Hammond v Marchbein
2019 NY Slip Op 34837(U)
October 28, 2019
Supreme Court, Nassau County
Docket Number: Index No. 602960-15
Judge: Robert A. Bruno
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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CECELIA HAMMOND and THOMAS HAMMOND,

TRIAL/IAS
PART 12

Plaintiffs,

-against-

Index No.: 602960-15
Submission Date: 8-5-19
Motion Sequence: 004, 005

HARVEY S. MARCHBEIN, M.D., CHARLES MILITANA, M.D., TRACY CATLIN, M.D., BIRTE J. WOLFF, M.D., DANIEL WALZ, M.D., PREFERRED WOMEN'S HEALTH and NORTH SHORE LONG-ISLAND JEWISH HEALTH SYSTEM, INC.,

DECISION & ORDER

Defendants.

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Sequence #004	
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition	2
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Sequence #005	
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition	2
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This motion by the defendant Charles Militana, M.D. for an order pursuant to CPLR §3212 granting him Summary Judgment dismissing the Complaint and any and all cross-claims against him (Sequence #004) is determined as provided herein.

This motion by the defendants Tracy Catlin, M.D., Birte J. Wolff, M.D., Daniel Walz, M.D., and North Shore-Long Island Jewish Health Systems, Inc. ("the Hospital") for an order pursuant to CPLR §3212 dismissing the complaint and any and all cross-claims against them (Sequence #005) is determined as provided herein.

The plaintiffs in this action seek to recover damages for medical malpractice. They allege that defendant surgeon Dr. Marchbein and the defendant anesthesiologist Dr. Militana were negligent in causing and failing to diagnose and timely treat the plaintiff Cecelia Hammond's ("the plaintiff") uterine perforation and transection of her ureter which she suffered during her hysteroscopy and dilation and cutterage procedure that was performed at the Hospital on January 24, 2014. They also allege that the Hospital and its employees, the defendant Emergency Room physician Dr. Catlin, the defendant Obstetric/Gynecological ("Ob/Gyn") resident Dr. Wolff and the defendant Radiologist Dr. Walz acted negligently in their medical care of the plaintiff when she presented to the Hospital's Emergency Room on January 25th by failing to diagnose and treat the aforementioned injuries. The plaintiffs allege that the two day delay in diagnosing her injuries caused her to suffer unnecessary pain. Drs. Militana, Catlin, Wolff and Walz as well as the Hospital seek summary judgment dismissing the complaint against them.

The facts pertinent to the determination of these motions are as follows:

In January 2014, the plaintiff began complaining to her private attending Ob/Gyn Dr. Marchbein that she was experiencing unusual vaginal bleeding. A sonohysterogram revealed an endometrial mass measuring approximately 7.8 millimeters by 6.1 millimeters. Dr. Marchbein diagnosed the plaintiff with a uterine polyp which required a dilation and cutterage ("D&C") procedure. The plaintiff underwent a hysteroscopy and a D&C procedure to address her symptoms and suspected uterine polyp a/k/a uterine fibroids at an ambulatory surgery center of the Hospital on January 24, 2014. Her pre-operative diagnosis was an "intrauterine mass." Dr. Marchbein performed the surgery. Dr. Militana was the attending anesthesiologist. He was assisted by a Certified Registered Nurse Anesthesiologist ("CRNA").

Prior to the surgery, Dr. Militana met with the plaintiff in the pre-operative area to conduct a pre-anesthesia evaluation. He established the plaintiff's medical history including her experience with anesthesia, her family history regarding anesthesia and

her current medications, allergies, airway anatomy, ASA classification and discussed his plan with her which included general anesthesia with an endotracheal tube. The endotracheal tube was required instead of a laryngeal mask due to the plaintiff's morbid obesity. Dr. Militana's plan included the medications/anesthetics Sevoflurane, Propofol, Versed, Fentanyl, Succinylcholine and Rocuronium. Dr. Militana was present when the anesthesia was begun and stopped and was available for consultation with the CRNA throughout the entire procedure. The remainder of the administration of the anesthesia was performed by the CRNA, again, under Dr. Militana's supervision.

Dr. Militana recalled at his examination-before-trial that he was present for the induction of the plaintiff's anesthesia as well as the emergence but he was unable to recall whether he was present in the operating room at other times. He recalled however that he was always available to consult with the CRNA. Dr. Marchbein testified at his examination-before-trial that Dr. Militana was not present during the monitoring portion of the procedure. Dr. Marchbein's operative report reflects that the plaintiff's cervix was difficult to see due to the length of her vagina and its narrowness. It also noted that the plaintiff was moving "quite a bit" during the surgery which resulted in the plaintiff being given "twice the normal amount of anesthesia." Dr. Marchbein testified at his examination-before-trial that the information regarding the sedative was related to him by the CRNA. Dr. Marchbein's report also noted that the procedure had to be halted twice due to the plaintiff's movements. At his examination-before-trial, Dr. Marchbein testified that the plaintiff's first movement occurred prior to the beginning of the procedure and he discussed it with the CRNA. Only after additional anesthesia was administered did he continue with the procedure. Dr. Marchbein testified at his examination-before-trial that the plaintiff subsequently moved again during the actual procedure and that he discussed that with the CRNA, too. The second movement is described in Dr. Marchbein's operative report as "lifting [of] her body up in the area from buttocks to the head." At his examination-before-trial, Dr. Marchbein testified that the resection had begun when the plaintiff was noted to be moving for the second time. The operative hysteroscope was in her uterine cavity at that time. He immediately discontinued the electrical impulse of the operative hysteroscope when he noticed the plaintiff moving. Dr. Militana's anesthesia report does not reflect any movement during the surgery by the plaintiff however he testified at his examination-before-trial that that is not something that is usually documented. The intrauterine mass was ultimately resectioned and sent to pathology along with endometrial curettings from

the D & C. The operative report notes that the plaintiff was sent to recovery in good condition and that when she was discharged, her vaginal bleeding was scant. The plaintiff's post-operative diagnosis added "probable submucous fibroid."

The plaintiff testified at her examination-before-trial that the evening following the surgery, she contacted Dr. Marchbein twice. The first time she complained of heavy bleeding and was advised to continue to observe it. She later called complaining of pain in her abdomen, back and pelvic area, heavy bleeding, vomiting and blood in her urine which she noticed in the toilet bowl and described as the color of cranberry juice. Her husband, the plaintiff Thomas Hammond, testified at his examination before trial regarding these symptoms, too and added that the plaintiff complained of feeling nauseous. The plaintiff testified that Dr. Marchbein told her to take ibuprofen for the pain and not to worry; that all of this was normal and that he would see her the following week.

The plaintiff presented at the Hospital's Emergency Room in the morning of January 25, 2019 reporting a history of nausea, vomiting and left lower abdominal and back pain. She did not presently complain of any pain nor did she have a fever or chills. She reported that her vaginal bleeding had stopped. She reported that she was given narcotics after her procedure the previous day, which she does not normally take. She was seen by the attending Emergency Room physician defendant Dr. Catlin. Dr. Catlin found that the plaintiff did not have a fever and that her vital signs were all normal. Dr. Catlin's examination of plaintiff was normal. The plaintiff refused a vaginal exam. Dr. Catlin ordered blood work, a urinalysis, abdominal and chest x-rays, an EKG and an Ob/Gyn consult. The plaintiff's white blood cell count was high, as were her neutrophils. Her sodium was low and her glucose was mildly elevated. Large amounts of ketones and blood were observed in her initial urinalysis. A subsequent urinalysis showed large amounts of ketones too, and a moderate amount of blood. Dr. Catlin testified at her examination-before-trial that the plaintiff's blood test results were consistent with her complaints and history. The plaintiff's abdominal examination was also normal. Dr. Catlin ordered normal saline and Zofran to treat the plaintiff's nausea, after which she reported feeling better. She also ordered Pepcid for the plaintiff's abdominal pain and an antibiotic because she suspected a urinary tract infection. While an antibiotic was ordered, the plaintiff's medical records do not indicate that it was ever administered. However, Dr. Catlin testified at her examination-before-trial that it was in fact administered due to the

presence of white blood cells in her urine and a concern that she might have a urinary tract infection.

X-rays were performed and the results were read by Radiologist defendant Dr. Walz. He had been advised that the plaintiff had undergone a gynecological procedure the previous day and was asked to check for free air. Plaintiff's abdominal x–ray consisted of a single upright view and did not indicate any evidence of free intra-abdominal air. A non-specific bowl pattern of gas was observed. The chest x-ray did not indicate any evidence of subdiaphragmatic free air, either. Dr. Walz testified at his examination-before-trial that radiologists look for free air under a patient's diaphragm and neither of the plaintiff's x-rays indicated any evidence of subdiaphragmatic free air. Thus, Dr. Walz did not find signs of intra-abdominal air which would have indicated a possible uterine or abdominal perforation. Dr. Walz recommended that *if* clinical concerns persisted, cross-sectional imaging be done.

The plaintiff was also seen by the defendant Dr. Wolff, a second year Ob/Gyn resident, who acted at all times under the direct supervision of non-party Ob/Gyn Dr. Oppenheim. Dr. Oppenheim was Dr. Marchbein's partner and the attending physician on call for his practice that day. Their notes reflect that the plaintiff vomited twice after dinner the night before and twice that morning. She reported that her abdominal pain had stopped after she took ibuprofen and that her vaginal bleeding had stopped. She also reported feeling better after receiving saline and Zofran. She continued to refuse a vaginal examination. Drs. Wolff and Oppenheim reviewed the results of the tests which did not show intra-abdominal air which would have been indicative of a uterine rupture. They also examined the plaintiff. She did not show any abdominal pain as there was no abdominal rebounding or guarding. In fact, the plaintiff reported that her abdominal pain had improved. Neither physician suspected a uterine perforation since the plaintiff's vaginal bleeding had stopped, her abdominal exam was normal, her vital signs were stable, and the other test results were not indicative of that condition, either. Plus, the plaintiff reported feeling considerably better. The Ob/Gyn discussed with Dr. Catlin that the amount of water in the plaintiff's uterus the previous day may have caused hyponatremia which caused her nausea. Dr. Oppenheim accordingly recommended that the plaintiff be discharged and told to follow up with her treating doctor on an out-patient basis. Based on all of the foregoing, Dr. Catlin discharged the plaintiff and instructed her to follow up with Dr. Marchbein on Monday, January 27th but to return to the Emergency Room if her pain worsened, she developed a fever or chills, her vaginal bleeding worsened or if she had

any other concerns. Dr. Catlin's ultimate conclusion was that the plaintiff had suffered from nausea and hyponatremia, i.e., low sodium levels. She did not suspect a uterine rupture and did not order any additional tests.

A note in Dr. Marchbein's records indicates that the plaintiff contacted his office again later that same day complaining of nausea and vomiting and she was instructed to return to the Emergency Room. She did not do so. Another note of that evening reflects that the Hospital called Dr. Marchbein's office and related the details of her visit that day. Her elevated white cell count was noted and it was advised that it be checked at her post-operative appointment.

The plaintiff contacted Dr. Marchbein's office on January 27th complaining of nausea, "some" abdominal pain, and an inability to move her bowels over the weekend. While she reported that her vaginal bleeding had stopped, she did note that she experienced slight bleeding when active. She reported having gone to the Hospital over the weekend and that she had been very gassy. The plaintiff was instructed to walk and stay hydrated to relieve her symptoms. She was also instructed to make a follow up appointment with Dr. Marchbein as well as with a GI doctor. Later that day, the plaintiff's surgical pathology report was received by Dr. Marchbein and the preliminary findings indicated the presence of fragments of benign ovarian tissue and mature adipose tissue, indicating a possible intra-operative rupture of the plaintiff's uterus and/or transection of her ureter. Dr. Marchbein contacted the plaintiff and had her return to the Hospital that day for a laparoscopy of her abdomen. He also discussed the possibility of a laparotomy and bowel surgery if there had been a bowel perforation. The plaintiff initially resisted Dr. Marchbein's instructions since she was feeling better every day, but after Dr. Marchbein explained the potential severity of her possible intra-abdominal injuries, the plaintiff acquiesced and returned to the Hospital as he instructed.

From January 27th through February 4th, 2014, the plaintiff underwent a number of tests and procedures. More specifically, on January 27th the plaintiff underwent a laparoscopy that revealed a perforation in the "posterior fundal aspect on the left side of the uterus with a small hole in the mesoperitonem." She was ultimately diagnosed as having suffered a perforation of her uterus and a transection of her left ureter. There was no active bleeding or evidence of an infection or sepsis. An intra-operative General Surgery consult was held and a rigid proctosigmoidoscopy was performed to determine whether the plaintiff had sustained a bowel perforation.

No evidence of a bowel injury was found. An intra-operative consult was also held to discuss a suspected ureteral injury as a result of which a cystoscopy, left retrograde pyelogram and exploratory laparotomy were done. That procedure revealed an 80% transection of the ureter just distal to the iliac vessels. A ureteroneocystostomy was performed to repair the plaintiff's ureteral injury. The plaintiff tolerated the procedures well and was sent to the recovery room in good condition. There continued to be no active bleeding or signs of an infection. The plaintiff was discharged on February 4th with instructions to follow up with a urologist. On February 7th , she reported feeling well and had no complaints or difficulties.

In their Bill of Particulars, the plaintiffs allege that the Hospital and Drs. Militana, Catlin, Wolff and Walz committed medical malpractice by, inter alia, failing to appreciate the plaintiff's signs and symptoms indicative of a perforation, including significant abdominal pain, heavy vaginal bleeding, nausea and vomiting and her recent procedures; improperly administering and reading her abdominal x-ray; failing to properly read the diagnostic test results including the pathology report and to order and conduct further diagnostic tests, including a diagnostic laparoscopy, exploratory laparotomy and CT scan; failing to refer the plaintiff to various specialists; failing to coordinate her care with Dr. Marchbein; failing to timely and properly diagnose the plaintiff's perforated uterus/urethra; and, discharging her prematurely on January 25th.

"The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage (citations omitted)" (*Stiso v Berlin*, __ AD3d__, 2019 WL 5057390 at *1 [2d Dept Oct. 9, 2019]. "To prevail on a motion for summary judgment in a medical malpractice action, a defendant must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries (citations omitted)" (*Stiso v Berlin*, 2019 WL 5057390 at * 1). Standing alone, negligent medical care does not provide grounds for a recovery. There must be damages that are a result of that negligence for a plaintiff to recover for medical malpractice. Absent causation, liability does not lie (*Anonymous v Gleason*, 175 AD3d 614, 617 [2d Dept 2019]). Once the defendant meets his or her burden, "the burden then shifts to the plaintiff to produce evidence in admissible form sufficient to establish the existence of triable issues of fact" (*Stiso v Berlin*, 2019 WL 5057390 at *1 , citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Stukas v Streiter*, 83 AD3d 18, 25–26 [2d Dept 2011]). " [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 (quotations and citations omitted)" (*Alvarez v Gerberg*, 83 AD3d 974, 975 [2d Dept 2011]). "A plaintiff need only demonstrate the existence of a triable issue of fact as to those elements on which the defendant met the prima facie burden (quotations and citations omitted)" (*In Sook Choi v Doshi Diagnostic Imaging Services, P.C.*, 152 AD3d 750, 751-52 [2d Dept 2017]). "Although conflicting expert opinions may raise credibility issues which can only be resolved by a jury, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact (citations omitted)" (*Wagner v Parker*, 172 AD3d 954, 955 [2d Dept 2019]). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on specifically cited evidence in the record (quotations and citations omitted)" (*Wagner v Parker*, 172 AD3d at 955). " 'An expert opinion that is contradicted by the record cannot defeat summary judgment' " (*Wagner v Parker*, 172 AD3d at 955, quoting *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [2d Dept 2017]).

"Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient.... " (*Wasserman v Staten Is. Radiological Assoc.*, 2 AD3d 713, 714 [2d Dept 2003], citing *Chulla v DiStefano*, 242 AD2d 657, 658 [2d Dept 1997], lv. dismissed, 91 NY2d 921 [1998]; *Markley v Albany Med. Ctr. Hosp.*, 163 AD2d 639, 640 [3d Dept 1990]). Generally, radiologists have the limited role of interpreting films and documenting their findings; They do not "assume[] a general duty of care to schedule or urge further testing, or diagnose the plaintiff's medical conditions" (*Mosezhnik v Berenstein*, 33 AD3d 895, 897 [2d Dept 2006]). Similarly, anesthesiologists' duties are generally limited "to administering anesthesia to patient, monitoring her vital signs and managing her airway...." (*Schallert v Mercy Hosp. Of Buffalo*, 281 AD2d 983 [4th Dept 2001]).

The anesthesiologist Dr. Militana has submitted the affirmation of Board Certified Anesthesiologist Dr. Mark Abel in support of his motion. Having reviewed the pertinent legal and medical records, he opines to a reasonable degree of medical certainty as follows:

Dr. Abel opines that Dr. Militana was the attending anesthesiologist to the plaintiff on January 24, 2014, that he properly supervised the CRNA's administration of anesthesia, and that she properly administered anesthesia to the plaintiff. He also opines that the CRNA's recording of the plaintiff's vital signs during the procedure that day is not at all indicative of aggressive movement by the plaintiff during the procedure or a failure by her to address any such movement. He concludes that Dr. Militana's care and involvement in the plaintiff's care that day did not deviate from the standard of care. Dr. Abel opines that it was appropriate for Dr. Militana to supervise CRNAs in two operating rooms and his doing so on the day in question did not deviate from the standard of care. He also opines that the use of general endotracheal anesthesia was appropriate in light of the plaintiff's obesity and that she was properly intubated. He also opines with specificity that the dosages of anesthesia provided to the plaintiff during the induction, maintenance and emergence phases of the procedure were normal and appropriate. He notes that the anesthesia record does not mention any movements by the plaintif while on the operating table and more importantly, there is no indication that her blood pressure or heart rate increased rapidly, which would have occurred had there been any movement. He opines that the dosages of anesthesia were properly increased on two occasions. He explains that some movement on the operating table is virtually inevitable as that can happen as the result of a reaction to surgical stimuli, a spinal reflex, or during induction and/or emergence. He opines that if the plaintiff did move at all, it was properly addressed with additional narcotics and paralytics by the CRNA. He opines that the CRNA was not required to consult with Dr. Militana regarding these issues as there is no specific anesthesia protocol to follow when a patient moves; It is standard to administer increased dosages of anesthesia. He notes that the Hospital's records do not reflect any movement by the plaintiff, either, during the procedure.

Dr. Abel opines that numerous inappropriate allegations of wrongdoing have been advanced against Dr. Militana as they fall outside of his role in treating the plaintiff. For instance, Dr. Militana was not responsible for diagnosing a surgical injury during surgery or theater; In fact, he is not really even capable of doing so given his positioning during the procedure. He notes that Dr. Militana had no role in reading x-rays, the pathology report or other test results; in treating the plaintiff's symptoms post-surgically; in making referrals to specialists; in the plaintiff's care following the surgery; or in discharging her. Dr. Abel opines that there was nothing about the administration of the plaintiff's anesthesia that warranted coordination with other doctors, including the surgeon. As for Dr. Militana's alleged failure to diagnose

the plaintiff, again that was not his responsibility and in any event, there are no indications whatsoever that the plaintiff exhibited any symptoms prior to her discharge from the Hospital on January 24th, which is when Dr. Militana's contact with the plaintiff ended.

In conclusion, Dr. Abel opines that Dr Militana and the CRNA's acted appropriately in their selection of anesthesia as well as in the induction, maintenance and extubation of the plaintiff.

As for causation, Dr. Abel notes that the plaintiff's ultimate fate would have been the same had her condition been diagnosed on January 24th. The delay in diagnosis did not cause any damages. The procedures performed January 27th did not reveal any active bleeding, nor did the plaintiff develop an infection or sepsis. The resulting care necessary would have been identical to the treatment provided had the diagnosis been made sooner. More importantly, there is no evidence that the plaintiff suffered any more than she would have. She even repeatedly reported that her condition improved from the 25th at the Emergency Room until she was ultimately diagnosed. Therefore, assuming, arguendo, that any of the moving defendants' care and treatment of the plaintiff deviated from prevailing medical standards, they cannot be held responsible here due to the lack of proximate cause.

Dr. Militana has established that the care and treatment he provided the plaintiff on January 24, 2014 conformed with acceptable medical standards of care and that his care of her did not deviate therefrom. He has also established that none of his acts or omissions were a proximate cause of the plaintiff's injuries. The burden accordingly shifts to the plaintiff to establish the existence of material issues of fact with respect to both malpractice and causation.

The Emergency Room physician Dr. Catlin has submitted the affirmation of Dr. Gregory Mazarin who is Board Certified in Emergency Medicine. Having reviewed the pertinent legal and medical records, he opines to a reasonable degree of medical certainty as follows:

Dr. Mazarin opines that Dr. Catlin did not depart from the accepted standards of medical care in her care and treatment of the plaintiff and that nothing she did or failed to do was a proximate cause of her injuries. He opines that Dr. Catlin timely assessed the plaintiff, ordered diagnostic and imaging tests and requested an Ob/Gyn

consult. He opines that since the plaintiff was not experiencing active bleeding or significant abdominal or pelvic pain, there was no need to insist on a vaginal exam. He opines that the results of the plaintiff's blood work and diagnostic tests were consistent with her reported vomiting and the D & C procedure she underwent the day before. He also opines that the blood stain in her urine was also a possible result of that procedure and was not unexpected. He notes that the imaging studies did not indicate the presence of intra-abdominal air. In light of the foregoing, Dr. Mazarin opines that there was absolutely no basis to order a CT scan or an MRI. Again, the plaintiff's x-rays were normal, she did not have a fever or any signs of an infection and she reported that she was feeling better. Therefore, Dr. Mazarin opines that the plaintiff's allegation that Dr. Catlin failed to appreciate her symptoms that were indicative of a perforation, including significant abdominal pain, heavy vaginal bleeding, nausea and vomiting and her recent procedure is purely unfounded as there is no evidence of them.

Dr. Mazalin also opines that Dr. Catlin properly relied on the findings and opinions of the Ob/Gyn doctors - in particular Dr. Oppenheim - regarding their impression of the plaintiff's symptoms and complaints, and that it was reasonable for her to rely on them for their opinion regarding a possible uterine perforation in light of their specialty. He opines that it was not in Dr. Catlin's expertise as an Emergency Room physician to order additional tests to explore the possibility of a uterine perforation in light of the plaintiff's status and the results of the tests that had been done. He concludes that in light of the absence of vaginal bleeding and free air in the plaintiff's chest and abdomen, it was reasonable for Dr. Catlin to discharge the plaintiff as she did with instructions to follow up with her treating doctor. He notes that her symptoms did not worsen and she in fact reported feeling better following her discharge from the Emergency Room, which is a further indication that she did not present with signs or symptoms indicative of a perforated uterus in the Emergency Room that day. Similarly, there were no indications of any need for further testing.

Dr. Mazarin also opines that there was no acts or omissions by Dr. Catlin that caused the plaintiff's uterine perforation: they were a direct result of the surgery performed by Dr. Marchbein on January 24th. Therefore, the following surgeries were inevitable. In addition, he notes that there is no evidence that the delay resulted in any additional pain or suffering by the plaintiff. The surgery on January 27th did not reveal active bleeding or infection so no additional treatment became necessary. And,

the plaintiff reported feeling progressively better after her discharge up until the time she was diagnosed.

Dr.Catlin has established that the care and treatment she provided the plaintiff on January 24, 2014 conformed with acceptable medical standards of care and that her care of plaintiff did not deviate therefrom. She has also established that none of her acts or omissions were a proximate cause of the plaintiff's injuries. The burden accordingly shifts to the plaintiff to establish the existence of material issues of fact with respect to both malpractice and causation.

In support of his motion, Dr. Walz has submitted the affirmation of Board Certified Diagnostic Radiologist Dr. Craig Sherman. Having reviewed the pertinent legal and medical records including the relevant radiographic studies, he opines to a reasonable degree of medical certainty as follows:

Dr. Sherman opines that Dr. Walz's limited role in the plaintiff's care on January 25th , i.e., his reading of x-rays of her abdomen and chest, was performed in accordance with good and accepted medical practices and that in any event, nothing he did or failed to do was a proximate case of the plaintiff's injuries. He notes that an overwhelming number of alleged wrongdoings by Dr. Walz are entirely inapplicable in view of his very limited role here. He explains that a radiologist is limited to his subspecialty which involves reviewing and interpreting radiological studies that have been ordered by the treating physicians. The clinical information conveyed to a radiologist is very limited, therefore, radiologists do not assume the clinical purview of ordering further tests which may be invasive, inappropriate, fraught with risks and or contraindicated. Nor does a radiologist's role include offering exhaustive and rare differential diagnoses. Dr. Walz played no role in assessing or treating the plaintiff's symptom, diagnosing her, ordering additional tests or the plaintiff's discharge. As for the x-rays, he notes that Dr. Walz was asked to examine the plaintiff's chest and abdomen to see if there was any free intra-abdominal air. Having reviewed those very x-rays, Dr. Sherman agrees with Dr. Walz that they do not show the presence of intra-abdominal free air nor do they indicate any other abnormalities that warranted any further work-up; They were unremarkable. Dr. Sherman also notes that Dr. Walz appropriately concluded that further testing was not indicated and recommended cross-sectional imaging be considered *if* the plaintiff's symptoms persisted. Dr. Sherman in fact opines that given his limited role here, Dr. Walz did not have responsibility for independently ordering additional tests. Dr. Sherman also opines

that none of Dr. Walz's actions or omissions were a proximate cause of the plaintiff's injuries since he fulfilled all of his duties in a competent manner.

Dr. Walz established that his role in treating the plaintiff was limited to reading the x-rays and relaying the results. He also established that he performed his responsibilities in accordance with prevailing medical principles. He did not assume any other duties of care of the plaintiff such as ordering additional tests or diagnosing her. (*Neyman v Doshi Diagnostic Imaging Services, P.C.*, 153 AD3d 538, 546 [2d Dept 2017]; *Meade v Yland*, 140 AD3d 931, 933 [2d Dept 2016]; *Covert v Walker*, 82 AD3d 825, 826 [2d Dept 2011]; *Dockery v Sprecher*, 68 AD3d 1043, 1046 [2d Dept 2009], lv denied 17 NY3d 704 [2011]; *Mosezhnik v Berenstein*, 33 AD3d at 897). He in fact noted that additional tests were possible if the plaintiff's condition changed (*Neyman v Doshi Diagnostic Imaging Services, P.C.*, 153 AD3d at 546).

Dr. Walz has established that the care and treatment he provided the plaintiff on January 24, 2014 conformed with acceptable medical standards of care and that his care of her did not deviate therefrom. He has also established that none of his acts or omissions were a proximate cause of the plaintiff's injuries. The burden accordingly shifts to the plaintiff to establish the existence of material issues of fact with respect to both malpractice and causation.

"A resident who assists a doctor during a medical procedure, and who does not exercise any 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 (citations omitted)" (*Quille v New York City Health and Hosp. Corp.*, 152 AD3d 808, 809 [2d Dept 2017];*France v Packy,* 121 AD3d 836, 837 [2d Dept 2014]; *Muniz v Katlowitz*, 49 AD3d 511, 513 [2d Dept 2008] *Soto v Andaz*, 8 AD3d 470, 471 [2d Dept 2004]). The defendant resident Dr. Wolff's care and treatment of the plaintiff was entirely under the auspices of Dr. Oppenheim. He has demonstrated that he did not exercise any independent judgment in the care and treatment of the plaintiff. His physical examination of the plaintiff and participation in her diagnosis and discharge from care does not demonstrate the exercise of independent medical judgment (*France v Packy,* 121 AD3d at 837). Nor did any of the care provided by Dr. Oppenheim deviate from normal practice to the extent of warranting intervention of any measure by him. The defendants have made a prima facie showing that Dr. Wolff was a resident under the supervision of an attending physician at all relevant times and that the attending

physician did not so greatly deviate from normal practice that Dr. Wolff could be held liable for failing to intervene (*Quille v New York City Health and Hosp. Corp.*, 152 AD3d at 809; *France v Packy,* 121 AD3d at 837; *Muniz v Katlowitz*, 49 AD3d at 513; *Soto v Andaz*, 8 AD3d at 471).

In addition, Dr. Wolff has submitted the affirmation of Board Certified Ob/Gyn Dr. Gary Mucciolo. Having reviewed the pertinent legal and medical records, he opines to a reasonable degree of medical certainty as follows:

Dr. Muccilio opines that the care rendered by Dr. Wolff and accordingly the Hospital did not depart from good and accepted standards of medical care and that none of his acts or omissions were a proximate cause of the plaintiff's injuries. He notes that when Dr. Wolff and Dr. Oppenheim saw the plaintiff, she was not experiencing any active bleeding or abdominal or pelvic pain indicative of a uterine perforation. Therefore, it was reasonable for them to conclude that the plaintiff's nausea and vomiting were related to the surgery she had undergone the previous day as those symptoms are typical in such cases, especially after undergoing anesthesia. There was no concern for vaginal bleeding as it had stopped nor was there concern for abdominal pain since even on examination, she showed no signs of it. Therefore, the plaintiff's allegations that these doctors failed to heed the plaintiff's symptoms of "significant abdominal pain and heavy vaginal bleeding" is simply not supported by the record. Dr. Muccilio opines that in light of the absence of vaginal bleeding and free air in the plaintiff's chest and abdomen, coupled with her normal abdominal exam, it was reasonable for Dr. Wolff, under the supervision of Dr. Oppenheim, to conclude that the plaintiff had not sustained a uterine perforation. He notes that that conclusion was confirmed by the fact that the plaintiff reported feeling better the next two days, indicating that she in fact was not showing signs of such an injury. He also opines that there was no indication for further testing.

Dr. Muccilio also opines that none of Dr. Wolff's - or Dr. Oppenheim's - acts or omissions were a proximate cause of the plaintiff's injuries. It is undisputed that the uterine perforation was the result of the surgery performed by Dr. Marchbein on January 24th. Nor can it be argued that the ensuing treatment would have been any different had the diagnosis been made sooner. Furthermore, the alleged delay in diagnosis did not exacerbate the plaintiff's pain or suffering. She in fact reported feeling progressively better.

Dr. Wolff has established that the care and treatment he provided the plaintiff on January 24, 2014 conformed with acceptable medical standards of care and that his care of her did not deviate therefrom. He has also established that none of his acts or omissions were a proximate cause of the plaintiff's injuries. The burden accordingly shifts to the plaintiff to establish the existence of material issues of fact with respect to both malpractice and causation.

In view of the foregoing, the Hospital has also met its burden of establishing its entitlement to summary judgment dismissing the complaint against it, thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

In opposition to Dr. Militana's motion, the plaintiffs have submitted the affirmation of Board Certified anesthesiologist Dr. Alexander Weingarten. Having reviewed the pertinent legal and medical records, he opines to a reasonable degree of medical certainty as follows:

Dr. Weingarten opines that "there was improper administration of anesthetic agents, a failure to administer adequate paralyzing agents, inadequate communication between the CRNA and [Dr. Militana,] [and] inadequate supervision of the CRNA;" that the care provided by Dr. Militana deviated from the reasonable standards in the medical community; and, that Dr. Militana's care of the plaintiff caused significant and avoidable pain and suffering, including the perforation of the plaintiff's uterus and the transection of her ureter. Dr. Weingarten opines that it is more likely than not that the injury to the plaintiff's uterus and surrounding structures was a consequence of inopportune movement by the plaintiff during the operative procedure. He opines that the excess movement was preventable and was attributable to the failure to provide adequate anesthesia and muscle relaxation agents to paralyze the patient and make her incapable of movement. He notes that the plaintiff first moved before the procedure had begun but necessary and required steps to assure that she remained motionless thereafter were not taken. He opines that had such steps been taken, the second episode of movement during the surgery would have been avoided. He opines that since the plaintiff was already under general anesthesia, adequate doses of paralyzing agents could have been administered without concern for the effects of paralysis on the respiratory muscles and that there was no risk of respiratory insufficiency even if the plaintiff's entire motor system was completely paralyzed throughout the entire surgery. Again, he attributes that plaintiff's injuries to the failure to administer adequate medication in response to the first episode of

movement and that it is more likely than not that the second episode of movement would not have occurred had adequate general anesthetic agents, pain medications, and paralytic agents been administered after the first episode of movement.

Dr. Weingarten focuses on the fact that Dr. Marchbein both recorded in his operative report and testified at his examination-before-trial that the plaintiff moved on the table. There is at a minimum an issue of fact as to whether the plaintiff in fact did so. However, insofar as Dr. Weingarten opines that the plaintiff was not given proper anesthetic agents, he completely fails to articulate what anesthetics and dosages were incorrect or what anesthetics or dosages should have been administered. He fails to specify what anesthetic was improperly administered, whether too much or too little was provided and how much was in fact appropriate and should have been given. He also entirely fails to address or refute Dr. Abel's opinion that movement can happen absent any negligence on account of external factors and that any dramatic movement on the operating table by the plaintiff would have been reflected in her blood pressure and heart rate, which was not the case here. Significantly, he has not disagreed with that fact. Dr. Weingarten's affirmation is unacceptably conclusory as it fails to address pivotal facts relied on by Dr. Militana. The plaintiff has accordingly failed to establish the existence of a material issue of fact with respect to Dr. Militana's care and treatment of the plaintiff (*Gilmore v Mihail*, 174 AD3d 686, 688 [2d Dept 2019]).

The plaintiffs have not submitted an expert's affidavit or affirmation in opposition to Dr. Walz's application. It has failed to addresses Dr. Walz's role here and to identify any act or omission by him that departed from the applicable standards of care and contributed to the plaintiff's injuries. Therefore, the plaintiffs have failed to establish the existence of material issue of fact with respect to Dr. Walz as well (*Koster v Davenport*, 142 AD3d 966, 969 [2d Dept 2016] lv denied, 28 NY3d 911 [2016], citing *Webb v Scanlon*, 133 AD3d 1385, 1387[4th Dept 2015]; *Rivers v Birnbaum*, 102 AD3d 26, 48 [2d Dept 2012]; *D'Elia v Menorah Home and Hosp. for the Aged & Infirm*, 51 AD3d 848, 851 [2d Dept 2008]).

In opposition to Dr. Wolff's application, the plaintiffs have submitted the affidavit of Board Certified Ob/Gyn Dr. John Garafolo. Having reviewed the pertinent legal and medical records, he opines to a reasonable degree of medical certainty as follows:

Like Dr. Weingarten opined with respect to Dr. Militana, Dr. Garafolo opines with respect to Dr. Wolff that "there was improper administration of anethetic agents, a failure to administer adequate paralyzing agents, inadequate communication between the CRNA and [Dr. Wolff] [and] inadequate supervision of the CRNA" and that the care provided by Dr. Wolff deviated from the reasonable standards in the medical community and caused significant and avoidable pain and suffering, including the perforation of the plaintiff's uterus and the transection of her ureter.

Dr. Garafolo opines that the plaintiff presented at the Emergency Room with worsening abdominal pain and nausea following the procedure the day before. He notes that Dr. Wolff admitted at her examination-before-trial that uterine perforation was a known complication of a D & C hysteroscopy and so it is always part of the differential diagnosis. Dr. Garafolo faults Dr. Wolff for failing to recognize signs of an infection, more specifically, elevated white cell counts with a relative proliferation of neutrophils. He opines that those signs indicated a need for an erythrosyte sedimentation rate and C-reactive protein level tests the results of which would have enabled an earlier diagnosis. In addition, he opines that imaging by CT scan of the abdomen and pelvis were also indicated and the failure to conduct those exams were departures from the standard of care. He also faults Dr. Wolff for failing to recognize the significance of the blood in the plaintiff's urine. While he acknowledges that the blood may have been a result of blood seeping from the uterus, "when such blood is encountered in a sample, the repeat urine analysis should be obtained by catheterizing the urethra, assuring that no such seepage was responsible for the blood," which was not done here. Dr. Garafolo also faults Dr. Wolff for "failing to heed the advice of the radiologist in obtaining additional radiological testing in order to exclude the possibility of free air in the abdominal cavity" to rule out the presence of free air. He theorizes that Dr. Walz himself recognized that the single view studies performed by him were inadequate to completely exclude the possibility that free air was present. He opines that both Dr. Wolff and Dr. Catlin relied entirely on a physical exam in concluding that there was no free air present which was violative of the standard of care. In conclusion, he opines that the "combined findings of blood, urine, and radiology testing favored the possibility that the progressive pain and nausea was a consequence of an intra-operative complication" and that Drs. Wolff and Catlin failed to consider this, which lead to the plaintiff's premature discharge. He opines that had further investigation been done, the diagnosis of the uterine perforation and transection of the ureter would have been made two days earlier and spared the plaintiff's two days of pain and suffering.

Dr. Garafolo has entirely failed to address the fact that Dr. Wolff was acting solely under the auspices of Dr. Oppenheim and exercised no independent medical judgment whatsoever and therefore cannot be held liable here. In any event, his opinions regarding Dr. Wolff's actions are contradicted by the record. For instance, he faults Dr. Wolff for failing to recognize that the plaintiff's elevated white count indicated the possibility of an infection and should have prompted further testing. The plaintiff however never displayed any infection whatsoever even after the surgery on January 27th , therefore, the failure to test for infection was of no consequence. And, while Dr. Garafolo opines that further testing for infection would have made the diagnosis easier, he has failed to explain how so, especially since there never was any infection and those tests would have been negative. Furthermore, no correlation between infection and the ultimate diagnosis has been made. In fact, in Reply, the defendants have established that the tests that Dr. Wolff is alleged to have failed to have performed are generally used to diagnose autoimmune disorders and infections, not a uterine perforation. Similarly, while Dr. Garafolo opines that a CT scan was indicated, he fails to explain why or what relevance it would have had. Dr. Garafolo's opinion that further urine testing was indicated to test for blood is also unexplained. He has provided no basis for finding that further urine testing would have yielded useful information in diagnosing the plaintiff's uterine perforation; Again, the correlation is absent rendering this conclusion purely speculative. Likewise, Dr. Garafolo's conclusion that Dr. Wolff failed to follow through on the radiologist's "recommendation" that additional testing be done is also not supported by the record. While Dr. Walz reported that his study was limited, he said it was limited because it only evaluated whether there was free air following the plaintiff's procedure. He never said it was inadequate and he only recommended further testing *if* the plaintiff's status changed and it did not. Similarly unsupported is Dr. Garafolo's conclusion that the plaintiff's pain and nausea progressed during her admission on January 25th. The evidence is directly to the contrary.

Dr. Garafolo has failed to establish the existence of any material issue of fact with respect to the care and treatment provided to the plaintiff by Dr. Wolff.

The plaintiff has submitted the affidavit of Board Certified Internist Dr. Ira Mehlman in opposition to Dr. Catlin's application. Having reviewed the pertinent legal and medical records, he opines to a reasonable degree of medical certainty as follows:

Dr. Mehlman opines that the plaintiff presented at the Emergency Room "with worsening abdoinal pain and nausea." He opines that there were several departures from the standard of care on Dr. Catlin's part that led to the plaintiff's negligent premature discharge on Saturday January 25th and prevented a timely diagnosis of her injuries.

Dr. Mehlman opines that "there was a failure to recognize signs of the uterine rupture and ureteral injury that were present when [the plaintiff] presented to the Emergency Room" and that "the care rendered to [her] by [Dr. Catlin] departed from the standards of care in failing to recognize and investigate these signs." He opines that these "deviations caused significant and avoidable pain and suffering, as a consequence of the delay in recognition and treatment of the perforation of the uterus and the transection of the uterer." As Dr. Garafolo faulted Dr. Wolff, he faults Dr. Catlin for failing to recognize the significance of the plaintiff's elevated white blood cells with a relative proliferation of neutrophils and for failing to have the aforementioned tests performed. In addition, he opines that imaging by CT scan of the abdomen and pelvis were also indicated and the failure to conduct those exams were departures from the standard of care. Also like Dr. Garafolo faulted Dr. Wolff, Dr. Mehlman faults Dr. Catlin for failing to recognize the significance of the blood in the plaintiff's urine and failing to perform the aforementioned tests. Dr. Mehlman also opines that the administration of the antibiotic Rocephin was a departure from accepted standards. He opines that there was inadequate evidence of a urinary tract infection because the white cells in urine could have ben an offshoot of the blood in the urine and not a sign of a urinary tract infection. And, assuming, arguendo, that the white cells were a sign of a urinary tract infection, this was not a proper antibiotic or method of administration. Once again, like Garafolo faulted Dr. Wolff, Dr. Mehlman faults Dr. Catlin for "failing to heed the advice of the radiologist in obtaining additional radiological testing in order to exclude the possibility of free air in the abdominal cavity." Like Dr. Garafolo, Dr. Mehlman opines that had further investigation been done, the diagnosis of the plaintiff's uterine perforation and transection of the ureter would have been made two days earlier and spared her two days of pain and suffering.

Much like Dr. Garafolo's opinion, Dr. Mehlman's conclusions and findings are not supported by the record. And, Dr. Mehlman fails to address the fact that Dr. Catlin was entitled to rely on the Ob/Gyn Dr. Oppenheim's actions here with respect to diagnosing the plaintiff's injuries. As for the antibiotic, Dr. Mehlman has failed to

establish the existence of issues of fact that the plaintiff suffered any injury assuming that it did not conform with the applicable standards.

Finally, assuming, arguendo that the plaintiffs' experts raised an issue of fact with respect to Drs. Militana, Catlin, Wolff and Walz's care and treatment of the plaintiff, they have not demonstrated that any alleged mistreatment by any of them was a proximate cause of the plaintiff's injuries. The plaintiff's allegation that she endured several days of pain and suffering while waiting for the results of the pathology report is not supported by the record which clearly indicates to the contrary.

In conclusion, the defendants' Drs. Militana, Catlin, Wolff and Walz as well as the Hospital have established their entitlement to summary judgment dismissing the complaint and any and all cross-claims against them. The plaintiffs have failed to establish the existence of any material issue of fact. Their motions are granted in their entirety and the complaint and any and all cross-claims against them are dismissed.

This constitutes the Decision and Order of this Court.

Dated: October 28, 2019
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.

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NASSAU COUNTY
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