Michaels v Gohil
2020 NY Slip Op 35802(U)
October 29, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 063672/2013
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 63672/2013
CAL. No. 201902282MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 7/1/20 (002 & 003)
ADJ. DATE 9/16/20
Mot. Seq. # 002 MotD
003 MotD

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VINCENT MICHAELS and KARYN MICHAELS

Plaintiffs,

- against -

BAIJU CHINMAN GOHIL, M.D., JANE DOE or JOHN DOE (ASSISTANT SURGEON), JANE DOE or JOHN DOE PA (ASSISTANT TO SURGEON), CENTER FOR BARIATRIC SURGICAL SPECIALTIES AT SYOSSET HOSPITAL, NSLIJ SYOSSET HOSPITAL, ARTHUR LOWEY, M.D., & PLAINVIEW MEDICAL GROUP,

Defendants.

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Upon the following papers read on these e-filed motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers filed by defendants Baiju Chinman Gohil and Syosset Hospital, on May 15, 2020; filed by Arthur Lowy, M.D. and Plainview Medical Group, P.C., on May 18, 2020; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers filed by plaintiffs, on August 18, 2020; filed by plaintiffs, on August 18, 2020; Replying Affidavits and supporting papers filed by defendants Baiju Chinman Gohil and Syosset Hospital, on September 14, 2020; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendants Baiju Chinman Gohil, M.D., and Syosset Hospital, s/h/a "Center for Bariatric Surgical Specialties at Syosset Hospital and NSLIJ Syosset Hospital," and the motion (#003) by defendants Arthur Lowy, M.D., s/h/a Arthur Lowey, M.D., and Plainview Medical Group, P.C., are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendants Baiju Chinman Gohil, M.D., and Syosset Hospital for summary judgment dismissing the complaint as asserted against them is granted in part, and denied in part; and it is further

ORDERED that the motion by defendants Arthur Lowy, M.D., and Plainview Medical Group, P.C., for summary judgment dismissing the complaint, or, in the alternative, for leave to amend their Verified Answer to add the affirmative defense of failure to mitigate, is granted in part, and denied in part.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff, Vincent Michaels, by defendants Baiju Chinman Gohil, M.D., Syosset Hospital, Arthur Lowy, M.D., and Plainview Medical Group, P.C. Plaintiff alleges that defendants were negligent, *inter alia*, in performing a laparoscopic sleeve gastrectomy and in failing to appreciate and correct a hiatal hernia. Plaintiff also alleges that defendants Dr. Gohil and Dr. Lowy failed to obtain his informed consent. Plaintiff's wife, Karyn Michaels, sues derivatively for loss of services.

The facts, subject to some dispute, can be summarized as follows: In 2011, plaintiff was a 40-year-old man who had a history of varicose veins, and required surgical treatment to correct them. At the time, plaintiff was morbidly obese and, due to his weight, was unable to undergo the necessary surgery. Plaintiff's vascular surgeon, nonparty Dr. Hormoz Mansouri, referred him to general surgeon Dr. Gohil, as Dr. Mansouri believed plaintiff was an excellent candidate for bariatric surgery, which would allow him to lose the weight needed before his varicose veins could be surgically corrected. On May 4, 2012, plaintiff consulted with Dr. Gohil to discuss the possibility of bariatric surgery for radical weight loss. Dr. Gohil testified that he evaluated plaintiff, who weighed 401 pounds and suffered from multiple comorbidities, including, hypertension, elevated cholesterol, and left leg cellulitis. Dr. Gohil testified that plaintiff also reported mild gastroesophageal reflux disease (GERD) and occasional diarrhea. Dr. Gohil testified that plaintiff was an "excellent candidate" for laparoscopic sleeve gastrectomy, and reviewed the risks and benefits of the procedure. Dr. Gohil testified that plaintiff consented, and that he was referred to several medical providers to obtain preoperative clearance, including a pulmonologist, a psychologist, a nutritionist, a cardiologist, and a gastroenterologist. Plaintiff was evaluated again by Dr. Gohil on May 31, at which time he signed a written consent for surgery.

On June 4, plaintiff met with Dr. Lowy for gastroenterology clearance. Dr. Lowy testified he performed a physical examination, and that his abdominal examination was normal. Plaintiff reported no history of gallbladder, liver, pancreatic or splenic complaints. On June 8, Dr. Lowy performed an endoscopy on plaintiff at Syosset Hospital, which found regular gastroesophageal (GE) function, mild duodenitis, mild gastritis, and an incidental finding of two-to-three centimeter hiatal hernia. Dr. Lowy testified that he cleared plaintiff for surgery, as his evaluation did not reveal any contraindications to the procedure. Dr. Lowy testified that the incidental finding of a small hiatal hernia was clinically insignificant, did not require any treatment, and would not change the surgical course. Dr. Lowy testified that he discussed the possibility of gall bladder removal during the gastrectomy with plaintiff, but explained that the decision to remove the gall bladder would have been Dr. Gohil's. Plaintiff was subsequently cleared by each speciality prior to surgery.

On June 25, plaintiff presented to Syosset Hospital to undergo the sleeve gastrectomy. During the procedure, Dr. Gohil testified that he created a gastric "sleeve" by removing a portion of plaintiff's stomach, which works to restrict caloric intake, resulting in rapid weight loss. Dr. Gohil testified that after he completed the procedure, he performed a leak test by injecting methylene blue dye, and performed a gastric leak test, utilizing endoscopy, to check the integrity of the stomach and for obstruction. Dr. Gohil testified that he looked for a hiatal hernia, but did not see one. He further testified that if he had observed a hiatal hernia, it would have been his custom and practice to reduce it intraoperatively.

On June 26, plaintiff underwent a video esophagram with contrast to evaluate for any leaks in the stomach. Attending radiologist Martin Elasant reviewed the study and noted no evidence of obstruction or leak. Dr. Gohil testified that plaintiff vomited the oral contrast solution, but that it did not "grossly affect" the results of the study, as contrast could still be seen passing through plaintiff's stomach. Throughout the remainder of his hospital stay, plaintiff complained of difficulty tolerating fluids, incisional pain, nausea, and vomiting. Dr. Gohil testified that these complaints are common immediately following bariatric surgery. On June 29, plaintiff was appropriately tolerating fluids without nausea or vomiting, and was discharged home.

On July 2, plaintiff had his first postoperative visit with Dr. Gohil. Plaintiff denied heartburn, abdominal pain, or nausea, and Dr. Gohil noted that he was doing well. On July 17, plaintiff presented to the emergency department of Syosset Hospital with complaints of nausea, vomiting and diarrhea for three weeks. Plaintiff was admitted and Dr. Gohil ordered an esophagram. The esophagram was performed by attending radiologist, Dr. Howard Heimowitz. Dr. Heimowitz noted that some oral contrast was retained in the upper left quadrant, but that the exam did not reveal any obstruction. On July 19, plaintiff underwent an abdominal CT scan, which revealed a possible ulceration. Dr. Lowy was consulted, and testified that an ulceration is "very common" when tissue is newly joined together in the stomach, such as during a sleeve gastrectomy procedure.

On August 6, plaintiff presented to Dr. Lowy with complaints of daily vomiting, increased phlegm and oral secretions, and dysphagia for solid foods. He also complained of epigastric and umbilical discomfort. Dr. Lowy ordered a repeat endoscopy, an upper right sonogram, and a doppler to rule out obstruction or erosion. On August 7, plaintiff presented to Syosset Hospital with complaints of vomiting blood and dark bloody stools. Dr. Gohil responded to the emergency department, and testified that his differential diagnosis included a Mallory-Weiss tear at the GE junction, an ulcer, or gastritis. Dr. Lowy performed an endoscopy, which revealed functional narrowing, without overt stricture. Dr. Lowy also observed two ulcers at the GE junction, without active bleeding or overt tear, and cauterized them. Dr. Lowy contacted Dr. Paul Berg, for a second opinion. Dr. Lowy testified that Dr. Berg recommended continued observation and acid suppression medication. Dr. Lowy further testified that all three physicians decided to approach plaintiff's treatment conservatively.

On September 12, Dr. Lowy performed an upper endoscopy, which revealed a minimal area of narrowing, and no overt obstruction at the GE junction. Dr. Lowy testified that his impression was diffuse gastritis with friability, no hiatal hernia, and a regular GE junction. During this procedure, Dr. Lowy performed balloon dilation, to stretch the body of the stomach. Dr. Lowy testified that the plan

was to continue his current diet and to undergo "aggressive" antisecretory therapy. Plaintiff did not return to Dr. Lowy for care.

On October 10, plaintiff presented to Dr. Gohil for the last time. His weight was 307.5 pounds, and he reported feeling better, with decreased nausea and vomiting. On October 27, plaintiff presented to Stony Brook University Medical Center with complaints of severe upper gastric pain. He was diagnosed with pancreatitis and underwent a cholecystectomy, performed by nonparty Dr. Dana Telem on October 29. Subsequently, plaintiff sought medical care from various treatment providers and facilities, and testified that his symptoms persist.

Dr. Gohil and Syosset Hospital now move for summary judgment dismissing the complaint as asserted against them, arguing that Dr. Gohil and the staff of Syosset Hospital rendered appropriate medical care and treatment to plaintiff, that the care they rendered was at all times in accord with good and accepted standards of medical care, and that no act or omission by Dr. Gohil or the staff of Syosset Hospital was a substantial factor in causing any of plaintiff's alleged injuries. In support of their motion. Dr. Gohil and Syosset Hospital submit, *inter alia*, the affidavit of John Kelly, M.D., the affirmation of Kevin Mennitt, M.D., plaintiff's medical records, and the transcripts of the depositions of the parties. Plaintiffs oppose the motion, arguing that issues of fact exist with respect to whether Dr. Gohil and the staff of Syosset Hospital deviated or departed from the applicable standards of care, and with respect to whether those deviations or departures were a proximate cause of plaintiff's alleged injuries. Plaintiff submits, *inter alia*, the affidavit of a board certified surgeon.

Dr. Lowy and Plainview Medical Group also move for summary judgment dismissing the complaint, arguing that they acted in accordance with good and accepted standards of medical practice, and that plaintiff's alleged injuries were not the result of any negligence attributable to them. In the alternative, Dr. Lowy and Plainview Medical Group move for leave to amend their answer to add the affirmative defense of failure to mitigate. In support, Dr. Lowy and Plainview Medical Group submit, *inter alia*, the affirmation Scott Tenner, M.D., plaintiff's medical records, and transcripts of the deposition testimony of the parties. In response, plaintiffs submit the affirmation of their attorney, which states that plaintiff takes no position with respect to the relief requested.

Initially, the Court notes that while each moving defendant has submitted uncertified copies of plaintiff's medical records, plaintiffs do not challenge their admissibility and references their contents in opposition. Since there is no prejudice to any substantial right of the plaintiffs by the lack of certification, the records will be considered admissible (***Matter of Robert E. Havell Revocable Trust v Zoning Bd. of Appeals of Vil. of Monroe***, 127 AD3d 1095, 8 NYS3d 353 [2d Dept 2015]; *see* CPLR 2001). Additionally, in civil cases, "inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess" (***Rosenblatt v St. George Health & Racquetball Assoc., LLC***, 119 AD3d 45, 54, 984 NYS2d 401 [2d Dept 2014]; *see* ***Alfaro v Lavacca***, __ AD3d __, 2020 NY Slip Op 05173 [2d Dept 2020]).

A medical malpractice action, which is a type of negligence action, involves three basic duties of care owed to a patient by a professional health care provider and hospital: (1) the duty to possess the same knowledge and skill that is possessed by an average member of the medical profession in the

locality where the provider practices; (2) the duty to use reasonable care and diligence in the exercise of his or her professional knowledge and skill; and (3) the duty to use best judgment applying his or her knowledge and exercising his or her skill (*see* ***Nestorowich v Ricotta***, 97 NY2d 393, 740 NYS2d 668 [2002]; ***Pike v Honsinger***, 155 NY 201, 49 NE 760 [1898]). As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment; a breach of this duty constitutes medical malpractice (*see* ***Dupree v Giugliano***, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; ***Tracy v Vassar Bros. Hosp.***, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015], *quoting* ***Scott v Uljanov***, 74 NY2d 673, 675, 543 NYS2d 369 [1989]). A plaintiff asserting a claim for medical malpractice, therefore, must present proof (1) that the defendant deviated or departed from accepted standards of medical practice, and (2) that such deviation or departure was a proximate cause of his or her injury or damage (*see* ***Lowe v Japal***, 170 AD3d 701, 95 NYS3d 363 [2d Dept 2019]; ***Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.***, 157 AD3d 773, 69 NYS3d 108 [2d Dept 2018]; ***Duvidovich v George***, 122 AD3d 666, 995 NYS2d 616 [2d Dept 2014]; ***Schmitt v Medford Kidney Ctr.***, 121 AD3d 1088, 996 NYS2d 75 [2d Dept 2014]). A plaintiff must also present proof that the defendant's deviation of care was a substantial factor in bringing about his or her injury (*see* ***Wild v Catholic Health Sys.***, 21 NY3d 951, 969 NYS2d 846 [2013]; ***Zak v Brookhaven Memorial Hosp. Med. Ctr.***, 54 AD3d 852, 863 NYS2d 821 [2d Dept 2008]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]).

It is fundamental that the primary duty of a hospital's staff is to follow the physician's orders, and that a hospital, generally, will be protected from tort liability if its staff follows the orders" (***Toth v Community Hosp. at Glen Cove***, 22 NY2d 255, 265, 292 NYS2d 440 [1968]; *see* ***Sledziewski v Cioffi***, 137 AD2d 186, 538 NYS2d 913 [3d Dept 1988]). "A hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee and may not be held concurrently liable unless its employees committed independent acts of negligence or the attending physician's orders were contraindicated by normal practice such that ordinary prudence required inquiry into the correctness of the same" (***Toth v Bloshinsky***, 39 AD3d 848, 850, 835 NYS2d 301 [2d Dept 2007]; *see* ***Sela v Katz***, 78 AD3d 681, 911 NYS2d 112 [2d Dept 2010]; ***Cerny v Williams***, 32 AD3d 881, 882 NYS2d 548 [2d Dept 2006]). "A hospital may also be held liable on a negligent hiring and/or retention theory to the extent that its employee committed an independent act of negligence outside the scope of employment, where the hospital was aware of, or reasonably should have foreseen, the employee's propensity to commit such an act" (***Doe v Gutherie Clinic, Ltd.***, 22 NY3d 480, 485, 982 NYS2d 431 [2014]; *see* ***Sieden v Sonstein***, 127 AD3d 1158, 7 NYS3d 565 [2015]). Furthermore, a hospital will not be found liable for damages caused by an employee's negligence under a theory of negligent hiring, supervision and retention, where the employee is acting within the scope of his or her employment (*see* ***Simpson v Edghill***, 169 AD3d 737, 93 NYS3d 399 [2d Dept 2019]; ***Henry v Sunrise Manor Ctr. for Nursing & Rehabilitation***, 147 AD3d 739, 46 NYS3d 649 [2d Dept 2017]).

A defendant seeking summary judgment on a medical malpractice claim has the initial burden of establishing, through medical records and competent expert affidavits, the absence of any departure from good and accepted medical practice, or that the plaintiff was not injured thereby (*see* ***Gullo v Bellhaven Ctr. for Geriatric Rehabilitative Care, Inc.***, *supra*; ***Stucchio v Bikvan***, 155 AD3d 666, 63 NYS3d 498 [2d Dept 2017]; ***Mackauer v Parikh***, 148 AD3d 873, 49 NYS3d 488 [2d Dept 2017]; ***Feuer v Ng***, 136 AD3d 704, 24 NYS3d 198 [2d Dept 2016]). The defendant must address and rebut specific allegations

of malpractice set forth in the plaintiff's bill of particulars (*see* ***Sheppard v Brookhaven Mem. Hosp. Ctr.***, 171 AD3d 1234, 98 NYS3d 629 [2d Dept 2019]; ***Mackauer v Parikh***, *supra*; ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 912 NYS2d 77 [2d Dept 2010]). The burden is not met "if defendant's expert renders an opinion that is conclusory in nature or unsupported by competent evidence" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *see* ***Smarkucki v Kleinman***, 171 AD3d 1118, 98 NYS3d 232 [2d Dept 2019]; ***Bongiovanni v Cavagnuolo***, 138 AD3d 12, 24 NYS3d 689 [2d Dept 2016]; ***Duvidovich v George***, *supra*). Once this burden is satisfied, in opposition, a plaintiff must submit evidentiary proof "to rebut the defendant's prima facie showing, so as to demonstrate the existence of a triable issue of fact" (***Stukas v Streiter***, 83 AD3d 18, 24, 918 NYS2d 176 [2d Dept 2011], quoting ***Deutsch v Claglassian***, 71 AD3d 718, 719, 896 NYS2d 431 [2d Dept 2010]; *see* ***Wagner v Parker***, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; ***Gray v Patel***, 171 AD3d 1141, 99 NYS3d 76 [2d Dept 2019]). The burden on the plaintiff is not to prove his or her entire case, but "merely to raise a triable issue of fact with respect to the elements or theories established by the moving party (***Stukas v Streiter***, *supra* at 25). Summary judgment is inappropriate in a medical malpractice action where the parties present conflicting opinions by medical experts (*see* ***Lefkowitz v Kelly***, 170 AD3d 1148, 96 NYS3d 642 [2d Dept 2019]; ***Jagenburg v Chen-Stiebel***, 165 AD3d 1239, 85 NYS3d 558 [2d Dept 2018]; ***Leto v Feld***, 131 AD3d 590, 15 NYS3d 208 [2d Dept 2015]). 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 in a medical malpractice action (*see* ***Wagner v Parker***, 172 AD3d 954, 100 NYS3d 280 [2d Dept 2019]; ***Bowe v Brooklyn United Methodist Church Home***, 150 AD3d 1067, 1068 [2d Dept 2017]; ***Kerrins v South Nassau Communities Hosp.***, 148 AD3d 795, 796 [2d Dept 2017]).

Lack of informed consent "is a distinct cause of action which requires proof of facts not contemplated by an action based merely on allegations of negligence" (***Kleinman v North Shore Univ. Hosp.***, 148 AD3d 693, 694, 48 NYS3d 455 [2d Dept 2017]; *see* Public Health Law § 2805-d). To establish a claim for medical malpractice based on lack of informed consent, a plaintiff must establish (1) that the physician failed to disclose the reasonably foreseeable risks, benefits, and alternatives to the procedure that a physician in a similar circumstance would have disclosed; (2) that a reasonably prudent person in the plaintiff's position would not have undergone the procedure if he or she had been fully informed of the reasonable foreseeable risks, benefits, and alternatives to the procedure; and (3) that the lack of informed consent is a proximate cause of the injury sustained (*see* Public Health Law § 2805-d [1]; ***Orphan v Pilnik***, 15 NY3d 907, 914 NYS2d 729 [2010]; ***Lynn G. v Hugo James v Greenberg***, 96 NY2d 306, 728 NYS2d 121 [2001]; ***Gilmore v Mihail***, 174 AD3d 686, 105 NYS3d 504 [2d Dept 2019]; ***Wright v Morning Star Ambulette Servs., Inc.***, 170 AD3d 1249, 96 NYS3d 678 [2d Dept 2019]). It is the obligation of a patient's private physician to obtain informed consent (*see* Public Health Law § 2805-d [1]; ***Cynamon v Mount Sinai Hosp.***, 163 AD3d 923, 81 NYS3d 520 [2d Dept 2018]; ***Sela v Katz***, *supra*; ***Salandy v Bryk***, 55 AD3d 147, 864 NYS2d 48 [2d Dept 2008]; ***Cirella v Central Gen. Hosp.***, 217 AD2d 680, 630 NYS2d 93 [2d Dept 1995]).

Dr. Gohil and Syosset Hospital have established, prima facie, entitlement to summary judgment dismissing the complaint as asserted against them. Dr. Gohil and Syosset Hospital submit the affidavit of John Kelly, M.D. Dr. Kelly avers that he is licensed to practice medicine in Massachusetts and that he is board certified in general surgery. Dr. Kelly avers that he is familiar with the applicable standards

of medical and surgical care, as they pertained to surgery and bariatric surgery as they existed in 2012 and 2013. Dr. Kelly opines, within a reasonable degree of medical certainty, that neither Dr. Gohil nor the staff of Syosset Hospital deviated or departed from accepted standards of medical care in the treatment of plaintiff, and that neither committed acts or omissions that were proximate causes of plaintiff's alleged injuries. Dr. Kelly also opines that Dr. Gohil properly obtained plaintiff's informed consent prior to the procedures he performed. Dr. Kelly opines that plaintiff's condition of symptomatic morbid obesity was causing, and exacerbating, medical conditions, such as varicose veins, cellulitis, and sleep apnea. Dr. Kelly opines that these conditions made plaintiff an appropriate candidate for bariatric surgery. Dr. Kelly opines that during plaintiff's first consultation with Dr. Gohil, Dr. Gohil appropriately evaluated plaintiff for sleeve gastrectomy surgery, including a review of plaintiff's medical and social history, and that Dr. Gohil appropriately appreciated plaintiff's multiple comorbidities. Dr. Kelly opines that plaintiff's medical history and comorbidities were not contraindications for bariatric surgery, and that surgery would abate or ameliorate them. Dr. Kelly opines that plaintiff's report of GERD would not complicate the surgery, noting that the condition was not severe, plaintiff was not under the care of a physician for it, and he was not taking any medication. Dr. Kelly opines that plaintiff's GERD was mild, and did not contraindicate surgery or erode the structural integrity of his esophagus. Dr. Kelly opines that after Dr. Gohil explained the risks and benefits of the laparoscopic sleeve gastrectomy and plaintiff consented, Dr. Gohil appropriately referred plaintiff to several physicians and health care providers for presurgical clearance. Dr. Kelly notes that plaintiff was cleared by Dr. Lowy, as well as by an internist, a psychologist, and a pulmonologist. Dr. Kelly states that while Dr. Lowy reported a small hiatal hernia during plaintiff's pre-surgical endoscopy, such a finding is "extremely common" and is not clinically significant.

Moreover, Dr. Kelly opines that Dr. Gohil and the staff of Syosset Hospital appropriately performed plaintiff's laparoscopic sleeve gastrectomy on June 25, 2012, and that each provided appropriate postoperative care. Dr. Kelly opines that Dr. Gohil's surgical technique was within the standard of care, including the distance he left between the staple line and the esophagus,, and that he appropriately checked the integrity of the stomach using endoscopy. With respect to plaintiff's hiatal hernia as reported by Dr. Lowy, Dr. Kelly states that it is possible for a small hiatal hernia to move, and that would explain why Dr. Gohil did not visualize it intraoperatively. Dr. Kelly opines that it was not a deviation from the standard of care for Dr. Gohil to not reduce a hiatal hernia that he could not visualize. Further, Dr. Kelly opines that it was not a deviation for Dr. Gohil to decide against removing plaintiff's gall bladder at the time of surgery, as his gall bladder was not causing symptoms, and states that gall bladder removal is not routine during a bariatric procedure. Dr. Kelly also opines that the post-operative care provided by Dr. Gohil and the staff of Syosset Hospital was within the standard of care. Dr. Kelly states that plaintiff exhibited typical and expected post-operative complaints, including difficulty tolerating liquids, nausea and vomiting. Dr. Kelly opines that it was appropriate for plaintiff to undergo a video esophogram the day after surgery, and states that this test did not reveal any leak or tear. Dr. Kelly opines that plaintiff was appropriately discharged on June 29, 2012, and instructed to follow-up within one week. With respect to plaintiff's July 2012 admission to Syosset Hospital, Dr. Kelly opines that there was no evidence of injury or gastric leak. With respect to plaintiff's August 2012 endoscopy, which revealed two small ulcers at the GE junction, Dr. Kelly opines that an ulcer is a known complication of bariatric surgery and was not caused by any negligence of Dr. Gohil. Dr. Kelly opines

that plaintiff did not suffer from any esophageal stricture or leak, and that there was no clear etiology for his described symptoms.

Dr. Gohil and Syosset Hospital also submit the affirmation of Kevin Mennitt, M.D., who avers that he is licensed to practice medicine in New York and that he is board certified in radiology. Dr. Mennitt states that he is fully familiar with the applicable standards of radiological care and practice as they existed in 2012 and 2013. Dr. Mennitt opines, within a reasonable degree of medical and radiological certainty, that Dr. Gohil and the staff at Syosset Hospital did not deviate or depart from accepted standards of medical care in their treatment of plaintiff, and that their alleged acts or omissions did not cause, nor were they a substantial factor in causing, plaintiff's alleged injuries. Initially, Dr. Mennitt opines, after reviewing the available images, that plaintiff's pre-operative upper endoscopy, which was performed by Dr. Lowy on June 8, 2012, did not reveal a hiatal hernia. Dr. Mennitt states that sliding hernias tend to be small and asymptomatic, and because they can move, they are often not detectable intraoperaterively or radiologically. Dr. Mennitt opines that even if a small, two-to-three centimeter hiatal hernia existed in plaintiff, it would not contraindicate or complicate his gastric sleeve procedure. Dr. Mennitt notes that during plaintiff's sleeve gastrectomy, Dr. Gohil did not find a hiatal hernia, despite looking for one. Dr. Mennitt opines that it was appropriate for Dr. Gohil to look for a hiatal hernia, and the claim that he failed to reduce a hiatal hernia is without merit, as it was not present. Dr. Mennitt further opines that Dr. Gohil's surgical technique was appropriate, as the sutures were appropriately aligned intraoperatively, and that any claim that Dr. Gohil placed sutures into the esophagus is without merit, as it is anatomically impossible. Dr. Mennitt further opines that Dr. Gohil appropriately checked plaintiff's gastric sleeve intraoperatively, and it was appropriate for him to determine there was no stricture present, as the endoscope passed through easily. Dr. Mennitt opines that the day after surgery, plaintiff's barium esophagram did not show any evidence of leak, tear or obstruction, that the results of the study were normal, and that it was appropriate to discharge him home. With respect to plaintiff's hospitalization at Syosset Hospital in July 2012, Dr. Mennitt opines that all of the radiological studies performed during this hospitalization were appropriately interpreted by the staff radiologists at Syosset Hospital. Further, Dr. Mennitt opines that the studies ruled out gastric leak, perforation or tear.

Dr. Gohil and Syosset Hospital having met their prima facie burden on the motion for summary judgment dismissing the causes of action for medical malpractice and lack of informed consent, the burden now shifts to plaintiffs to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Stiso v Berlin***, 176 AD3d 888, 110 NYS3d 139 [2d Dept 2019]; ***Stukas v Streiter***, *supra*). Plaintiffs submit the affidavit of an expert, who avers that he or she is licensed to practice medicine in Illinois, and that he or she is board certified in surgery. Plaintiffs' expert states that he or she is familiar with the standard of care, as it existed in 2012, for the performance and evaluation of bariatric surgery. Plaintiffs' expert opines, within a reasonable degree of medical certainty, that Dr. Gohil departed from good and accepted surgical practice in the performance of plaintiff's June 25, 2012 gastric sleeve surgery. Plaintiffs' expert opines that plaintiff was a proper candidate for bariatric surgery, due to his weight and co-morbidities, and because he was cleared for surgery by multiple specialists. However, plaintiffs' expert opines that Dr. Gohil incorrectly performed plaintiff's sleeve gastrectomy by stapling too close to the GE junction, which created a sleeve that was too narrow, causing obstruction. Plaintiffs' expert opines that the video

esophagram performed one day after plaintiff's surgery shows evidence of a "near total" obstruction at the GE junction. Plaintiffs' expert opines that Dr. Gohil departed from the standard of care by failing to recognize the obstruction and performing dilation and stenting immediately to stretch the area. Plaintiff's expert also opines that it was a departure from the standard of care for Dr. Gohil to fail to monitor plaintiff closely post-operatively in light of his complications and complaints. Plaintiffs' expert opines that the obstruction caused by Dr. Gohil's surgery is a proximate cause of plaintiff's alleged injuries, including continued vomiting, pain, and gastric dysfunction.

Plaintiffs have submitted evidence sufficient to raise triable issues of fact with respect to their cause of action for medical malpractice, as the opinion of their expert describes the applicable standard of care under the circumstances, explains how Dr. Gohil and Syosset Hospital deviated or departed from such standards, and concluded that these departures were competent causes of plaintiff's alleged injuries (*see* ***Smith v Mollica***, 158 AD3d 656, 70 NYS3d 234 [2d Dept 2018]; ***Omane v Sambaziotis***, 150 AD3d 1126, 55 NYS3d 345 [2d Dept 2017]; ***Williams v Bayley Seton Hosp.***, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; ***Stukas v Streiter***, *supra*). As the parties have presented conflicting opinions by medical experts as to whether a departure from good and accepted medical practice occurred, and as to the proximate cause of plaintiff's injuries, an Order granting summary judgment to Dr. Gohil and Syosset Hospital on the medical malpractice claim is not appropriate (*see* ***Lefkowitz v Kelly***, *supra*; ***Jagenburg v Chen-Stiebel***, *supra*).

With respect to plaintiffs' cause of action for lack of informed consent as asserted against Dr. Gohil, plaintiffs have failed to oppose this branch of Dr. Gohil's application, or specifically address such a cause of action (*see* ***Wright v Morning Star Ambulette Servs., Inc.***, *supra*; ***Stukas v Streiter***, *supra*). Further, plaintiffs' counsel states in his affirmation that plaintiffs do not oppose this branch of the motion. Therefore, plaintiffs' cause of action for lack of informed consent, as asserted against Dr. Gohil, is dismissed.

With respect to the motion by Dr. Lowy and Plainview Medical Group, they have established, prima facie, entitlement to summary judgment dismissing the complaint as asserted against them. Dr. Lowy and Plainview Medical Group submit the affirmation of Scott Tenner, M.D., who avers that he is licensed to practice medicine in New York and that he is board certified in internal medicine and gastroenterology. Dr. Tenner opines, within a reasonable degree of medical certainty, that the treatment rendered by Dr. Lowy was in accordance with good and accepted standards of medical practice. As an initial matter, Dr. Tenner opines that the decision to perform bariatric surgery, and the specific type of bariatric surgery to be performed, was made by the surgeon, Dr. Gohil, and not by Dr. Lowy. Dr. Tenner explains that Dr. Lowy's initial role as a gastroenterologist was to provide preoperative clearance, and that Dr. Lowy performed an endoscopy on plaintiff to evaluate the gastric anatomy. Dr. Tenner opines that Dr. Lowy obtained proper informed consent prior to the June 8, 2012 endoscopy and appropriately appreciated plaintiff's history of occasional reflux. Dr. Tenner opines that Dr. Lowy appropriately performed the procedure and appropriately appreciated the results of the endoscopy, including mild duodenitis, mild erosive gastritis, and a small hiatal hernia. Dr. Tenner opines that the results of the endoscopy did not contraindicate the planned sleeve gastrectomy procedure; that plaintiff's claimed injuries were not proximately caused by Dr. Lowy's preoperative care and treatment, as his care and treatment was limited to preoperative clearance procedures; and that there is

no causal connection between plaintiff's complaints and injuries and the preoperative evaluation by Dr. Lowy.

With respect to Dr. Lowy's postoperative care of plaintiff, Dr. Tenner opines that the postoperative care provided was at all times reasonable, appropriate, and in conformity with the standard of care, and that this care was not a proximate cause of plaintiff's alleged injuries. Dr. Tenner opines that after plaintiff presented to him with complaints of abdominal pain, vomiting, and nausea, Dr. Lowy appropriately performed an endoscopy and ordered imaging, laboratory studies, and prescribed medication. Dr. Tenner opines that, during the August 7, 2012 endopscopy, Dr. Lowy appropriately observed and treated an esophageal ulceration. Further, Dr. Tenner opines that, during the September 12, 2012 endoscopy, Dr. Lowy appropriately performed a balloon dilation for mild to minimal narrowing at the sleeve.

Dr. Lowy and Plainview Medical Group having met their prima facie burden on the motion for summary judgment dismissing the causes of action for medical malpractice and lack of informed consent, the burden now shifts to plaintiffs to raise a triable issue of fact(*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Stiso v Berlin***, *supra*; ***Stukas v Streiter***, *supra*). In opposition, plaintiffs submit the affirmation of their attorney, stating that they take no position with respect to the relief requested by Dr. Lowy and Plainview Medical Group. The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). Therefore, Dr. Lowy and Plainview Medical Group's motion for summary judgment dismissing the complaint as asserted against them is granted. As the complaint is dismissed as asserted against Dr. Lowy and Plainview Medical Group, the branch of their motion seeking leave to amend their answer is denied, as moot.

The unredacted affirmation of plaintiffs' medical expert submitted in opposition to Dr. Gohil and Syosett Hospital's motion is being returned by mail to plaintiffs' counsel simultaneously with the issuance of this order.

Dated: October 29, 2020
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**