DOCKET NO. HHD-CV23-6168888-S	:	SUPERIOR COURT
MARIA T. MAYER f/k/a MARIA T. MARTINEZ	:	JUDICIAL DISTRICT OF HARTFORD
V.	:	AT HARTFORD
VASILIOS D. KARABINIS, M.D., ET AL	:	MAY 28, 2024

MEMORANDUM OF DECISION
RE: MOTION TO STRIKE (#121)

Defendants move to strike the Second and Fourth Counts of the plaintiff's Complaint, which allege claims for battery. There is no dispute that the plaintiff, who was suffering from acute appendicitis, consented to have her appendix removed. However, she alleges the defendants told her they would perform the surgery laparoscopically. Instead, it was performed as an open procedure. The plaintiff contends that these allegations support her claims for battery.

The defendants respond that because the plaintiff consented to an appendectomy, her battery claims fail as a matter of law. Any questions about how the procedure would be performed go to the issue of informed consent.

For the following reasons, the court agrees with the defendants.

I

THE COMPLAINT

The court summarizes the allegations of the Complaint. On June 1, 2021, the plaintiff presented to Manchester Memorial Hospital (MMH) with abdominal pain. She was diagnosed with acute appendicitis and admitted as a patient. Surgery was scheduled for the following day. Complaint (dated 5/3/23) (Cmpl.), ¶¶ 5-7.

Before the surgery, the plaintiff signed a consent form authorizing the defendants to perform an appendectomy. The form did not specify the method of surgery. Cmpl., ¶¶ 9-10. The

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plaintiff alleges that "agents and/or servants and/or employees of MMH informed [her that] her appendectomy would be performed laparoscopically." Cmpl., ¶ 8. The defendant, Dr. Vasilios Karabinis, performed the appendectomy "as an open procedure, not a laparoscopic procedure." Cmpl., ¶ 15.

The plaintiff commenced this action by service of a five-count complaint on May 5, 2023. The First and Third Counts allege medical negligence claims against Dr. Karabinis, Connecticut Valley General and Vascular Surgical Associates, P.C. The specifications of negligence in those counts include the defendants' alleged failure to obtain specific consent to perform an open procedure, rather than a laparoscopic procedure. The Second and Fourth Counts allege battery claims against the same defendants on the basis of their alleged failure to inform the plaintiff that they would perform an open procedure not a laparoscopic one. The Fifth Count is not at issue.

In short, the factual allegations supporting the plaintiff's negligence claims are substantially the same as the allegations underlying her battery claims.

II

DISCUSSION

A

"A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . .[I]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . ." (Citations omitted; internal quotation marks omitted.) *Vacco* v. *Microsoft Corp.*, 260 Conn. 59, 64-65, 793 A.2d 1048 (2002). "Thus, we

assume the truth of both the specific factual allegations and any facts fairly provable thereunder. In doing so, moreover, we read the allegations broadly, rather than narrowly."

Macomber v. *Travelers Property & Casualty Corp.*, 261 Conn. 620, 629, 804 A.2d 180 (2002).

B

Since at least 1983, the distinction under Connecticut law between battery and lack of informed consent has been quite clear. "The theory of battery as a basis for recovery against a physician has generally been limited to situations where he fails to obtain any consent to the particular treatment or performs a different procedure from the one for which consent has been given, or where he realizes that the patient does not understand what the operation entails. *Cobbs* v. *Grant,* 8 Cal.3d 229, 240, 104 Cal.Rptr. 505, 502 P.2d 1 (1972); 4 Restatement (Second), Torts § 892B, comment i; note, 'Informed Dissent: A New Corollary to the Informed Consent Doctrine?' 57 Chi.Kent L.Rev. 1119, 1122 n. 18 (1981). The failure to make a sufficient disclosure, which is ordinarily the basis for claiming lack of informed consent, has been regarded by most courts as presenting the question, not whether there was an effective consent which would preclude an action for battery, but whether the physician had fulfilled his duty of informing the patient under the appropriate standard." *Logan* v. *Greenwich Hospital Assoc.*, 191 Conn. 282, 289, 465 A.2d 294 (1983). Thus, "a patient can recover for assault and battery when the physician (1) fails to obtain any consent to the particular treatment, (2) performs a different procedure from the one for which consent has been given, or (3) realizes that the patient does not understand what the procedure entails." *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 137, 757 A.2d 516 (2000).

In her objection to the Motion to Strike, the plaintiff argues, "[t]he Defendant *should have* determined the Plaintiff did not understand what the open procedure entails since he never

informed her of the procedure." (Emphasis added.) Plaintiff's Objection to Motion to Strike (#123), p.5. Whether the defendant "should have" so determined is not the law of battery, which is an intentional tort. As just noted, battery requires that the defendant actually "realizes that the patient does not understand what the procedure entails," not that the defendant should have realized the patient did not understand.

Both parties cite *Martinelli* v. *Fusi*, No. X10NNHCV044016894SCL, 2006 WL 164921, at *3 (Conn. Super. Ct. Jan. 5, 2006), which states, "it is apparent that the word 'entail' as used in *Logan* contemplates situations where the mechanics of the procedure itself, or some part thereof, are not sufficiently disclosed." Relying on this statement, the plaintiff claims that her battery claim is proper because the defendants allegedly failed to sufficiently disclose "the mechanics" of the appendectomy procedure. The defendants counter that "[a]ny claim that [the plaintiff] did not understand what the procedure 'entailed' because she did not know the risks would 'go to sufficiency of disclosure, and therefore to a claim for lack of informed consent, not battery.'" Memorandum of Law in Support of Motion to Strike (#121), pp. 3-4 (citing *Gallinari v. Koth*, 148 F. Supp. 3d 202, 212-13 (D. Conn. 2015)).

To the extent that *Martinelli* v. *Fusi* holds that a doctor commits battery when he or she fails to describe in detail how a particular medical procedure will be performed, this court respectfully disagrees with that decision. A doctor's alleged failure to sufficiently describe how a particular procedure will be performed and to disclose the risks of that procedure goes to the issue of informed consent.

In conclusion, the plaintiff acknowledges that she consented to an appendectomy. The defendants performed an appendectomy, not some other procedure, like removing her gall bladder or a kidney. The allegations that the defendants did not inform her the surgery would be

performed as an open procedure rather than laparoscopically support the plaintiff's negligence claims. As a matter of law, the allegations do not support her battery claims.[1]

III

CONCLUSION

For the foregoing reasons, the Motion to Strike the Second and Fourth Counts of the Complaint is GRANTED.

Daniel J. Klau, Judge

[1] Pursuant to General Statutes § 52-190a, the plaintiff attached to her Complaint the good faith opinion of a "similar health care provider." The author of the letter opined that the standard of care required the defendants to discuss the surgery with the plaintiff, including discussing "risks, benefits, and alternatives. Alternatives include therapeutic choices and surgical approaches. The alternatives included . . laparoscopic appendectomy, robotic appendectomy, or open appendectomy." The opinion letter supports the court's position that the plaintiff's allegations state a negligence claim, not an intentional tort claim of battery.

Checklist for Clerk

Docket Number: HHD-CV23-6168888-S

Case Name: Maria T. Mayer f/k/a Maria T. Martinez v. Vasilios D. Karabinis, M.D., Et Al.

Memorandum of Decision dated: 5/28/24

File Sealed: **Yes** **No** X

Memo Sealed: **Yes** **No** X

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HHD-CV23-6168888-S **MAYER, MARIA T., F/K/A MARIA T. MARTINEZ v. KARABINIS, MD, VASILIOS D. Et Al**

Prefix: HD3 **Case Type:** T28 **File Date:** 05/11/2023 **Return Date:** 05/23/2023

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Case Information

Case Type: T28 - Torts - Malpractice - Medical
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List Type: No List Type
Trial List Claim:
Last Action Date: 05/21/2024 (The "last action date" is the date the information was entered in the system)

Disposition Information

Disposition Date:
Disposition:
Judge or Magistrate:

Party & Appearance Information

Party		No Fee Party	Category
P-01	**MARIA T. MAYER F/K/A MARIA T. MARTINEZ** **Attorney:** BECK & ELDERGILL (002702) File Date: 05/11/2023 447 CENTER STREET MANCHESTER , CT 06040		Plaintiff
D-01	**VASILIOS D. KARABINIS MD** **Attorney:** COONEY SCULLY & DOWLING (010872) File Date: 05/25/2023 HARTFORD SQUARE NORTH 10 COLUMBUS BOULEVARD HARTFORD , CT 06106		Defendant
D-02	**CONNECTICUT VALLEY GENERAL AND VASCULAR SURGICAL ASSOCIATES, P.C.** **Attorney:** COONEY SCULLY & DOWLING (010872) File Date: 05/25/2023 HARTFORD SQUARE NORTH 10 COLUMBUS BOULEVARD HARTFORD , CT 06106		Defendant
D-03	**PROSPECT MANCHESTER HOSPITAL, INC.** **Attorney:** DANAHERLAGNESE PC (101685) File Date: 05/24/2023 CAPITOL PLACE/STE 700 21 OAK STREET HARTFORD , CT 06106		Defendant

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