAZZO, M.D. (dated February 27, 2013) _____	6

Upon the foregoing papers, the motion and cross motions for summary judgment of defendants HEALTHCARE ASSOCIATES IN MEDICINE, P.C. (No. 3566), JOHN LUCENTE, F.N.P. (No. 3643) and JOSEPH J GIOVINAZZO, M.D. (No. 3666) are denied.

Plaintiff commenced this medical malpractice action to recover damages for injuries sustained as a result of defendants' alleged failure to timely diagnose and properly treat a systemic bacterial infection and/or infective endocarditis, which ultimately required him to undergo mitral valve replacement surgery and right upper extremity brachial and ulnar embolectomy with radial artery ligation.

By way of background, plaintiff was a patient of defendant RICHARD LUCENTE, D.O. (hereinafter, DR. LUCENTE) at defendant SI FAMILY MEDICAL PRACTICE ASSOCIATES, P.C. (hereinafter, "SIFMP") since 2007.¹ On July 18, 2008, plaintiff allegedly presented to SIFMP with complaints of a fever, joint and muscle pains and dizziness. This much is undisputed. However, there is no agreement as to whether plaintiff made any contemporaneous complaint of dark and foul smelling urine, or reported any significant weight loss. Plaintiff was seen at that time by Family Nurse Practitioner JOHN LUCENTE, F.N.P.. (hereinafter, NURSE LUCENTE), who performed a urinalysis which indicated, *inter alia*, positive leukocytes, high protein, and trace blood. NURSE LUCENTE suspected a urinary tract infection, whereupon he prescribed the antibiotic Cipro and ordered blood work. As noted in plaintiff's medical chart at SIFMP, he had a history which included the detection of a heart murmur and mitral valve prolapse.

¹ It appears that plaintiff has discontinued the action against DR. LUCENTE due to his bankruptcy filing.

Insofar as it appears, plaintiff subsequently presented to the emergency room at defendant STATEN ISLAND UNIVERSITY HOSPITAL (hereinafter, SIUH) on both July 22, 2008 and July 23, 2008, complaining of hiccups and a fever for several days duration. He was seen and advised of the possibility that he had developed distal esophageal lesions. A subsequent CT scan of plaintiff's chest and abdomen performed on July 24, 2008 revealed mild concentric thickening of the distal esophagus and gastric fundus; clinical correlation was recommended. In addition, the scan detected a focal 1.7 cm area of low indeterminate attenuation in the right lobe liver; further evaluation by MRI was recommended.

On that same date, plaintiff apparently was seen again by NURSE LUCENTE at SIFMP, where he was prescribed Companzine to alleviate the hiccups. In addition, he was advised to seek a gastroenterology consult based on the findings revealed by the CT scan that was performed at SIUH. Plaintiff also appears to have received a telephone call from DR. LUCENTE informing him of the results of his blood work. At this time, plaintiff was purportedly told that his testosterone levels were too high, and that he should decrease his usage of the medicine Androgel.

As is relevant to the claims against co-defendant JOSEPH J. GIOVINAZZO, M.D. (hereinafter DR. GIOVINAZZO), it is claimed that after sustaining a back injury in a fall in 2006, plaintiff was seen by a non-party orthopedist (Dr. Suarez) for nerve impingement of the right shoulder. After an unsuccessful course of conservative treatment, *i.e.*, physical therapy, he was referred by Dr. Suarez to DR. GIOVINAZZO for possible rotator cuff repair surgery. On August 4, 2008, plaintiff presented to DR. GIOVINAZZO for a surgical consultation. It is alleged that plaintiff informed DR. GIOVINAZZO during that consultation that he was experiencing night sweats, and that had been hiccupping for the past several days. After examining plaintiff and discussing prospective shoulder surgery, DR. GIOVINAZZO purportedly apprised plaintiff that his hiccups needed to be resolved prior to any operation.

On August 6, 2008, plaintiff maintains that he presented to DR. LUCENTE for a prescription renewal. According to plaintiff, despite indications suggestive of an underlying infection, nothing further was done at that time.

On September 15, 2008, plaintiff presented to SIUH for pre-operative testing. As is relevant, the pre-operative examination records make no mention of his prior complaints of hiccups, night sweat, and dark, foul smelling urine, but do include a note indicating that the CT scan performed in July of 2008 was consistent with left ventricular hypertrophy. In addition, these records contain a notation referencing plaintiff's prior history of a heart murmur and hypertension.

Two days later, *i.e.*, on September 17, 2008, plaintiff presented to DR. LUCENTE for preoperative medical clearance. At that time, his complaint of dark colored urine was noted in his medical record, but there is no entry regarding the other complaints which plaintiff claims to have made to DR. LUCENTE, *e.g.*, continued fever and weight loss. In fact, whether or not plaintiff made these additional complaints is hotly contested. According to plaintiff, as a result of his complaints, DR. LUCENTE performed a urine test which apparently revealed the presence of blood. As a result, plaintiff was told to see an infectious disease specialist.² Notwithstanding the foregoing, DR. LUCENTE medically cleared plaintiff for the upcoming surgery to his right shoulder, which was performed arthroscopically without incident by DR. GIOVINAZZO on September 23, 2008.

The very next day, plaintiff presented to Dr. Glaser, whose medical records contain a reported history of night sweats, fever (for one month), blood in the urine and a recent weight loss of 25 lbs. Blood cultures and laboratory tests were ordered. On October 1, 2008, Dr. Glaser's office advised plaintiff that his blood cultures were positive for bacteria, and he was immediately admitted to SIUH for the treatment of enterococcus fecalis sepsis, which is claimed to have caused the subsequently detected endocarditis and septic thrombi to the brachial, radial and ulnar arteries of the right arm. As a result, a right upper extremity embolectomy was performed to remove all of the thrombi from plaintiff's right arm on October 8, 2008, and five days later, a mitral valve replacement was performed.

² It appears that plaintiff was subsequently able to obtain an appointment with such a specialist, Dr. Jordan Glaser, but it was not until after his should surgery.

In his Bill of Particulars, plaintiff makes numerous allegations against each of the defendants, including, but not limited to (1) the failure to timely diagnose plaintiff's condition; (2) the failure to timely treat his condition, (3) improperly clearing him for shoulder surgery; (4) ignoring various signs, symptoms and complaints indicative of an infection (including weight loss, blood in the urine, night sweats, fever and increased granulocytes); (5) the failure to initiate proper and appropriate testing; (6) the failure to properly read and interpret the results of those tests which were performed; (6) the failure to take a proper medical history; (7) disregard of plaintiff's prior medical history; (8) the failure to properly examine plaintiff; (9) allowing plaintiff's condition to worsen and/or deteriorate; and (10) causing a two-month delay in the diagnosis of the infection, which allowed its progression and caused plaintiff's health to deteriorate, necessitating the above-noted serious and invasive surgery.

In its current application (Motion No. 3566-007), defendant HEALTHCARE ASSOCIATES IN MEDICINE, P.C. (hereinafter, "HCA") moves for summary judgment dismissing the complaint on the grounds that it rendered no medical care or treatment to the plaintiff. In support, HCA submits the affidavit of expert orthopedic surgeon, Dr. Philip Robbins, who reviewed plaintiff's medical records and the pleadings relative to his care and treatment before reaching the conclusion that HCA was merely the location where DR. GIOVINAZZO examined plaintiff on August 4, 2008 prior to his arthroscopic rotator cuff repair surgery. According to Dr. Robbins, there are no separate allegations of negligence which pertain to HCA independently of the allegations of negligence against DR. GIOVINAZZO for which HCA might be held vicariously liable. As to these allegations, Dr. Robbins opines that the care rendered by DR. GIOVINAZZO met all of the appropriate standards of care.

As stated by the expert, when DR. GIOVINAZZO first examined plaintiff for shoulder surgery, he noted that plaintiff had complained of hiccups for three to four days, and indicated that the hiccups needed to be resolved prior to any surgery. In addition, he opined that once plaintiff had been cleared for surgery by DR. LUCENTE on September 17, 2008. DR. GIOVINAZZO was entitled to rely upon such clearance when proceeding to operate on plaintiff's shoulder on September 23, 2008. Moreover, Dr. Robbins notes that the records of DR. GIOVINAZZO indicate that plaintiff voiced no complaints when he was examined post-operatively on October 1, 2008. At this point, the sutures were removed,

and plaintiff was ordered to start physical therapy and return for a follow-up visit in two weeks. According to Dr. Robbins, DR. GIOVINAZZO's reliance on the medical evaluation and clearance by DR. LUCENTE was not misplaced, as there were no other findings or complaints to alert him to the presence of any preexisting infection at the time of surgery. In sum, HCA's expert concludes that there was no departure or deviation by DR. GIOVINAZZO from appropriate orthopedic standards of care in the treatment he rendered to plaintiff. On the basis of this opinion, HCA argues that it is entitled to summary judgment dismissing the complaint and all cross claims against it.

In his cross motion (No. 3643-008), NURSE LUCENTE argues that he is entitled to summary judgment dismissing the complaint and any cross claims against him since he did not depart from accepted medical standards in his care and treatment of plaintiff. In support, NURSE LUCENTE submits the affidavit of a fellow Family Nurse Practitioner, Catherine Pearsall, who reviewed the pertinent medical records, including plaintiff's chart at SIFMP. As the outset, this expert notes that many of the allegations of negligence set forth in the complaint do not even relate to the care rendered by NURSE LUCENTE, but rather, that of plaintiff's primary care physician, DR. LUCENTE. In particular, it is noted that NURSE LUCENTE played no role in clearing plaintiff for surgery. To the contrary, Ms. Pearsall states that plaintiff's medical records indicate that it was his primary care physician, DR. LUCENTE, who gave him surgical clearance. In point of fact, according to those records, it appears that the last time NURSE LUCENTE saw plaintiff was almost two months prior to the time when DR. LUCENTE cleared him for surgery. Moreover, the expert opines that there is nothing that NURSE LUCENTE did or failed to do which caused or contributed to plaintiff's injury, and that there were no deviations or departures from accepted medical practice in his care and treatment of the plaintiff. According to Ms. Pearsall, when seen by NURSE LUCENTE at SIFMP, plaintiff's condition was entirely consistent with a urinary tract infection, and he was treated appropriately. In addition, at no time did NURSE LUCENTE act in excess of the statutory limitations placed on Family Nurse Practitioners.

In the second cross motion (No. 3666-009), DR. GIOVINAZZO moves for summary judgment on the ground that no triable issue of fact has been presented with regard to his care and treatment of plaintiff. In support, the doctor submits an expert affidavit by another orthopedic surgeon, Dr. Elton Strauss, who reviewed the pleadings pertaining to the within lawsuit and the medical records relating to plaintiff's care and treatment. According to Dr. Strauss, the MRI/arthrogram of plaintiff's right shoulder taken by his original orthopedist, Dr. Suarez, revealed a full thickness tear of the supraspinatus and linear interstitial extension to the anterior aspect of the infraspinatus. When a subsequent course of physical therapy produced no significant improvement, Dr. Suarez recommended a follow-up visit with DR. GIOVINAZZO, who first examined plaintiff on August 4, 2008.

After taking plaintiff's medical history, DR. GIOVINAZZO proceeded to evaluate the injury to plaintiff's right shoulder. His examination allegedly revealed a mild impingement with pain and weakness at the right rotator cuff. According to DR. GIOVINAZZO's deposition testimony, the only other complaint made by plaintiff at that time was that he had been experiencing hiccups for three to four days. DR. GIOVINAZZO then discussed with plaintiff various operative and non-operative treatments for the shoulder, detailed the risks and benefits of shoulder arthroscopy, and advised plaintiff that his hiccups would have to be resolved prior to surgery. After a surgical course of treatment was agreed upon, DR. GIOVINAZZO referred plaintiff to SIUH for pre-operative testing and surgical clearance by his primary care physician. The expert noted that plaintiff presented to SIUH on September 15, 2008 for pre-operative testing, and that the pre-operative testing records do not include any physical complaints registered by plaintiff or any significant medical findings other than the notation that a CT scan performed in July 2008 was consistent with left ventricular hypertrophy. Plaintiff was subsequently cleared for surgery by DR. LUCENTE.

On the basis of these facts, Dr. Strauss concluded that DR. GIOVINAZZO's care of plaintiff was within accepted standards of medical care. According to the expert, he properly evaluated plaintiff's shoulder injury and took an appropriate medical history. In addition, there is no proof that DR. GIOVINAZZO had any basis for knowledge of plaintiff's weight loss, blood in the urine, night sweats or fever prior to his performing surgery. Although DR. LUCENTE was apparently aware of these

symptoms, he cleared plaintiff for surgery, and DR. GIOVINAZZO was entitled to rely on that clearance. In addition, Dr. Strauss opined that plaintiff did not experience any post-operative complications or infections stemming from the care and treatment rendered to him by DR. GIOVINAZZO, and that all of DR. GIOVINAZZO's post-operative care with regard to plaintiff's shoulder surgery was appropriate. In view of this conclusion, DR. GIOVINAZZO contends that he is entitled to summary judgment dismissing the complaint and all cross claims against him.

In opposition to all three motions, plaintiff submits the affidavit of an expert physician specializing in internal medicine, who reviewed the pleadings, EBT transcripts, and plaintiff's medical records in support of the conclusion that plaintiff's injuries were the result of defendants' departures from good and accepted medical practice. In particular, this expert states that while the moving defendants individually attempt to acquit themselves by limiting the appropriate standard of care to the specific treatment rendered by them during their direct contact with plaintiff, this narrow view of their professional duty is contrary to accepted practice. More specifically, plaintiff's expert states that in rendering appropriate care and treatment, it is the duty of each physician and nurse practitioner to address patient's current signs and symptoms in the context of his or her medical history in order to properly diagnose and treat the individual, and that good and accepted medical practice requires that a patient be thoroughly and appropriately "worked-up" prior to rendering affirmative treatment. In addition, the expert opines that each of the defendants either singly or collectively departed from good and accepted standards of medical practice by failing to obtain an appropriate medical history from the plaintiff, and in failing to obtain and/or read or comprehend the significance of his medical history in assessing his then-current physical condition.

With regard to the care and treatment rendered by NURSE LUCENTE, plaintiff's expert opined that given the symptoms that plaintiff was reporting in the light most favorable to him (*i.e.*, fever, joint and muscle pain, dizziness, dark and foul smelling urine and weight loss), as well as his history of a heart murmur and mitro valve prolapse, NURSE LUCENTE should have ordered a more thorough work-up, as such symptoms are indicative of something more significant than a simple urinary tract infection. In particular, since the urinalysis performed at SIFMP indicated the presence of positive leukocytes, high

protein and trace blood in the urine, plaintiff's expert states that it was a departure from good and accepted medical practice not to order urine or blood cultures either in the office, lab or hospital before prescribing the antibiotic Cipro or any other antibiotic. According to the expert, the administration of Cipro merely masked the symptoms of plaintiff's infection and interfered with the growth and identification of the bacteria, thereby permitting the germ to remain in plaintiff's body and erode the heart valve. The resulting delay in diagnosis and treatment is claimed to have permitted the infectious endocarditis to spread, colonizing the lining of the heart chambers and/or heart valve. Moreover, it was opined that this particular type of systemic bacterial infection and/or its progression is readily treatable, and responds well to intravenous antibiotics. According to this doctor, had they been timely prescribed, positive blood cultures would have indicated plaintiff's need for hospitalization and the administration of intravenous antibiotics in order to abort the infection. As a result of this substandard care, it was opined that NURSE LUCENTE delayed the proper treatment of plaintiff's infection for approximately two months, which caused his heart valve to become infected and allowed vegetations to become embolized to other parts of his body.

In addition, this expert notes that plaintiff's records indicate that NURSE LUCENTE must have been aware when he saw plaintiff on July 24, 2008 of his visit to the emergency room on July 22 and 23, as there was a contemporaneous note in plaintiff's chart of the possibility of distal esophageal lesions. However, NURSE LUCENTE never communicated with anyone regarding these findings, plaintiff's visit to the emergency room or the results of the CT scan. Had there been some sort of inquiry, *i.e.*, had a copy of plaintiff's CT scan report been obtained and its findings reviewed, it was opined by plaintiff's expert that this, in conjunction with his other complaints, would have facilitated the diagnosis of plaintiff's infection much earlier.

Turning to plaintiff's allegations of malpractice against DR. GIOVINAZZO, plaintiff's expert did not agree with the opinion of the former's expert that the clearance examination by plaintiff's primary care physician relieved DR. GIOVINAZZO of the responsibility to obtain relevant medical and

historical information directly from the patient³. In addition, plaintiff's expert states that the appropriate standards of care required the surgeon to ensure that his patient was fully recovered from any pre-existing malady and in proper health before undergoing elective surgery; he may not simply relinquish this duty by deferring to the patient's other medical providers.⁴

Furthermore, plaintiff's expert states that the surgical records include a pre-anesthesia note which contained important information regarding the results of the CT scan of plaintiff's chest, as well as a note recommending a cardio work-up. It is opined that this information, which was available to DR. GIOVINAZZO prior to surgery, should have been addressed by him before proceeding with the operation.

As previously indicated, the motions are denied.

It is well settled that in order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of his or her injuries (*see DiGeronimo v. Fuchs*, 101 AD3d 933, 936). By extension, it is the medical practitioner moving for summary judgment who bears the burden of establishing, *prima facie*, either that there was no such departure, or that any departure was not a proximate cause of plaintiff injuries (*id.* at 936). Once a defendant has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to those elements on which defendant met its *prima facie* burden. As in all such applications, the failure to make a *prima facie* showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853).

³ Although plaintiff claims that he told DR. GIOVINAZZO that he was experiencing hiccups, fever and night sweats, this is denied by DR. GIOVINAZZO.

⁴In this regard, DR. GIOVINAZZO claims that it was SIUH rather than himself which required medical clearance prior to plaintiff's surgery.

Because summary judgment is a drastic measure, it may only be granted where no genuine, triable issue of fact is presented (*see Ugarriza v. Schmieder*, 46 NY2d 471, 474). Accordingly, if there is any doubt as to the existence of a triable issue, the motion should be denied (*see Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231). As the Court stated in *DiGeronimo*, “[S]ummary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury” (*DiGeronimo v. Fuchs*, 101 AD3d at 936 [citations and internal quotation marks omitted]).

Here, it is the opinion of this Court that HCA has failed to meet its burden of establishing a prima facie right to judgment as a matter of law. Although HCA’s expert states that HCA was merely the location where DR. GIOVINAZZO examined plaintiff, and that there are no separate allegations of negligence against it, the complaint contains independent allegations of negligence against HCA insofar as it relates to, *e.g.*, its retention of unqualified and/or unskilled physicians; its failure to review and evaluate staff, nurses and physicians at indicated time intervals; and its failure to adequately supervise its staff. None of these allegations have been addressed by HCA’s expert.

Moreover, since a dispute exists as to whether or not DR. GIOVINAZZO’s care of plaintiff fell within the course and scope of his employment with HCA, a question of vicarious liability exists regarding the alleged malpractice of DR. GIOVINAZZO. In this regard, while HCA’s expert avers that the doctor acted within the bounds of good and accepted medicals practice insofar as plaintiff is concerned, triable issues of fact have been raised by plaintiff’s medical expert requiring the denial of its motion (*see infra*).

With regard to the cross-moving defendants, the expert affidavits filed by both NURSE LUCENTE and DR. GIOVINAZZO are sufficient to satisfy their respective burdens of demonstrating, prima facie, that they did not depart from good and accepted medical practice in the case and treatment of plaintiff. Nevertheless, it is the opinion of this Court that plaintiff has raised triable issues of fact through the affidavit of his expert, who articulated a factual basis for the conclusion that the care and treatment they rendered to plaintiff, singly or collectively, represented a departure from good and

accepted standards of medical practice.

As to NURSE LUCENTE, these departures included (1) the accuracy of his diagnosis that plaintiff was suffering a urinary tract infection and prescribing Cipro given the nature of plaintiff's complaints, (2) his failure to order a urine culture in light of plaintiff's symptoms and the results of the simple urine test administered in the office; (3) the failure to consider plaintiff's history of a heart murmur and prolapsed mitral valve in making a diagnosis of his malady, and (4) his failure to consult with DR. LUCENTE. In addition, plaintiff's expert opines that the questionable CT scan results should have alerted all of the defendants involved with plaintiff's care of a medical situation requiring further inquiry, *i.e.*, that insofar as NURSE LUCENTE is concerned, his focus should have been on plaintiff's cardiac condition and not his gastrointestinal tract.

Similarly, with regard to DR. GIOVINAZZO, it was the opinion of plaintiff's expert that the doctor should not have proceeded with the surgery based on plaintiff's recent medical history, as well as the well-documented history of a heart murmur and prolapsed mitral valve. Moreover, it is argued that DR. GIOVINAZZO departed from sound pre-operative practice in relying upon the "clearance" which plaintiff received from his primary care physician. Significantly, plaintiff's expert opined that while medical clearance examinations are performed to enlighten surgeons as to the medical risks that must be managed during surgery and to reduce the risk of post-operative complications, it does not replace the importance of the surgeon obtaining a complete medical history that includes both present and prior health issues. Nor, in the expert's opinion, does the clearance relieve the surgeon of his or her responsibility to obtain information directly from the patient in addition to reviewing his medical records. According to plaintiff's expert, it was DR. GIOVINAZZO's responsibility to ensure that his patient was in good health before performing elective surgery. In this regard, it is claimed that the questionable CT scan results were available to DR. GIOVINAZZO prior to surgery, and that plaintiff's earlier medical records make note of his cardiac condition. As opined by plaintiff's expert, all of this information should have been known to DR. GIOVINAZZO and alerted him of the need to make further

inquiry regarding plaintiff's pre-operative condition.⁵

Since plaintiff is only required to rebut the defendants' prima facie showing, the conflicts of opinion among the respective medical experts prevents this Court from awarding judgment in favor of any of the moving parties (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324).

Accordingly, it is hereby:

ORDERED that the motion and cross motions for summary judgment of defendants HEALTHCARE ASSOCIATES IN MEDICINE, P.C., JOHN LUCENTE, F.N.P., and JOSEPH J. GIOVINAZZO, M.D., are denied.

All parties shall appear in DCM Part 3 for a Pre-Trial Conference on **June 10, 2013** at 9:30 a.m.

ENTER,

DATED: May 10, 2013

Joseph J. Maltese
Justice of the Supreme Court

⁵ Also relevant here is the issue of whether or not plaintiff ever advised DR. GIOVINAZZO and the others of his immediate pre-operative complaints of, *e.g.*, fever, dark urine and/or recent weight loss, all of which is hotly contested and must be viewed in the light most favorable to plaintiff for the purposes of this motion (*see Pearson v. Dix McBride, LLC*, 63 AD3d 895).