

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 19-01505

PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

BRIAN MITCHELL, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

PO N. LAM, M.D., AND ASSOCIATED MEDICAL
PROFESSIONALS OF NY, PLLC, ALSO KNOWN AS A.M.P.,
DEFENDANTS-APPELLANTS.

GALE GALE & HUNT, LLC, SYRACUSE (MATTHEW J. VANBEVEREN OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

COTE & VANDYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County
(Anthony J. Paris, J.), entered July 18, 2019. The order, among other
things, denied that part of defendants' motion seeking to dismiss
plaintiff's claim of lack of informed consent.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: In this medical malpractice action in which
plaintiff seeks damages arising from a surgical procedure, defendants
appeal from an order that, inter alia, denied that part of their
motion seeking dismissal of plaintiff's claim of lack of informed
consent. We reject defendants' contention that Supreme Court erred in
denying that part of their motion, and therefore we affirm. A medical
professional may be deemed to have committed the intentional tort of
battery, rather than medical malpractice, "if he or she carries out a
procedure or treatment to which the patient has provided 'no consent
at all' " (*VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1394
[4th Dept 2012]; see *McCarthy v Shah*, 162 AD3d 1727, 1728 [4th Dept
2018]). Nevertheless, the lack of informed consent may be a proper
element of a medical malpractice claim against a medical professional
who is alleged to have negligently exceeded the scope of the patient's
consent (see *Ponholzer v Simmons*, 78 AD3d 1495, 1496 [4th Dept 2010],
lv dismissed 16 NY3d 886 [2011]; cf. *Tirado v Koritz*, 156 AD3d 1342,
1343 [4th Dept 2017]). Here, plaintiff pleaded in the alternative
that defendant Po N. Lam, M.D. failed to recall the scope of the
consent while performing the hernia-related procedure and thereby
"negligently exceeded the scope of plaintiff's consent" (*Ponholzer*, 78

AD3d at 1496).

Entered: August 20, 2020

Mark W. Bennett
Clerk of the Court