

Seliger v Wagner

2021 NY Slip Op 33551(U)

June 1, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 621243/2018

Judge: Joseph A. Santorelli

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ORIGINAL

SHORT FORM ORDER

INDEX No. 621243/2018
CAL. No. 202000837MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2/25/21 (002)
MOTION DATE 2/25/21 (003)
MOTION DATE 3/25/21 (004)
ADJ. DATE 4/8/21
Mot. Seq. # 002 MD.
Mot. Seq. # 003 MotD
Mot. Seq. # 004 MG

-----X
KRYSTA SELIGER and JORDAN SELIGER,

Plaintiffs,

- against -

JOHN WAGNER, M.D., JOHN WAGNER,
M.D., PLLC, WGM OBSTETRICS AND
GYNECOLOGY, P.C., KIP L. BODI, M.D., KIP
L. BODI, PHYSICIANS, FACS, PLLC,
AMANDA HILL, P.A., HUNTINGTON
HOSPITAL ASSOCIATION, NORTHWELL
HEALTH, INC.,

Defendants.
-----X

DUFFY & DUFFY
Attorney for Plaintiffs
1370 RXR Plaza
West Tower, 13th Floor
Uniondale, New York 11556

FUREY, FUREY, LEVERAGE &
DARLINGTON, P.C.
Attorney for Defendants John Wagner, M.D.,
John Wagner, M.D., PLLC, WGM Obstetrics
and Gynecology, P.C.
600 Front Street
Hempstead, New York 11550

HEIDELL, PITTONI, MURPHY & BACH, LLP
Attorney for Defendants Kip L. Bodi, M.D,
Kip M. Bodi, Physicians, FACS, PLLC,
Amanda Hill, P.A., Huntington Hospital
Association, and Northwell Health, Inc.
1050 Franklin Avenue, Suite 408
Garden City, New York 11530

Upon the following papers read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendants John Wagner, M.D., John Wagner, M.D., PLLC, and WGM Obstetrics and Gynecology, P.C., on January 27, 2021; filed by defendants John Wagner, M.D., John Wagner, M.D., PLLC, and WGM Obstetric and

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Gynecology, P.C., on January 27, 2021; filed by defendants Kip L. Bodi, M.D., Amanda Hill, P.A., Huntington Hospital Association, and Northwell Health, Inc., on January 29, 2021; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers filed by plaintiffs, on March 25, 2021; Replying Affidavits and supporting papers filed by defendants John Wagner, M.D., John Wagner, M.D., PLLC, and WGM Obstetrics and Gynecology, P.C., on April 6, 2021; Other ___; it is

ORDERED that the motion (#002) by defendants John Wagner, M.D., John Wagner, M.D., PLLC, and WGM Obstetrics and Gynecology, P.C., the motion (#003) by defendants John Wagner, M.D., John Wagner, M.D., PLLC, and WGM Obstetrics and Gynecology, P.C., and the motion (#004) by defendants Kip L. Bodi, M.D., Amanda Hill, P.A., Huntington Hospital Association, and Northwell Health, Inc., are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#002) by defendants John Wagner, M.D., John Wagner, M.D., PLLC, and WGM Obstetrics and Gynecology, P.C., for summary judgment dismissing the complaint (#002), which was superceded by their subsequent motion for summary judgment, is denied, as moot, and it is further

ORDERED that the motion (#003) by defendants John Wagner, M.D., John Wagner, M.D., PLLC, and WGM Obstetrics and Gynecology, P.C., for summary judgment dismissing the complaint as asserted against them is granted in part, and denied in part.

ORDERED that the unopposed motion (#004) by defendants Kip L. Bodi, M.D., Amanda Hill, P.A., Huntington Hospital Association, and Northwell Health, Inc., is granted.

This is a medical malpractice action brought to recover damages for injuries allegedly arising from the treatment of plaintiff Krysta Seliger by defendants John Wagner, M.D., John Wagner M.D., PLLC, WGM Obstetrics and Gynecology, P.C. (WGM), Kip L. Bodi, M.D., Amanda Hill, P.A., Huntington Hospital Association (Huntington Hospital), and Northwell Health, Inc. Plaintiff alleges, inter alia, that Dr. Wagner negligently performed a total hysterectomy, causing injury to her left ureter, and that he failed to appreciate the injury intraoperatively. Plaintiff further alleges that Dr. Bodi did not appreciate the injury to her ureters during his treatment. Plaintiff asserts causes of action sounding in medical malpractice, negligent hiring, and lack of informed consent. Plaintiff's husband, Jordan Seliger, sues derivatively for loss of services.

The facts, subject to some dispute, can be summarized as follows: Plaintiff was a 37-year-old woman with a history of uterine fibroids, which were confirmed by a CT scan on May 17, 2017. Plaintiff was seeing Dr. Joseph Koka as her gynecologist, who recommended a hysterectomy for the treatment of her fibroids. Plaintiff desired to have an abdominoplasty procedure at the same time as a hysterectomy, which was to be performed at Huntington Hospital, by her plastic surgeon, Dr. Ian Bourhill. However, Dr. Koka did not have privileges at Hungtinton Hospital, and plaintiff was referred to Dr. Wagner for the hysterectomy procedure. On December 13, 2017, plaintiff presented to Dr. Wagner and WGM for an initial consultation. Dr. Wagner performed a physical examination, and obtained plaintiff's medical and surgical history. Dr. Wagner testified that he observed plaintiff's uterus to be 16 weeks in size, and that he explained the options for treatment. Dr. Wagner testified that due to the size of her uterus, plaintiff was not a candidate for IUD, birth control, or ablation therapies for treatment. He testified that he explained the options of hysterectomy, including total versus

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supracervical, open versus laparoscopic, and whether to remove her fallopian tubes and/or ovaries to reduce her cancer risk. He also testified that he discussed the risks and benefits of each procedure. Dr. Wagner testified that after their discussion, the plan was for a laparoscopic supracervical hysterectomy and salpingectomy.

On December 28, 2017, plaintiff called Dr. Wagner to ask additional questions. On January 8, 2018, plaintiff again called Dr. Wagner to request that her hysterectomy be performed as an open procedure, rather than laparoscopically, so that Dr. Bourhill could perform an abdominoplasty at the same time. Dr. Wagner testified that he further discussed the risks of an open procedure, and specifically counseled the patient about an increased risk of blood loss, as she would refuse blood transfusions due to her religion. Dr. Wagner testified that the plan now called for Dr. Bourhill to act as the primary surgeon, and that he would do an intraoperative consultation to perform the hysterectomy and bilateral self-injectomy, and that Dr. Bourhill would be responsible for the pre-operative work-up for plaintiff. Dr. Wagner testified that he requested a preoperative consultation with plaintiff.

On January 16, 2018, plaintiff testified that she underwent presurgical testing at Huntington Hospital. On January 24, 2018, plaintiff met with Dr. Wagner for a final preoperative visit. Dr. Wagner testified that he obtained plaintiff's formal informed consent, that she signed consent forms, and that all preoperative testing was completed. Dr. Wagner testified that he discussed specific surgical risks, including injury to blood vessels, bowel, ureters, and bladder, and that he arranged for a cell-saver to be in the operating room, as plaintiff would refuse blood transfusions. Dr. Wagner further testified that postoperative care would be deferred to Dr. Bourhill's team.

On January 26, 2018, plaintiff presented to the Ambulatory Surgery Center at Huntington Hospital. Dr. Wagner testified that it was custom and practice for Dr. Bourhill to begin the surgery by exposing the abdomen to where Dr. Wagner had to visualize to perform the hysterectomy. Dr. Wagner testified that he was called in to the procedure, and was assisted by Ms. Hill, who had already been present and assisting Dr. Bourhill. Dr. Wagner testified that he encountered multiple adhesions in plaintiff's abdomen, and that he spent approximately 20 to 25 minutes performing adhesiolysis. Dr. Wagner testified that he found a uterine fibroid, as well as a large cervical fibroid and a large vaginal fibroid. He further testified that he removed the uterus, cervix and vaginal fibroid, and that he traced plaintiff's ureters down to the cardinal ligament. He testified that he dissected the ureters to clear them away from the operative field. Dr. Wagner testified that after he completed his procedure, he closed the fascia, and turned the case back over to Dr. Bourhill. Dr. Wagner further testified that Dr. Bourhill would manage plaintiff's postoperative care, as the abdominoplasty would require more analgesic care and incision management, and he therefore deferred to the plastic surgery team. On January 27, 2018, plaintiff was discharged home. On January 29, 2018, Dr. Wagner testified that he called plaintiff to review the surgery, and on January 31, 2018, he called her to review pathology reports.

On February 4, 2018, plaintiff presented to the emergency department of Huntington Hospital with complaints of constipation, nausea, and pain in her back and flank. A CT scan of her abdomen and pelvis was performed, which showed a distal left ureteral obstruction, which was causing mild left hydronephrosis. Plaintiff was admitted, and urology and gynecology were called to consult. On February 5, 2018, Dr. Wagner saw plaintiff in the hospital. He testified that he believed it was "very

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unlikely” that there was a ureteral tear, based upon the CT scan from the prior day, as there was no free fluid in her abdomen and no leakage of dye. Plaintiff was started on antibiotic therapy for a possible urinary tract infection or possible low-grade pelvic cellulitis. On February 6, 2018, Dr. Bodi evaluated plaintiff as the on-call urologist for Huntington Hospital. Dr. Bodi believed plaintiff had a stricture of the ureter, due to scarring. He performed a physical evaluation and noted that plaintiff’s bloodwork was all within normal limits. Dr. Bodi’s assessment was hydronephrosis, with ureteral stricture. Plaintiff was discharged, with instruction to follow-up with Dr. Wagner, Dr. Bourhill, and Dr. Bodi. Plaintiff had no further contact with Dr. Bodi or Dr. Wagner.

On February 11, 2018, plaintiff returned to the emergency room of Huntington Hospital, but left without being seen by a physician. She then presented to the emergency department of Winthrop University Hospital. Plaintiff was ultimately diagnosed with a left ureteral tear.

Dr. Wagner and WGM now move for summary judgment dismissing the complaint as asserted against them, arguing that Dr. Wagner did not deviate or depart from the applicable standard of care in his surgical and post-operative care of plaintiff, or, that if there was a deviation or departure from the applicable standard of care, it was not the proximate cause of plaintiff’s alleged injuries. They also argue that Dr. Wagner properly obtained plaintiff’s informed consent prior to the hysterectomy procedure. In support of their motion, Dr. Wagner and WGM submit, inter alia, the affirmation of Robert Berg, M.D., transcripts of the deposition testimony of plaintiff and Dr. Wagner, plaintiff’s certified medical records from St. Joseph’s Hospital, and plaintiff’s uncertified medical records from WGM, Dr. Gershbaum, Dr. Edelman, Huntington Hospital, and Winthrop University Hospital. Plaintiffs oppose the motion, arguing, among other things, that triable issues of fact exist with respect to whether Dr. Wagner and WGM departed from accepted standards of care, and whether those deviations caused plaintiff’s injuries. Plaintiffs submit the affirmation of a physician who is board certified in obstetrics and gynecology. The Court notes that the plaintiffs have provided the court with an unredacted copy of their physician’s affirmation for in camera review.

Dr. Bodi, Ms. Hill, Huntington Hospital, and Northwell Health, Inc., also collectively move for summary judgment dismissing the complaint as asserted against them, arguing that the care and treatment provided to the plaintiff was at all times consistent with good and accepted standards of medical care, and that none of the actions or omissions were a proximate cause of plaintiff’s alleged injuries. They further argue that they did not have an independent duty to obtain plaintiff’s informed consent prior to the hysterectomy procedure, and that the staff of Huntington Hospital were properly qualified and credentialed. Dr. Bodi, Ms. Hill, Huntington Hospital, and Northwell Health, Inc., submit, inter alia, the affirmation of Frederick A. Gulmi, M.D., and the affirmation of Avraham Z. Schwartz, Esq., on behalf of Northwell Health, Inc. Plaintiffs do not oppose the motion.

Initially, the Court notes that while defendants have separately submitted uncertified copies of plaintiff’s medical records, plaintiffs do not challenge their admissibility and reference 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).

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As healthcare providers, doctors and hospitals owe a duty of reasonable care to their patients while rendering medical treatment, and a breach of this duty constitutes medical malpractice (*see Dupree v Giugliano*, 20 NY3d 921, 924, 958 NYS2d 312, 314 [2012]; *Scott v Uljanov*, 74 NY2d 673, 675, 543 NYS2d 369 [1989]; *Tracy v Vassar Bros. Hosp.*, 130 AD3d 713, 715, 13 NYS3d 226, 288 [2d Dept 2015]). To recover damages for medical malpractice, a plaintiff patient must prove both that his or her healthcare provider deviated or departed from good and accepted standards of medical practice, and that such departure proximately caused his or her injuries (*see Gross v Friedman*, 73 NY2d 721, 535 NYS2d 586 [1988]; *Bongiovanni v Cavagnuolo*, 138 AD3d 12, 16, 24 NYS3d 689, 692 [2d Dept 2016]; *Stukas v Streiter*, 83 AD3d 18, 23, 918 NYS2d 176 [2d Dept 2011]).

To establish his or her entitlement to summary judgment in a medical malpractice action, a defendant healthcare provider must prove, through medical records and competent expert affidavits, the absence of any such departure, or, if there was a departure, that the plaintiff was not injured as a result (*see Bongiovanni v Cavagnuolo, supra; Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 982 NYS2d 361 [2d Dept 2014]; *Faccio v Golub*, 91 AD3d 817, 938 NYS2d 105 [2d Dept 2012]). To sustain this burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 33 NYS3d 369 [2d Dept 2016]; *Seiden v Sonstein*, 127 AD3d 1158, 7 NYS3d 565 [2d Dept 2015]; *Lormel v Macura*, 113 AD3d 734, 979 NYS2d 345 [2d Dept 2014]). If such a showing is made, the burden then shifts to the plaintiff to submit evidentiary facts or materials in rebuttal, but only as to those elements on which the defendant met his or her prima facie burden (*see Keesler v Small*, 140 AD3d 1021, 35 NYS3d 356 [2d Dept 2016]; *Abakpa v Martin*, 132 AD3d 924, 19 NYS3d 303 [2d Dept 2015]; *Williams v Bayley Seton Hosp.*, 112 AD3d 917, 977 NYS2d 395 [2d Dept 2013]; *Stukas v Streiter, supra*). 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]).

Further, a hospital may 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]). However, 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 claim for 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

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(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. Wagner and WGM have established, prima facie, entitlement to summary judgment dismissing the complaint as asserted against them. Dr. Wagner and WGM submit the affirmation of Robert Berg, M.D., who avers that he is licensed to practice medicine in New York and that he is board certified in obstetrics and gynecology. Dr. Berg avers that he is familiar with the standard of care with respect to the management of medical and surgical conditions involving the female pelvis, including urologic complications of pelvic surgery. Dr. Berg opines, within a reasonable degree of medical certainty, that Dr. Wagner adhered to good and accepted medical practice in his care and treatment of plaintiff. With respect to the pre-operative care provided by Dr. Wagner at WGM, Dr. Berg opines that Dr. Wagner's care was in accordance with good and accepted medical practice. Dr. Berg opines that Dr. Wagner appropriately obtained plaintiff's past surgical history, history of fibroids, reviewed her prior CT scan, and performed a physical examination. Dr. Berg opines that further presurgical imaging examinations were not required, as they would not have changed the surgical plan, and that there were no preoperative or intraoperative indications for a urology consult. He opines that it was not the standard of care for hysterectomy surgery to place stents in the ureters, regardless of a patient's surgical history. Dr. Berg opines that Dr. Wagner appropriately observed plaintiff's anatomy, including identification of the ureters, and that his surgical technique in identifying the ureters was within the standard of care. Dr. Berg opines that the standard of care does not require a cystoscopy, a ureteroscopy, or a retrograde pyelogram, and that, even if such procedure was performed, it would not have identified ureter injury, other than a total transection or complete obstruction, intraoperatively.

Dr. Berg further opines that plaintiff's ureter was not perforated at the time of the surgery, but rather that she suffered a delayed injury in the form of a partial ureteral tear. He states that ureteral injuries are known to present in a delayed fashion, and are known to occur in the absence of negligence. Dr. Berg states that this opinion is based on the fact that Dr. Wagner observed the ureters and did not observe an injury, that Dr. Wagner was able to confirm that the ureters were away from the operative field, that the pelvis was "exceedingly dry" before closing, and that the CT scan performed at Huntington Hospital after surgery did not identify any perforation or significant amount of fluid in her pelvis.

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As to plaintiff's claim for lack of informed consent, Dr. Berg opines that Dr. Wagner adhered to good and accepted medical practice in obtaining plaintiff's informed consent prior to the hysterectomy procedure. Dr. Berg opines that Dr. Wagner's notes indicate multiple detailed discussions with plaintiff regarding surgical options and the risks associated with each. Dr. Berg states that ureter injury is a known complication of hysterectomy surgery, and that this potential was discussed by Dr. Wagner on at least two occasions prior to the January 26, 2018 surgery. Further, Dr. Berg notes that plaintiff signed a written consent to surgery. Additionally, Dr. Wagner testified that while explaining the options for hysterectomy and fibroid treatment with plaintiff, Dr. Wagner drew diagrams, explained that less invasive options were not appropriate given the size of her fibroids, and answered all of plaintiff's questions. Plaintiff testified that Dr. Wagner explained all of the available methods to treat uterine fibroids with her, and testified that she had more than two conversations with Dr. Wagner about the procedure.

Dr. Wagner and WGM having met their prima facie burden on the motion for summary judgment dismissing the complaint as asserted against them, the burden now shifts to plaintiff to raise a triable issue of fact necessitating a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Stiso v Berlin*, 176 AD3d 888, 110 NYS3d 139 [2d Dept 2019]; *Stukas v Streiter, supra*). Plaintiff submits the affirmation of a physician, who avers that he or she is licensed to practice medicine in New York, that he or she is board certified in obstetrics and gynecology, and that he or she is familiar with the standards of care with respect to open hysterectomy procedures, as well as the evaluation, diagnosis, and treatment of ureter injuries. Plaintiffs' expert opines, within a reasonable degree of medical certainty, that Dr. Wagner deviated from the applicable standard of care with respect to his treatment of plaintiff. Plaintiffs' expert opines that Dr. Wagner deviated from the standard of care by failing to order appropriate preoperative imaging, particularly an MRI examination, which such expert describes as the "gold standard" for mapping uterine and cervical myomas. Plaintiffs' expert further opines that it was a departure for Dr. Wagner to rely on a CT scan that was performed one year and eight months prior, as this study would not be reliable in determining the location and size of plaintiff's fibroids, because fibroids can change over short periods of time. Plaintiffs' expert states that the standard of care required an MRI within 30 days of a hysterectomy. Plaintiffs' expert opines that this failure to perform preoperative imaging caused or contributed to plaintiff's ureter injury as Dr. Wagner was unaware of plaintiff's anatomy. Further, plaintiffs' expert opines that Dr. Wagner deviated from the standard of care in recommending and performing a hysterectomy without attempting conservative methods first, as plaintiff had a history of abdominal surgery. Plaintiffs' expert also opines that Dr. Wagner deviated from the standard of care by failing to place ureteral stents to assist in visualization and reduce the risk of injury, given plaintiff's surgical history and the size of her uterus, and that this failure contributed to plaintiff's injuries. Additionally, plaintiffs' expert opines that Dr. Wagner deviated from the standard of care by failing to call for an intraoperative urology consultation, considering plaintiff's increased risk of adhesions and anatomical disortion, and that this failure to have a urologist present to identify the ureters and other urological structures contributed to plaintiff's injuries. Finally, plaintiffs' expert opines that the injury to plaintiff's left ureter was caused by Dr. Wagner's failure to properly identify, visualize, and protect the left ureter while dissecting bladder adhesions, and that this injury was directly caused by Dr. Wagner's failure to exercise proper care.

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Plaintiffs have submitted evidence sufficient to raise triable issues of fact, as the opinion of their expert describes the applicable standard of care under the circumstances, explains how Dr. Wagner deviated or departed from such standards, and concludes 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*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]). As plaintiff, Dr. Wagner and WGM 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 alleged injuries, an order granting summary judgment as to Dr. Wagner and WGM is not appropriate (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]).

With respect to plaintiffs' cause of action for lack of informed consent as asserted against Dr. Wagner, plaintiffs have failed to oppose this branch of Dr. Wagner and WGM's motion, or specifically address such a cause of action (see *Wright v Morning Star Ambulette Servs., Inc.*, *supra*; *Stukas v Streiter*, *supra*). Therefore, plaintiffs' cause of action for lack of informed consent, as asserted against Dr. Wagner and WGM, is dismissed.

With respect to Dr. Bodi, Ms. Hill, Huntington Hospital, and Northwell Health, Inc., each have also established, prima facie, entitlement to summary judgment dismissing the complaint as asserted against them. With respect to Dr. Bodi, Dr. Bodi has established his prima facie entitlement to summary judgment. Dr. Bodi submits the affirmation of Frederick A. Gulmi, M.D., who avers that he is licensed to practice medicine in New York, that he is board certified in urology, and that he is fully familiar with the standard of care as it existed in 2018. Dr. Gulmi opines, within a reasonable degree of medical certainty, that Dr. Bodi did not deviate or depart from the applicable standard of care in his February 6, 2018 treatment of plaintiff, and that no act or omission of Dr. Bodi was a proximate cause of plaintiff's alleged injuries. Dr. Gulmi states that by the time Dr. Bodi evaluated plaintiff, she had already undergone all appropriate testing to evaluate her condition, including bloodwork, blood cultures, and a CT scan. Dr. Gulmi opines that these tests were appropriate to evaluate plaintiff's complaints, and there was no failure by Dr. Bodi with respect to testing. Further, Dr. Gulmi opines that a CT scan was the appropriate test, rather than an ultrasound, to evaluate plaintiff. Dr. Gulmi opines that Dr. Bodi performed a timely and proper examination, and that he reached a reasonable and appropriate diagnosis of left ureteral obstruction. Dr. Gulmi further opines that Dr. Bodi's treatment recommendations were appropriate, including the recommendation that she be treated as an outpatient, as her condition was not emergent. With respect to plaintiff's cause of action for lack of informed consent, Dr. Gulmi opines that there was no duty imposed on Dr. Bodi to obtain plaintiff's informed consent, as he did not perform any invasive procedures.

With respect to Ms. Hill, it is undisputed that she acted as the assistant to Dr. Bourhill and Dr. Wagner during plaintiff's January 26, 2018 surgery. Hospital staff, such as assistant surgeons, may be liable for carrying out a doctor's order "where the hospital staff knows that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders" (*Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 265 n 3, 292 NYS2d 440 [1968],

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citing *Fiorentino v Wenger* 19 NY2d 407, 414-415, 280 NYS2d 373 [1967]; see *Vaccaro v St. Vincent's Med. Ctr.*, 71 AD3d 1000, 898 NYS2d 163 [2d Dept 2010]). This general standard has been applied not only to nurses and hospital personnel, but also to medical residents and other doctors who are engaged in assisting a treating physician, and who do not themselves exercise any professional judgment with respect to the patient (*Abrams v Bute*, 138 AD3d 179, 191, 27 NYS3d 58 [2d Dept 2016]; see *Soto v Andaz*, 8 AD3d 470, 471, 779 NYS2d 104 [2d Dept 2004]; *Cook v Reisner*, 295 AD2d 466, 744 NYS2d 426 [2d Dept 2002]). “When supervised medical personnel are not exercising their independent medical judgment, they cannot be held liable for medical malpractice unless the directions from the supervising superior or doctor so greatly deviates from normal medical practice that they should be held liable for failing to intervene” (*Bellafiglio v Ricotta*, 83 AD3d 632, 633, 920 NYS2d 373 [2d Dept 2011]; see *Abrams v Bute*, *supra*; *Zhuzhingo v Milligan*, 121 AD3d 1103, 1106, 995 NYS2d 588 [2d Dept 2014]; *Soto v Andaz*, *supra*). Ms. Hill has established that she was not exercising any independent medical judgment, and that there were no actions taken by Dr. Bourhill or Dr. Wagner that so greatly deviated from normal medical practice such that she can be liable for failing to intervene.

With respect to the branch of the motion by Huntington Hospital, it has established its prima facie entitlement to summary judgment dismissing the complaint. Huntington Hospital submits the affirmation of Dr. Gulmi, who opines, within a reasonable degree of medical certainty, that the staff of Huntington Hospital performed reasonable and appropriate preoperative and postoperative evaluations of plaintiff during her admissions to the facility. Dr. Gulmi opines that plaintiff was evaluated by the appropriate medical specialists, and that the care and treatment provided by the staff at all times conformed to the standard of care, and was not the proximate cause of plaintiff's alleged injuries.


Dr. Bodi, Ms. Hill, and Huntington Hospital having met their prima facie burden on their respective branches of the motion, the burden now shifts to plaintiffs to raise a triable issue of fact necessitating a trial (see *Alvarez v Prospect Hosp.*, *supra*; *Stiso v Berlin*, *supra*; *Wright v Morning Star Ambulette Servs., Inc.*, *supra*; *Stukas v Streiter*, *supra*). Plaintiffs fail to oppose the motion which, in effect, is a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (see *Kuehne & Nagel v Baiden*, *supra*; *114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC*, *supra*). Therefore, the branch of the motion by Dr. Bodi, Ms. Hill and Huntington Hospital for summary judgment dismissing the complaint as asserted against them is granted.

With respect to the branch of the motion seeking judgment in favor of Northwell Health, Inc., the moving defendants submit the affirmation of Avraham Schwartz, Esq., who avers that he is the Vice President of the Medical Malpractice Program at Northwell Health, Inc. Mr. Schwartz states that Northwell Health, Inc. is a not-for-profit corporation and the corporate parent of Huntington Hospital, and that it does not provide patient care. Here, Northwell Health, Inc. has established that it had no physician-patient relationship with plaintiff such as to establish a claim for medical malpractice. “It is generally recognized that liability for medical malpractice may not be imposed in the absence of a physician-patient relationship” (see *Zimmerly v Good Samaritan Hosp.*, 261 AD2d 614, 614, 690 NYS2d 718 [2d Dept 1999]). As there is no evidence that Northwell Health, Inc., as a corporate parent of Huntington Hospital, had any relationship with plaintiff for the purposes of rendering medical or surgical treatment, the complaint is dismissed as against it.

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

Dated: JUN 01 2021



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION