

**Leycock-Gamble v Pothuri**

2018 NY Slip Op 34142(U)

June 26, 2018

Supreme Court, Bronx County

Docket Number: Index No. 21265/13

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA PART 23**

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WALETTE LEYCOCK-GAMBLE and JAMES GAMBLE,

Index No.: 21265/13

Plaintiffs,

Decision/Order

-against-

BHAVANA POTHURI, TARAH PUA, NYU MEDICAL  
CENTER TISCH HOSPITAL and INTUITIVE SURGICAL  
INC. D/B/A DA VINCI SURGICAL SYSTEM,

Defendants.

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PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed -----	1, 2
Cross-Motion and Affidavit Annexed -----	3
Answering Affidavit and Exhibits -----	4, 5
Replying Affidavit and Exhibits -----	6, 7

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS AS FOLLOWS:

By notices of motions, defendant Intuitive Surgical Inc d/b/a Da Vinci Surgical System (Intuitive) and defendants Bhavana Pothuri, Tarah Pua and NYU Medical Center Tisch Hospital (collectively referred to as NYU defendants) move for summary judgment (CPLR 3212) dismissal of plaintiffs’ complaint. In opposition to the motion by NYU defendants, plaintiffs cross-move for leave to amend their bills of particulars.

At the outset, the motion by defendant Intuitive for summary judgment is granted without opposition and this action is dismissed as against Intuitive. Regarding plaintiffs’ cross-motion to amend their bills of particulars by changing the words “ureter or uretral” to “bowel” throughout and more accurately describing plaintiff’s claimed injuries, NYU defendants have not demonstrated that they would suffer surprise or prejudice from any of the proposed changes as the bills have been amended to conform with the NYU defendants’ own records (*Cherebin v Empress Ambulance*, 43 AD3d 364 [1<sup>st</sup> Dept 2007]). Additionally, the amendments are addressed fully by NYU defendants in the instant motion. Accordingly, plaintiffs’ cross-motion for permission to amend their bills of particulars in order to conform their allegations to the evidence is granted.

This is an action based on claims of medical malpractice, and a derivative claim for loss of services, surrounding the care and treatment rendered by the NYU defendants to plaintiff, Walette Leycock-Gamble (Walette) before, during, and after she underwent a robotic-assisted laparoscopic abdominal hysterectomy and bilateral salpingo-oophorectomy<sup>1</sup> on November 22, 2010. Dr. Pothuri was the gynecologic oncology attending surgeon who performed the procedure with the assistance of Dr. Pua, a fellow in the gynecologic oncology program. Notably, Walette had a past medical history of tubal ligation, three caesarian sections and a hernia repair with mesh. Walette claims that NYU defendants departed from accepted standards of care when they recommended and performed a hysterectomy to rule out cancer, failed to order a pre-operative bowel preparation, performed a robotic-assisted hysterectomy without the requisite experience, failed to call for an intra-operative surgical consultation, failed to elicit an informed consent for the removal of her fallopian tubes and ovaries, and abandoned Walette to the care of resident doctors-in-training. Walette alleges that the above departures resulted in, *inter alia*, a bowel perforation, the development of fistulas and abscesses, vaginal cuff dehiscence<sup>2</sup> and a temporary ileostomy.<sup>3</sup>

The NYU defendants argue that they comported with standards of care at all times, that no action or inaction on their part caused injuries to Walette and that Walette's medical history was not a contraindication to the surgery. They also argue that Dr. Pothuri properly obtained Walette's informed consent. With respect to Dr. Pua, NYU defendants maintain that as a doctor-in-training under the supervision of Dr. Pothuri, she was not exercising independent medical judgment and therefore cannot be held liable for medical malpractice. The NYU defendants' arguments are supported by an expert affirmation from Dr. John Lovecchio who offers a detailed analysis of the available evidence and concludes, within a reasonable degree of medical certainty, that the care and treatment rendered to Walette did

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<sup>1</sup> Removal of the uterus, cervix, fallopian tubes and ovaries.

<sup>2</sup> After the cervix is removed during a hysterectomy, the top of the vagina that is sewn together is called the "vaginal cuff." Vaginal cuff dehiscence refers to a separation of the vaginal cuff.

<sup>3</sup> A surgical operation in which the end of the small intestine is diverted to the abdominal wall and brought out onto the surface of the skin so that bowel movements and gas can exit the body.

not depart from good and acceptable medical standards of care, and that NYU defendants' actions were not the proximate cause of Walette's claimed injuries. Accordingly, NYU defendants' initial burden for summary judgment has been sufficiently met and the burden shifts to Walette to come forward with proof, in admissible form, to demonstrate that the NYU defendants did in fact commit malpractice and that the malpractice was the proximate cause of Walette's injuries (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, Walette's expert opines that Dr. Pothuri departed from the standard of care and proximately caused Walette's injuries when she recommended and performed a hysterectomy to rule out a malignancy without first availing herself of all other available procedures for this purpose; failed to order a pre-operative bowel preparation in anticipation of extensive bowel adhesions<sup>4</sup> which allowed for post-operative leakage of feces into the abdomen that contributed to abscesses, fistula, and infection; spent three to four intra-operative hours lysing adhesions<sup>5</sup> thereby needlessly increasing Walette's likelihood of sustaining a thermal burn, blood loss, and pulmonary embolism; failed to obtain a surgical consult from a specialist surgeon with greater familiarity of the region consequently increasing the risk of injury to Walette's bowel; failed to convert to an open procedure with greater access to and visualization of the bowel which would have avoided injury to the bowel; and failed to turn over Walette's post-operative care to another attending physician when she went on vacation shortly after Walette's surgery, instead leaving Walette under the care of only residents and fellows who were not equipped to interpret post-operative symptoms, as well as, diagnose and treat the evolving perforation. Based on the foregoing, Walette's expert has sufficiently created an issue of fact with regard to whether Dr. Pothuri and NYU rendered appropriate care to Walette and whether those departures caused Walette's alleged injuries. (*Zuckerman v City of New York*, 49 NY2d 557 [1980].) However, as a fellow working under the supervision and direction of an attending physician, Dr. Pua did not exercise independent

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<sup>4</sup> Bands of scar-like tissue.

<sup>5</sup> Lysis of adhesions is the process of cutting away scar tissue within the body.

medical judgment and will not be held liable for actions taken under the direction Dr. Pothuri (*Buchheim v Sanghavi*, 299 AD2d 229 [1<sup>st</sup> Dept 2002]).

Accordingly, that portion of NYU defendants' motion for summary judgment regarding defendant Tarah Pua is granted. The balance of the NYU defendants' summary judgment motion is denied with respect to defendants Bhavana Pothuri and NYU Medical Center Tisch Hospital. The cross-motion by plaintiffs for leave to amend the bills of particulars is granted and the amended bills of particulars annexed as exhibit 1 to the cross-motion are deemed served.

Plaintiffs are directed to serve a copy of this decision/order with notice of entry by first class mail upon all parties within 30 days of receipt of same. This constitutes the decision and order of this court.

June 26, 2018  
Dated

  
Hon.

Joseph E. Capella, J.S.C.