Lopata v Mamdani
2020 NY Slip Op 34629(U)
April 27, 2020
Supreme Court, Orange County
Docket Number: Index No. EF001858-2017
Judge: Robert A. Onofry
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY,.J.S.C.

SUPREME COURT : ORANGE COUNTY
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ALLAN LOPATA and MARGARET LOPATA,
Plaintiffs,

- against –

SOHAIL MAMDANI, D.O., ST. ANTHONY COMMUNITY HOSPITAL, BON SECOURS CHARITY HEALTH SYSTEM, INC. and MIDDLETOWN MEDICAL, P.C.
Defendants.
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF001858-2017

DECISION AND ORDER

Motion Dates: February 26, 2020

The following papers numbered 1 to 13 were read and considered on (1) a motion by the Defendants St. Anthony Community Hospital and Bon Secours Charity Health System, Inc., pursuant to CPLR 3112, for a summary judgment dismissing the complaint and all cross claims insofar as asserted against them; and (2) a motion by the Defendants Sohail Mamdani, D.O. and Middletown Medical, P.C,, pursuant to CPLR 3112, for a summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

Notice of Motion- Poles Affirmation- Exhibits A-O- Memorandum of Law	1-4
Notice of Motion- Fierro Affirmation- Exhibits A-J- Peralo Affidavit	5-8
Affirmation in Opposition- Novick- Exhibits 1-14- Lopata Affirmation	9-11
Affirmation in Reply- Poles	12
Affirmation in Reply- Fierro	13

Upon the foregoing papers, it is hereby,

ORDERED, that the motions are granted in part and denied in part, as set forth herein.

Introduction

The Plaintiffs commenced this action, *inter alia*, to recover damages allegedly arising from medical malpractice that occurred in December of 2014. The Plaintiffs allege, *inter alia*,

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that the Defendant Sohail Mamdani, D.O. negligently performed a laparoscopic cholecystectomy (gallbladder removal, a/k/a Lap Chole) and engaged in negligent post-operative care.

The Plaintiffs allege that the Defendants St. Anthony Community Hospital ("SACH") and Bon Secours Charity Health System, Inc. ("BSCHS") (hereinafter referred to collectively as the "St. Anthony Defendants") negligently granted privileges to Dr. Mamdani and may be held vicariously liable for his negligence.

Disclosure is now complete and a note of issue was filed on or about September 13, 2019.

The Defendants Sohail Mamdani, D.O. and Middletown Medical, P.C. (hereinafter referred to collectively as the "Mamdani Defendants") now move for a summary judgment seeking dismissal of the complaint and all cross claims insofar as asserted against them.

SACH and BSCHS move for a summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

The motions are, in the main, denied.

The St. Anthony Defendants' Motion

In support of their motion, the St. Anthony Defendants submit an affirmation from counsel, Carol Poles.

Poles asserts the following as relevant background facts.

On December 10, 2014, the Plaintiff Allan Lopata (hereinafter "Lopata") fell ill after eating dinner. In addition to experiencing severe abdominal discomfort, he also complained of shortness of breath. When emergency medical personnel arrived, Lopata began vomiting and he was transported to the emergency room at SACH.

Upon his arrival, Lopata, who had a history of high cholesterol, hypertension,

hypothyroidism and diabetes, reported mild pain. He underwent multiple imaging studies, including a chest x-ray and a CT scan, and laboratory analyses were performed. Ultimately, he was admitted to the hospital with a diagnosis of acute pancreatitis after studies and laboratory results revealed unexplained elevated lipase levels.

Following his admission to SACH, Lopata continued to undergo diagnostic testing. When the results continued to reveal abnormal results, Lopata underwent an Endoscopic Retrograde Cholangiopancreatography (hereinafter "ERCP") with sphincterotomy.

The latter procedure revealed no defects in the common bile duct. However, as a precaution, the duct was swept twice.

Lopata was cleared to undergo a cholecystectomy.

A surgical consult was requested with Dr. Mamdani.

Dr. Mamdani was not an employee of either BSCHS or SACH, but rather was a surgeon employed by co-defendant Middletown Medical, P.C. He was the Director of Bariatric Surgery and General Surgery at Middletown Medical, and had been granted privileges to perform general surgery at SACH.

On December 13, 2014, Dr. Mamdani performed a surgical consult with Lopata, who had continued complaints of abdominal pain. Dr. Mamdani reviewed laboratory results and notes contained in Lopata's chart, and performed a physical examination.

Dr. Mamdani diagnosed Lopata as suffering from pancreatitis/cholelithiasis, and concluded that a laparoscopic cholecystectomy was warranted. Dr. Mamdani recommended that Lopata continue to be on IV fluids and antibiotics to allow his pancreas to "cool down" prior to proceeding with surgery. On December 15th, it was determined that Lopata could undergo a

laparoscopic cholecystectomy.

Poles asserts that, prior to performing the procedure, Dr. Mamdani, in the presence of a nurse, met with Lopata to review the risks associated with such a procedure and obtain his informed consent. Lopata was told that the most common risk associated with the procedure was the possibility of bile leaks following surgery. Lopata consented to the procedure, and signed consent forms.

Dr. Mamdani performed the laparoscopic cholecystectomy to remove Lopata's gallbladder.

Following the surgery, Lopata continued to experience pain and exhibit complications.

Because Lopata had multiple co-morbidities, Dr. Mamdani's post-operative care was performed in conjunction with Lopata's gastroenterologist and internist.

In the days following the surgery, Lopata's liver enzymes did not decrease, as would be expected post surgery, and he continued to complain of pain. Additional studies and testing were performed.

On December 18th, after an initial CT scan revealed fluid-build-up, a Hepatobiliary Iminodiacetic Acid (hereinafter referred to as "HIDA") scan and a follow-up ERCP were performed. They revealed that Lopata had a bile leak. The common bile duct appeared intact, and Dr. Mamdani suspected that bile was leaking from the cystic duct.

Studies were unable to confirm a cause or location of the leak.

Another CT scan was performed on December 19th and revealed additional fluid retention.

On December 20th, Lopata's white blood cell count increased, which can be indicative of

an infection or an inflammatory process.

Dr. Mamdani acknowledged that it was possible to perform further surgery to locate and repair the bile leak, but did not believe that Lopata was an appropriate candidate for such surgical intervention, given the unknown cause of the leak, together with his co-morbidities.

By this time, infectious disease specialists had become involved with Lopata's care and he had experienced respiratory arrest.

Ultimately, after a repeat CT scan showed a dramatic increase in fluid retention and abdominal distention, three liters of fluid appearing to be bile were drained from Lopata's abdomen. Unable to determine the cause of the bile leak, all involved in Lopata's care began working on a plan to transfer him to Westchester Medical Center (hereinafter "WMC"), a tertiary care facility, where his care could be managed by a bilary endoscopist and bilary surgeon.

After two days of attempting to make arrangements for the transfer, Lopata, on December 23, 2014, was accepted for transfer to WMC.

Poles argues that Dr. Mamdani neither violated a standard of care nor proximately caused Lopata's alleged injuries. Rather, she asserts, following his laparoscopic cholecystectomy, Lopata experienced a bile leak, which is the most common risk of complication from such procedure.

Further, she notes, in the days following the surgery, not only was the existence of the bile leak discovered, but also, Dr. Mamdani continued to treat Lopata in an effort to remedy the leak.

When he was unable to determine the cause of the leak, she contends, Dr. Mamdani, along with Lopata's other attending physicians, appropriately determined that he should be

transferred to a tertiary facility where he could be treated by biliary specialists.

Thus, she asserts, Dr. Mamdani did not depart from good and accepted medical practice.

Further, she argues, to the extent that the Plaintiffs claim that SACH and/or BSCHS negligently granted Dr. Mamdani privileges to perform surgery at the community hospital, the evidence "unquestionably establishes that SACH and BSCHS followed the necessary protocols prior to granting privileges to Dr. Mamdani."

Moreover, she notes, the appended affidavit of Dr. Leahy, CEO of BSCHS, attests that BSCHS did not render medical services to any patients in December 2014. Rather, at that time, BSCHS only provided long range planning and administrative services to its members, which included SACH. Consequently, Poles argues, there is no factual basis upon which liability may be imposed as against BSCHS.

In support of their motion to dismiss, the Mamdani Defendants submit an affirmation from counsel, Lia Fierro.

Fierro notes that the Plaintiffs allege that Dr. Mandami engaged in malpractice when he performed a subtotal laparoscopic cholecystectomy; when he left stones behind; when he failed to properly close the gallbladder that he left behind; when he failed to properly close the cystic duct during the procedure; when he failed to close the end of the gallbladder; when he failed to tie or close the cystic duct; when he failed to use good and accepted surgical care while dissecting Lopata's gallbladder, which traumatically and severely injured the common bile duct and its adjacent structures, when he allowed injuries to go undiagnosed and untreated, causing a prolonged bile leak resulting in peritonitis; when he failed to inform any hospital or medical staff of what he had done, or to have written a complete report; when he dissected too close to

Lopata's gallbladder and its adjacent structures, causing a traumatic injury which went undiagnosed and untreated, causing a prolonged bile leak resulting in peritonitis; when he failed to obtain Lopata's informed consent; when he failed to dictate a complete operative report; when he failed to follow Lopata post-op and failed to record post-op progress notes; when he failed to convert Lopata's Lap Chole procedure to an open procedure; when he failed to appreciate Lopata's anatomy at the gallbladder, and performed an improper dissection and closure of the gallbladder and cystic duct, allowing it to continue to leak inside of Lopata, causing him peritonitis; when he improperly grasped Lopata's inflamed gallbladder; when he left the gallbladder behind; when he failed to properly apply clips to the gallbladder and duct, and he used too many clips and clipped the wrong structures; when he left the infundibulum behind; when he left stones behind; when he left the gallbladder and the cystic duct open, and left leaking bile and stones; when he dissected too close with heat; when he dissected too close with a scalpel; and when he failed to obtain an intraoperative consult and failed to transfer Lopata to another hospital sooner.

In support of their motion, the St. Anthony Defendants submits an affirmation of John Peralo, M.D., a physician licensed to practice medicine in the State of New York and Board Certified in Surgery.

Dr. Peralo asserts that he maintained a full-time private practice for the past twenty-seven (27) years and maintained privileges to perform general surgery at a local hospital for the past twenty (20) years.

Based on his review of the evidence in the case, Dr. Peralo opines, to a reasonable degree of medical certainty, that the care and treatment rendered Lopata by Dr. Mamdani was in

accordance with good and accepted standards of care.

Dr. Peralo asserts as follows.

Dr. Mamdani did not cause any injury to Lopata's common bile duct ("CBD").

First, the common bile duct is outside the surgical field in a Lap Chole. Moreover, "Dr. Mamdani cautiously excised the gallbladder farther up the infundibulum so as to specifically avoid approaching the area of the CBD. This practice is appropriate and well within the applicable standard of care."

Dr.Peralo notes that Lopata's medical records indicate that he underwent several ERCP procedures by gastroenterologists, which took place in and around his CBD, both at St. Anthony's and WMC.

By contrast, he asserts, "there is no indication whatsoever that Dr. Mamdani ever approached his CBD or that he sustained any damage to his CBD in connection with the Lap Chole."

Dr. Peralo notes that Dr. Mamdani testified that his standard practice for initiating a laparoscopic cholecystectomy is to establish four (4) ports in the abdominal cavity for insertion of tools and a camera (p. 124); to retract the cystic duct and utilize electrocautery tools to remove the gallbladder from the liver bed (p. 157); to place clips on the cystic duct and artery proximally and distally before transecting it (p. 148); and to use clips to close the cystic duct and artery.

Dr. Peralo opines that these are good and accepted surgical practices, and well within the standard of care.

Further, Dr. Peralo opines, it is clear from Lopata's medical records that Dr. Mamdani did not perform a"subtotal" Lap Chole as alleged. A subtotal Lap Chole is actually a different

procedure than a standard Lap Chole.

In a typical Lap Chole, either the gallbladder is dissected longitudinally, such that the posterior wall of the gallbladder is left attached to the liver, or only select portions of a gallbladder are removed. Here, he notes, Lopata's records indicate that Dr. Mamdani did not perform a subtotal Lap Chole.

Further, he notes, Lopata's records demonstrate that Dr. Mamdani did not leave the infundibulum behind. Moreover, that would not be evidence a departure from the standard of care. Rather, he asserts, it is well within the standard of care to dissect the gallbladder at or about the infundibulum, which is located at the base of the neck of the gallbladder, away from the cystic duct. This technique is often employed as a way to ensure against approaching the area of the CBD. Thus, he opines, that Lopata's infundibulum may have partly remained is not a departure from the standard of care.

As a surgeon, Dr. Peralo notes, the standard of care in obtaining informed consent for a surgical procedure is to explain the risks and benefits of the procedure, including a general percentage chance for various outcomes, and answer any questions posed by the patient regarding the procedure. It has also become standard to ask the patient to sign a form which states that they have been informed of the risks of the procedure to be performed, and consent to the same.

Here, he notes, Lopata testified that he could not remember whether he had such a discussion with Dr. Mamdani.

However, he notes, Dr. Mamdani testified that he explained to Lopata the potential complications, risks and benefits of the laparoscopic cholecystectomy, and that a bile leak was a common injury, and that there is a potential that the surgery could be converted to an open

surgery. Further, Dr. Mamdani testified that it was his practice, and that it was his understanding of the hospital's protocol, that the assisting nurse would not allow a patient to go into the operating without first witnessing the explanation of the risks and benefits to the patient.

This testimony, Dr. Peralo notes, is consistent with the signed form entitled, "Consent for Operative/Invasive Diagnostic/Therapeutic Procedure." The form lists Dr. Mamdani as authorized to perform a laparoscopic cholecystectomy, and possible open repair of umbilical hernia, and is dated December 15, 2014.

Based on the above, Dr. Peralo opines, to a reasonable degree of medical certainty, Dr. Mamdani obtained Lopata's informed consent to the surgery.

Further, Dr. Peralo notes, Dr. Mamdani testified that he did in fact dictate an operative report using the hospital's sanctioned method for the same, to wit: over the telephone using a transcription service, which converts the verbal report into a form which is then entered into the patient's medical chart. In any event, he opines, the absence of such an operative report from a medical chart is not tantamount to a departure from the standard of care.

Moreover, Dr. Peralo opines, permitting gallstones to remain in the area of the gallbladder following a Lap Chole is also not a deviation from the standard of care. Gallstones do not pose any significant risk of harm unless they cause an obstruction in the hepatobiliary system, which cannot occur if they are outside of that system

Further, he opines, it is possible for gallstones to spill from the gallbladder during its removal, but this is not indicative of a deviation from the standard. Rather, this presents the surgeon with the opportunity to either remove the stones or allow them to remain. Such a decision is typically based on, first, whether they are visible, and second, whether the act of

pursuing their removal could potentially cause injury to another structure.

Thus, here, he opines, to the extent Dr. Mamdani may have permitted gallstones to remain in Lopata's abdominal cavity following the Lap Chole, there is no indication in Lopata's medical records that he was harmed by loose gallstones in his abdominal cavity, and the mere act of permitting gallstones to remain in the abdominal cavity is not a departure from the standard of care.

Regarding Dr. Mamdani's closure of Lopata's cystic duct, it was Dr. Peralo's opinion, to a reasonable degree of medical certainty, that Dr. Mamdani properly and sufficiently caused the cystic duct to be closed during the Lap Chole. Concerning such, he asserts, Lopata's medical records show two crucial pieces of information, to wit: first, that Lopata's pain levels following the Lap Chole steadily decreased until they were reported at 2/10 within 24 hours of the surgery. Second, that Dr. Mamdani utilized an appropriate number of 10mm ligaclips (approximately 12, according to Lopata's medical records) to fasten the cystic duct closed.

Further, he asserts, there was no indication in Lopata's medical records that Dr. Mamdani clipped "the wrong structures" as alleged by Plaintiffs. To the contrary, he notes, the operative report in the WMC records indicate that the surgeon who performed the subsequent exploratory laparotomy located the 12 clips and later identified that they were placed on the cystic duct, which is precisely where they were supposed to be placed during the Lap Chole.

In addition, Dr. Peralo opines, the Plaintiffs' related allegations that Dr. Mamdani did not properly apply clips to the gall-bladder, left the gallbladder behind, did not properly close the gallbladder, dissected too near and too close to Lopata's gallbladder and its adjacent structures, and left the gallbladder open, are "all mooted by [Lopata's] medical records which show

conclusively that [Lopata's] gallbladder was removed from his body during the Lap Chole."

Similarly, he opines, the allegations that Dr. Mamdani dissected too close with heat and with a scalpel,"do not make sense in context, as they fail to indicate the structure to which Dr. Mamdani is alleged to have dissected 'too closely'."

In addition, he asserts, the Plaintiff's allegations that Dr. Mamdani improperly grasped Lopata's inflamed gallbladder, failed to appreciate his anatomy at the gallbladder while dissecting it, and did not know the anatomy, "are similarly stated within a vacuum and not supported by the [Lopata's] medical records." Rather, he opines, "[o]verall, Dr. Mamdani performed the subject Lap Chole in all respects within the applicable standard of care."

In addition, Dr. Peralo opines, Dr. Mamdani's decision not to convert the Lap Chole to an open procedure, and the threshold for so converting to an open procedure, are well within the standard of care, considering the facts at hand at the time of the surgery, to wit: An open procedure carries tremendously greater medical risks than a laparoscopic surgery, including but not limited to greater risk of infection. It is not a decision which is made lightly, and the standard of care requires that, in order to convert to an open procedure, on balance, the laparoscopic procedure must be close to, if not definitively, unsuccessful in order for it to outweigh the risks of an open surgery.

Here, Dr, Peralo opines, given Lopata's medical records, including Dr. Mamdani's brief operative note, and Lopata's immediate satisfactory recovery following the Lap Chole, in which he reported an appropriate deceleration in his pain level, "there was no clear reason to convert the Lap Chole to an open procedure at that time. Similarly, there was no apparent reason for Dr. Mamdani to obtain and interoperative consult during the procedure, and his decision not to do so

was within the standard of care."

In addition, Dr. Peralo opines, to a reasonable degree of medical certainty, Dr. Mamdani did not deviate from the standard of care in his post-operative evaluation of plaintiff and timely transfer to WMC.

First, he asserts, as a surgeon, Dr. Mamdani's duty to perform post-operative evaluations encompassed only those issues which may have been directly related to the Lap Chole. Here, Lopata's medical records indicate that he experienced a host of co-morbidities, including infection, rashes, and breathing difficulty, all of which fell outside the scope of Dr. Mamdani's treatment as a surgeon. Otherwise, he opines, Dr. Mamdani's post-operative evaluation of the surgical site and related monitoring for potential operative bile leak was well within the standard of care. Dr. Peralo notes that Lopata's medical records show that Dr.Mamdani visited him on four (4) occasions following the Lap Chole within the first six (6) days post-op, which is sufficient and within the standard of care.

Further, he notes, Dr. Mamdani's progress notes were sufficient to apprise other professionals in the surgical department of Lopata's medical condition as it pertained to his status post-op, which is the extent to which Dr. Mamdani evaluated him, as was appropriate, and the extent of Dr. Mamdani's duty to evaluate and comment on his condition.

Relatedly, he opines, to the extent Dr. Mamdani participated in the apparent course of conservative treatment of Lopata's many co-morbidities, including a suspected bile leak, the same was also within the standard of care. The good and accepted standard of practice when a patient is suspected of having a bile leak is to continue on a course of conservative care, using the least invasive means to achieve stability.

Here, he asserts, Lopata's medical records and Dr. Mamdani's deposition testimony confirm that his medical needs exceeded the resources available at SACH following this course of conservative treatment. Consequently, Dr. Mamdani specifically testified that Lopata was sent to another hospital to have a higher level of diagnosis that was not available at SACH. This included access to a biliary surgeon, which was not available at SACH.

Indeed, he asserts, the transfer to another facility is not without its own risks, including those inherent with physically moving a post-operative patient and exposing them to another environment, which increases the likelihood of contracting an infection; as well as the time that it takes to physically transport them from one facility to another, and the interruption of the continuity of care from one team of professionals to another, etc.

Thus, he opines, while it is a common practice among hospital physicians, it must only be done in such circumstances where the risks inherent in the transfer are outweighed by the patient's potential to obtain more advanced medical care. Here, he opines, on the facts presented, Lopata's transfer to WMC was timely and within the standard of care.

Dr. Peralo notes that Lopata's medical records indicate that the source of the leak which required surgical intervention was determined to be an exposed subvesical duct in the gallbladder fossa, known as the duct of Luschka. A bile leak from the duct of Luschka, Dr. Peralo asserts, is an exceptionally rare occurrence that cannot be detected during a laparoscopic cholecystectomy, regardless of the level of skill of the surgeon. Rather, such a leak is only detectable post-operatively, first based on imaging, which includes a CT scan, and then, if a collection is seen, a HIDA scan, and then, ultimately, during an open surgery to confirm the same. Indeed, he opines, it is so rare that it is typically only suspected once every other more common potential

source of bile leak is ruled out, such as those that might be resolved through ERCP. In fact, he asserts, based on his experience and expertise, he could definitively state that it only occurs in approximately 2% of Lap Chole patients.

Indeed, he opines, potential exposure of the duct of Luschka is entirely unforeseeable pre-operatively, as it involves an element of a patient's anatomy that is inaccessible by external scans and diagnostics tools. In other words, he asserts, it is an exceedingly rare complication, and an inherent risk in every Lap Chole that cannot be prevented or mitigated during a Lap Chole that is in no way tied to the surgeon's skill or care.

Additionally, he opines, Dr. Mamdani's duty to Lopata was limited to that of a surgeon undertaking a surgical consult, and performing a laparoscopic cholecystectomy. Here, he opines, Dr. Mamdani exceed that standard, as he performed his pre-operative consult appropriately, he obtained Lopata's informed consent for the procedure, performed the procedure in accordance with good and accepted standards of practice, and provided appropriate follow-up care in both frequency and content.

Thus, Dr. Peralo opines, to a reasonable degree of medical certainty, Dr. Mamdani acted properly in his limited role in providing surgical care to Lopata, and in no way deviated from the standard of care for surgical treatment of a patient with cholelithiasis; Dr. Mamdani did not fail to diagnose the source of Lopata's apparent bile leak, and nothing he did or failed to do was a substantial factor in causing damage to Lopata.

In opposition to the Defendant's motions, the Plaintiffs submit an affirmation from an expert in pathology whose name has been redacted (hereinafter "Pathology Expert").

The Pathology Expert avers that he/she is licensed to practice medicine in the State of

New York, is Board Certified by the American Board of Anatomic Pathology, and Board Certified in Forensic Pathology, and has along and significant work history.

On August 9, 2019, the Pathology Expert notes, he/she reviewed a slide containing tissue from Lopata's December 15, 2014, laparoscopic cholecystealomy. The slide has tissue from three distinct sections of the gallbladder wall.

All of the tissue was thickened with fibrosis, and Lopata's gallbladder was inflamed. Further, "[t]he architecture of the tissues was highly disrupted and distorted, even outside the cauterized artifact edges of the gall bladder."

In addition, the Pathology Expert notes, portions of the gall bladder tissue were torn and lacerated.

It was the Pathology Expert's opinion, to a reasonable degree of medical certainty, that Lopata's tissue showed evidence of blunt force trauma, which is evidence that it was pulled too hard by the surgeon during the operation.

In addition, the Pathology Expert asserts, the absence of bile and/or stones submitted with the gallbladder specimen was "concerning," as it would have been "packed full of stones." That is, the fact that there were no stones sent to pathology is "highly suspicious" that the contents of Lopata's gallbladder fell into Lopata's abdominal cavity and were not retrieved. Indeed, the Pathology Expert opines, Lopata's gallbladder, which was so inflamed and diseased, "had to have been packed with stones, besides most likely some gallstone, gravel and bile."

Further, the Pathology Expert notes, repeated CT scans on December 10, 2014, December 17, 2014, and December 19, 2014, demonstrated the presence of cholelithiesis (gall stones), as well as "Unchanged fluid (bile) collection in the gallbladder fossa."

The Pathology Expert notes that the inner epithelial lining of the gall bladder produces mucus. Foci of metaplasia signify that stones were present for a long time, damaging the columnar epithelium. Yet, here, the Pathology Expert notes, there were no stones found and sent to the laboratory by Dr. Mamdani.

Thus, the Pathology Expert opines, to a reasonable degree of medical certainty, the fact that there were no stones sent to Pathology is evidence of malpractice, in combination with the evidence of blunt force trauma described above.

Further, it was the Pathology Expert's opinion, to a reasonable degree of medical certainty, that, based upon examination of the slide, Dr. Mamdani pulled or yanked at Lopata's gall bladder and, in doing so, ripped it.

Thus, it was the Pathology Expert's opinion, to a reasonable degree of medical certainty, that Dr. Mamdani, was "clumsy or panicked" during the surgery, as is evidenced by the way he extricated the gall bladder, to wit: the edges of the gall bladder reveal that Dr. Mamdani removed it with blunt force trauma, which is beneath the standard of care.

Finally, it was the Pathology Expert's opinion, to a reasonable degree of medical certainty, that the bile leak was a substantial factor in causing damages to Lopata, which included chemical, sterile peritonitis.

In further opposition to the Defendant's motions, the Plaintiffs submit an affirmation from an expert in surgery whose name has been redacted (hereinafter "The Surgery Expert").

The Surgery Expert avers that he/she is licensed to practice medicine in the State of New York, and has been Board Certified in Surgery since 1977. Further, that he/she had maintained a full-time private practice in General Surgery for more than 40 years in New York City, and has

an extensive academic background.

Initially, the Surgery Expert asserts, SACH claim that it cannot be held responsible for Dr. Mamdani's malpractice because Dr. Mamdani was not an employed by SACH during the operation, lacks merit, as SACH provided the surgical services, the operative suite, the anesthesiologist, the nurses, the equipment, etc. to perform the operation.

Further, the Surgery Expert notes, Lopata testified that he did not choose Dr. Mamdani.

Based upon his/her review of the evidence in the case, the Surgery Expert opines as follows.

First, absent from SACH's hospital records is a complete and detailed Operative Report from Dr. Mamdani. Rather, there is only what is described as a "Brief Note" which is not sufficient. The Surgery Expert asserts that an operative report for a Lap Chole is never brief, and requires much greater detail. Indeed, he notes, SACH'S Chairman of the Department of Surgery, Dr. John Juliano, testified that a "brief operative note does not comply with the hospitals rules and regulations."

Here, the "brief note" does not include the description of techniques, findings and tissues removed from Lopata. Nor does it include the surgical tasks that were conducted, which is a departure from the standard of care. These items are all required in an Operative Report.

The Surgery Expert opines that this lack an adequate report caused further harm, as subsequent care providers were unaware that Dr. Mamdani did an incomplete procedure.

Further, The Surgery Expert notes, the brief note indicated that the surgery was a success and without complications. However, this is not true. Rather, post-operatively, on December 17, 2014, SACH records reflect that Lopata was in increasing pain. A CT scan was ordered, and it

showed "circumscribed fluid collections interposed between the lateral segment of the liver." The scan also showed a "5 cm circumscribed collection within the gallbladder fossa" and the radiologist determined that he/she "cannot exclude an infected collection."

This "infected collection" turned out to be bile. Thus, the Surgery Expert opines, for Dr. Mamdani's expert to say that there were no signs of a biliary leak at this time, when the radiologist mentioned infection in his report, "makes zero sense." Rather, there was a bile leak and it was causing an infection.

Further, he notes, a review of the SACH records and Dr. Mamdani's testimony reveals that he did not see Lopata on December 16th or 17th, 2014. Rather, the first time he examined Lopata after the surgery was on December 18, 2014, approximately three days post-op. This delay, he opines, was a departure from the standard of care, and caused harm, as Lopata's pancreatis worsened during the period. Rather, the Surgery Expert opines, the standard of care requires a surgeon to see his/her patient within 24 hours after surgery.

A scan performed on December 18, 2014, showed a biliary leak, and a stent was placed to drain the bile.

On December 19, 2014, Lopata complained of diffuse abdominal pain and distention. A CT scan of his abdomen and pelvis still showed fluid collection in the gallbladder fossa (the area where the gallbladder once was). Nonetheless, the Surgery Expert notes, it appears that Dr. Mamdani waited until December 20, 2014, to see Lopata again.

The records show that, at this point, other physicians independently suspected that Lopata might have pneumonia, pancreatitis, sepsis, tachycardia, leukocytosis and a urinary tract infection. The Surgery Expert opines that the reason why all these other conditions were "on the

radar" was because Dr. Mamdani had failed to write an Operative Report. Had he written an operative report., the Surgery Expert opines, the subsequent providers would have known that Dr. Mamdani performed a partial Lap Chole.

Indeed, the Surgery Expert asserts, the proof that Dr. Mamdani did a sub-total Lap Chole is in the WMC operative report, which was generated after Lopata underwent another operation to stop his bile leak. At that time it was discovered that Dr. Mamdani did an incomplete job, to wit: At page 2 of the report it states: "we then proceeded to get access to hepatoduodenal ligament. It was here we found 12 surgical clips placed around what appeared to be a mucosal ductlike structure. These clips were removed because they were not across any structure. We extracted several stones from this duct like structure which we later identified to be the infundibulum of the gallbladder. We proceeded to irrigate the area thoroughly and there was a 3 mm duct of Lushka found in the gallbladder fossa".

The Surgery Expert opines that, based on this complete and detailed Operative Report provided by the surgeon at WMC, there is proof that Dr. Dr. Mamdani was careless and negligent when he failed to remove all of Lopata's gall bladder. That is, the fact that the surgeon at the WMC found Lopata's infundibulum of the gallbladder means that at least one third of his gallbladder was left behind by Dr. Mamdani, which Dr. Mamdani never reported. Thus, physicians at SACH who were trying to care for and treat Lopata were unaware of the sub-total procedure, which caused post-op physicians to work in the dark.

Further, the Surgery Expert opines, Dr. Mamdani also departed from good and accepted practice because he failed to remove any gallstones during the operation and send them to pathology. Lopata's gallbladder would have been full of gallstones, as is shown by the

affirmation of Pathology Expert (*supra*).

In addition, the Surgery Expert opines, Dr. Mamdani committed malpractice by dissecting too near and too close to Lopata's gallbladder and its adjacent structures, causing a prolonged bile leak resulting in peritonitis; by failing to adequately follow Lopata post-op; by failing to convert Lopata's Lap Chole procedure to an open procedure and to seek a consult intra-operatively, and by leaving gallstones behind.

Further, he opines, Dr. Mamdani also failed to properly apply clips to the gallbladder and duct, used too many clips and clipped the wrong structure.

The Surgery Expert notes that the Dr. Mamdani's expert makes the claim that the major problem was a leak from the duct of Luschka. However, the Surgery Expert opines, bile leaks from this duct are not infrequent, and occur after surgery regardless of gallbladder pathology or urgency of operation. Further, they have been encountered more frequently in the era of laparoscopic chclecystectomy. Intraoperative cholangiography does not detect all such leaks. Staying close to the gallbladder wall during its removal from the fossa is the only known prophylactic measure. ERCP and stent placement are the most common effective diagnostic and therapeutic methods used. This is sufficient to end the bile leak in almost all patients. However, he opines, it must be noted that Lopata's bile leak was from the remnant gallbladder section and the stones left behind in that area. The bile leak does not cease with an open gall bladder and a foreign body (gall stones) in the patient's subhepatic space.

One conclusion, he opines, is that Dr. Mamdani did not remove the entire gall bladder as he stated, did not remove all the gall stones, and did not perform an uncomplicated cholecystetemy. Thus, the Surgery Expert opines, the surgery he performed was below the

standard of care and was negligent.

Finally, the Surgery Expert opines, SACH may be held vicariously liable for Dr. Mamdani's malpractice.

In reply, the St. Anthony Defendants submits another affirmation from Carol Poles.

Poles argues that the Plaintiffs had not demonstrated any basis to recover as against BSCHS. That is, the Plaintiff's had failed to demonstrate, either through their medical experts, or any qualified witness, that there was any deviation from, or any violation of, Section 2805-k by BSCHS in granting privileges to Dr. Mamdani. Poles argues that one alleged negligent performance of gallbladder surgery is not a "history" of negligently surgeries by Dr. Mamdani which would have placed BSCHS on notice of a potential issue.

In reply, the Mamdani Defendants submit an affirmation from counsel, Lia Fierro.

Fierro argues that the Plaintiffs have failed to raise a triable issue of fact regarding Dr. Mamdani's care and treatment of Lopata because their surgical expert, while apparently qualified, failed to offer any opinion as to eleven allegations set forth in the Plaintiffs' Amended Verified Bill of Particulars; failed to offer any analysis or other support for his opinion as to six of the allegations; and had offered, in the main, an opinion lacking the necessary detail and support to raise a triable issue of fact as to the remaining claims.

Further, Fierro asserts, the opinion of the Plaintiffs' proffered expert in forensic pathologist lacks the necessary foundation. That is, nothing in that expert's education, training or experience indicates that he/she as any expertise in the field of surgery. Thus, Fierro argues, the Pathology Expert's affirmation should be disregarded.

Moreover, she argues, to the extent the Court chooses to consider the Pathology Expert's

affirmation, the following was noted.

First, the Pathology Expert reviewed only a single pathology slide and corresponding pathology report from the subject Lap Chole. The Pathology Expert reviewed no other medical records, and no deposition testimony.

Despite this, she notes, the Pathology Expert makes "quantum leaps between what she claims to have observed on the slide, and what she believes to have happened during the surgery - despite having no experience performing, observing, researching, or otherwise participating in surgical procedures, according to her own biographical information."

Further, the Pathology Expert "baldly asserts that Lopata's gallbladder would have been packed full of stones" without providing basis for the same, and claims that he/she can determine, based on review of microscopic cells on a pathology slide, that Dr. Mamdani "was clumsy or panicked during the surgery." Fierro argues that there "is no possible way that the nature of epithelial cells on a pathology slide can evidence a person's state of mind, nor does Plaintiffs' Forensic Pathologist offer any such fantastical reasoning."

Similarly, Fierro asserts, despite no pertinent training, education or other experience in surgery, the Pathology Expert also concludes that the fact that no stones were sent to pathology is "highly suspicious" of malpractice, and "concerning." This, Fierro argues, "falls far short of sufficient proof of malpractice, and certainly is insufficient to raise a triable issue of fact in opposition to a summary judgment motion."

Indeed, Fierro asserts, the Pathology Expert's opinion, in general, "contains loose, conclusory language that is bereft of evidentiary value."

Thus, she argues, it should not be considered.

Further, she asserts, to the extent that the Surgery Expert's opinion is based on the same, it should also not be considered.

As to the Surgery Expert, Poles notes that the Surgery Expert claims that the lack of a detailed operative report caused damages, as subsequent care providers were unaware that Dr. Mamdani performed an incomplete operation.

However, Poles argues, first, Dr. Mandani did, in fact, prepare an Operative Report.

Second, she asserts, Lopata's ailments presented to his other physicians through symptoms directly related to those ailments (such as blood in the urine, indicative of a urinary tract infection; skin irritation, indicative of dermatitis, and so-on). Thus, she argues, Lopata's other treating physicians relied on their own examinations of Lopata, as is standard, to determine whether he was in need of medical treatment within their purview.

Indeed, she asserts, there is also no way to connect an "incomplete Lap Chole" with the other ailments Lopata experienced, and the Surgery Expert does not attempt to do so. Rather, she asserts, the Surgery Expert merely states, in conclusory fashion, that the lack of an Operative Report made it harder for Lopata's other physicians - none of whom were surgeons - to make their own independent diagnoses. He/she provides no specifics.

Similarly, she argues, the Surgery Expert provides no basis or specifics in support of the opinion that Dr. Mandani failed to make timely and appropriate post-operative visits. That is, there is no explanation of how additional, or earlier, post-operative visits would have impacted Lopata's care, aside from a conclusory statement that the delay caused Lopata's peritonitis to worsen.

Indeed, she opines, the Plaintiffs' entire case is based largely on hindsight. That is, while,

at this moment in time, it is easy to see that Lopata experienced a bile leak, his records as of December 18, 2014, painted a very different picture. As Dr. Peralo opined, and as supported by the evidence available by that date, there was no direct evidence of a bile leak. The CT scan performed on December 17, 2014, showed "typical post-operative collections." This demonstrates, she asserts, that there is typically a collection of bile in the gallbladder fossa following a Lap Chole, and Lopata's CT scan was consistent with the usual case.

Poles argues that the Surgery Expert's opinion that the "infected" collection was seen at that time arises only out of hindsight. The CT report itself does not state that it was an infected collection, but only that it could not be ruled out. That, she argues, is not enough to state affirmatively that, as of the CT scan on December 17, 2014, Lopata had a bile leak which became infected, and should have received different or additional medical care.

In addition, she asserts, there is no support in the record for the Surgery Expert's claim that Dr. Dr. Mamdani left "1/3" of Lopata's gallbladder behind, as there is no indication as to the exact fraction that remained after the Lap Chole. Otherwise, she contends, as stated by Dr. Peralo, it is and was standard practice to dissect the gallbladder on the infundibulum (also called the "neck") to avoid the area of the Common Bile Duct, which is what Dr. Mamdani did according to his practice, and the Operative Report from the exploratory laparctomy at WMC, to wit: the surgeon there described the remaining portion as a "stump."

With regard to the source of the bile leak, Poles notes that the Surgery Expert concluded, without evidence, that it was from "the remnant gall bladder infundibulum and the stones left behind in that area", stating further, "[t]he bile leak does not cease with an open gall bladder and a foreign body (gall stones) remaining the patient's subhepatic space." However, she asserts, the

Surgery Expert fails to reference, anywhere, where Lopata's medical records state that he had "an open gall bladder." Indeed, she argues, no such record exists. Rather, the Operative Report from the exploratory laparotomy performed at WMC states clearly that the surgeon discovered a leak from the duct of Lushka, but found the remaining portion of the infundibulum clipped closed with 12 clips. Indeed, she asserts, the Surgery Expert's opinion actually bolsters the fact that a duct of Luschka leak is not detectable pre-operatively or operatively, and can occur regardless of the skill or care of the surgeon.

Similarly, she asserts, the Surgery Expert's additional opinions in paragraphs 35-37 of the affirmation lack any reference to the medical records, testimony or other proof in this case, or to the Surgery Expert's own education, experience of training.

In addition, she argues, the Surgery Expert left many allegations in the pleading simply unaddressed.

Finally, Poles asserts, concerning informed consent, Lopata's claim that he "has no recollection" of "any of the doctors" or his "interaction with them," is insufficient to rebut Dr. Mamdani's testimony concerning the same, and the signed consent form.

Thus, she argues, that cause of action should be dismissed.

Discussion/Legal Analysis

On a cause of action alleging medical malpractice, a plaintiff must prove a deviation or departure from good and accepted standards of medical practice, and that such departure was a proximate cause of damages. *Goldberg v. Horowitz,* 73 A.D.3d 691 [2nd Dept. 2010). In general, expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause. *Goldberg v. Horowitz,* 73 A.D.3d 691 [2nd Dept. 2010]. Because

causation is often a difficult issue, a plaintiff need do no more than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that defendant's deviation was a substantial factor in causing the injury. *Goldberg v. Horowitz,* 73 A.D.3d 691 [2nd Dept. 2010]. A plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which defendant's act or omission decreased plaintiff's chance of a better outcome or increased the injury, as long as evidence is presented from which the jury may infer that defendant's conduct diminished plaintiff's chance of a better outcome or increased the injury. *Semel v. Guzman,* 84 A.D.3d 1054 [2nd Dept. 2011]; *Goldberg v. Horowitz,* 73 A.D.3d 691 [2nd Dept. 2010].

A defendant moving for summary judgment in a medical malpractice case must demonstrate the absence of any material issues of fact with respect to at least one of these elements. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017]. A defendant must establish, *prima facie*, either that there was no departure from good and accepted medical practice or that, if there were, the plaintiff was not injured thereby. *Contreras v. Adeyemi*, 102 A.D.3d 720, 958 N.Y.S.2d 430, (2nd Dept. 2013). The defendant is required to address the factual allegations set forth in the plaintiffs' bill of particulars with reference to the moving defendant's alleged acts of negligence and the injuries suffered with competent medical proof. Bare conclusory assertions by a defendant that he or she did not deviate from good and accepted medical practices, with no factual relationship to the alleged injury, does not establish that the cause of action has no merit so as to entitle defendants to summary judgment. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017].

In opposing a motion for summary judgment in a medical malpractice case, a plaintiff

needs only to rebut the moving defendant's prima facie showing. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017].

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017]. However, general and conclusory allegations of medical malpractice, unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat a defendant physician's summary judgment motion. Rather, the plaintiff's expert must specifically address the defense expert's allegations. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017].

A medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017]. However, the witness must be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017]. Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered. Where no such foundation is laid, the expert's opinion is of no probative value. *DiLorenzo v. Zaso*, 148 A.D.3d 1111 [2nd Dept 2017].

BSCHS

As a threshold issue, the Plaintiffs do not allege any independent acts of negligence by BSCHS, but rather seek to hold them vicariously liable for the conduct of Dr. Mamdani.

Here, in support of its motion, BSCHS demonstrated, *prima facie*, that it provided only administrative type services to SACH, such as credentialing non-employee doctors, including Dr.

Mamdani. That is, it did not provide or oversee any medical treatment of patients at SACH, etc. *See Affidavits of Leahy and Stoohs.*

Further, it demonstrated, *prima facie*, that it complied with Public Health Law § 2805-k in credentialing Dr. Mamdami. *See Affidavits of Leahy and Stoohs.*

Thus, BSCHS demostrated a *prima facie* entitlement to summary judgment dismissing the complaint insofar as asserted against them. *Ortiz v. Jaber*, 44 A.D.3d 632 [2nd Dept. 2007].

In opposition, the Plaintiffs failed to raise a triable issue of fact that BSCHS acted in violation of its by-laws or the Public Health Law in credentialing Dr. Mandami.

Thus, BSCHS is granted summary judgment dismissing the complaint insofar as asserted against it. *Ortiz v. Jaber*, 44 A.D.3d 632 [2nd Dept. 2007].

Dr. Mamdani

In support of his motion, Dr. Mamdani demonstrated, *prima facie* entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar asserted against him.

However, in opposition, the Plaintiffs raised triable issues of fact as to the allegations of negligence.

Significantly, the Court notes, the allegations concern a course of treatment over several days.

However, the Plaintiffs failed to raise a triable issue of fact as to the allegations of a lack of informed consent.

To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment

failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury. *Lavi v. NYU Hospitals Center*, 133 A.D.3d 830 [2nd Dept. 2015]; *Public Health Law § 2805–d[1]*.

Here, Dr. Mamdani's testimony, and the signed consent form, demonstrate, *prima facie*, that Dr. Mamdani complied with this standard.

In opposition, the Plaintiffs failed to raise a triable issue of fact. That Lopata does not recall discussing the same does not suffice and is insufficient to rebut Mamdani's *prima facie* showing.

In sum, that branch of the motion of the Mamdani Defendants which seeks summary judgment dismissing the allegations of negligence insofar as asserted against them is denied.

That branch of the motion which seeks summary judgment dismissing the allegations of lack of informed consent insofar as asserted against them is granted, and that cause of action is dismissed as against those Defendants.

SACH

Initially, as noted, the Plaintiffs do not allege separate acts of malpractice by SACH. Rather, the Plaintiffs seek to hold SACH vicariously liable for the conduct of Dr. Mamdani, who was not an employee of SACH.

As a threshold issue, it does not appear that SACH is arguing that it may not be held vicariously liable for the conduct of Dr. Mamdani. However, because the issue is mentioned, at

least in passing, it will be addressed.

In general, a hospital may not be held vicariously liable for the negligence of a private attending physician chosen by the patient who is not an employee. *Doria v. Benisch*, 130 A.D.3d 777 [2nd Dept. 2012]. An exception to this general rule exists where a plaintiff seeks to hold a hospital vicariously liable for the alleged malpractice of an attending physician who is not its employee where the plaintiff came to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing. *Muslim v. Horizon Medical Group, P.C.*, 118 A.D.3d 681 [2nd Dept. 2014]; *Orgovan v. Bloom*, 7 A.D.3d 770 [2nd Dept. 2004]. Consequently, for a hospital to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee, and that the exception to the general rule did not apply. *Muslim v. Horizon Medical Group, P.C.*, 118 A.D.3d 681 [2nd Dept. 2014].

Here, the record indicates that Lopata did not choose or request Dr. Mamdami, but rather came to the emergency room of SACH seeking treatment from the hospital and not from a particular physician.

Thus, the exception applies and SACH may be held vicariously liable for the conduct of Dr. Mamdani.

Given such, that branch of the motion of SACH which seeks summary judgment dismissing the complaint and all cross claims insofar as asserted against it arising from allegations of negligence by Dr. Mamdani is denied for the reasons discussed *supra*.

Similarly, that branch of the motion of SACH which seeks summary judgment dismissing

the complaint and all cross claims insofar as asserted against it arising from allegations of lack of informed consent are granted for the reasons discussed *supra*.

Accordingly, and for the reasons cited herein, it is hereby,

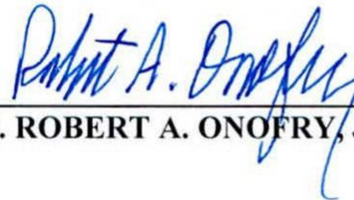
ORDERED, that the motions are granted in part and denied is part, as set forth herein; and it is further,

ORDERED, that the parties are directed to appear for a Status Conference on Wednesday, June 17, 2020, at 9:30 a.m., at the Orange County Court House, 285 Main Street, Court room #3, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: April 27, 2020
Goshen, New York

E N T E R



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