

587 F.Supp.2d 579

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Briefs and Other Related Documents

Judges and Attorneys

United States District Court,
S.D. New York.
Brenda NEALY, as Administratrix of the Estate of
Erica Nealy, Plaintiff,
v.
UNITED STATES SURGICAL CORPORATION,
Defendant.
No. 06 Civ. 11390(VM).

Nov. 14, 2008.

Background: Administratrix for probate estate of patient, who died three weeks after surgical stapler purportedly designed, manufactured, and sold by defendant was used in her gastric bypass procedure, brought state-court action alleging negligence, strict liability, breach of express warranty, breach of implied warranty, fraudulent misrepresentation, fraudulent concealment, violation of consumer protection statutes, loss of companionship, and wrongful death, and also asserted survival claim. After removing action, defendant moved for summary judgment.

Holdings: The District Court, [Victor Marrero, J.](#), held that:

- (1) administratrix was required to submit expert medical opinion supporting her theory of causation to establish her claims, and
- (2) medical consultant's letter did not provide expert medical opinion required for administratrix to establish causation elements of her claims.

Motion for summary judgment granted.

West Headnotes

[1] Federal Civil Procedure 170A  **657.5(1)**[170A](#) Federal Civil Procedure[170AVII](#) Pleadings and Motions[170AVII\(A\)](#) Pleadings in General[170Ak654](#) Construction[170Ak657.5](#) Pro Se or Lay Pleadings[170Ak657.5\(1\)](#) k. In General. **Most****Cited Cases**

Courts are required to broadly construe pro se pleadings and interpret them to raise the strongest arguments that they suggest.

[2] Attorney and Client 45  **62**[45](#) Attorney and Client[45II](#) Retainer and Authority[45k62](#) k. Rights of Litigants to Act in Personor by Attorney. **Most Cited Cases**

Submissions of pro se litigants are to be liberally construed.

[3] Federal Civil Procedure 170A  **2531**[170A](#) Federal Civil Procedure[170AXVII](#) Judgment[170AXVII\(C\)](#) Summary Judgment[170AXVII\(C\)3](#) Proceedings[170Ak2531](#) k. In General. **Most Cited****Cases**

That plaintiff is proceeding pro se does not relieve her of her duty to meet requirements necessary to defeat motion for summary judgment.

[4] Products Liability 313A  **114**[313A](#) Products Liability[313AII](#) Elements and Concepts[313Ak114](#) k. Negligence or Fault. **Most****Cited Cases**(Formerly [313Ak6](#))

To state a claim for negligence against product manufacturer under New York law, plaintiff must show (1) that manufacturer owed plaintiff a duty to exercise reasonable care, (2) breach of that duty so that a product is rendered defective, or, in other words, reasonably certain to be dangerous, (3) that the defect was the proximate cause of plaintiff's in-

jury, and (4) loss or damage.

[5] Federal Civil Procedure 170A  **2515**

170A Federal Civil Procedure


170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort Cases in General.

[Most Cited Cases](#)

Negligence 272  **371**

272 Negligence

272XIII Proximate Cause

272k371 k. Necessity of Causation. [Most Cited Cases](#)

[Most Cited Cases](#)

Causation is an essential element of any negligence claim under New York law, and if plaintiff is unable to establish that her injuries were proximately caused by defendant's conduct, summary judgment is proper.

[6] Products Liability 313A  **113**

313A Products Liability

313AII Elements and Concepts

313Ak113 k. Strict Liability. [Most Cited Cases](#)

[Most Cited Cases](#)

(Formerly 313Ak5)

To state a claim for strict liability under New York law, plaintiff must show that (1) defendant's product is defective because it is not reasonably safe as marketed, (2) the product was used for a normal purpose, (3) the defect was a substantial factor in causing plaintiff's injuries, (4) plaintiff, by the exercise of reasonable care, would not have both discovered the defect and apprehended its danger, and (5) plaintiff would not have otherwise avoided the injury by the exercise of ordinary care.

[7] Products Liability 313A  **148**

313A Products Liability


313AII Elements and Concepts

313Ak146 Proximate Cause

313Ak148 k. Design. [Most Cited Cases](#)

(Formerly 313Ak15)

To establish a prima facie case of strict liability under New York law, plaintiff must show that the defectively designed product caused his injury and that the defect was the proximate cause of the injury.

[8] Sales 343  **261(1)**

343 Sales

343VI Warranties

343k259 Making and Requisites of Express Warranty

343k261 Statements Constituting Warranty

343k261(1) k. In General. [Most Cited Cases](#)

[Most Cited Cases](#)

Sales 343  **262**


343 Sales

343VI Warranties

343k259 Making and Requisites of Express Warranty

343k262 k. Reliance by Buyer on Statements. [Most Cited Cases](#)

Under New York law, a prima facie claim for breach of express warranty requires plaintiff to show that there was an affirmation of fact or promise by the seller, the natural tendency of which was to induce plaintiff to buy, and that the warranty was relied upon to plaintiff's detriment.

[9] Sales 343  **439**

343 Sales

343VIII Remedies of Buyer

343VIII(D) Actions and Counterclaims for Breach of Warranty

343k438 Evidence

343k439 k. Presumptions and Burden of Proof. [Most Cited Cases](#)

When plaintiff brings a claim for breach of express warranty premised upon an allegation that a product was defective, it is plaintiff's burden, under New York law, to establish causation.

[10] Sales 343 ↪284(1)

343 Sales

343VI Warranties

343k281 Breach

343k284 Warranty of Quality, Fitness, or Condition

343k284(1) k. In General. **Most Cited**

Cases

Under New York law, a prima facie claim for breach of implied warranty requires that plaintiff prove that the product is not fit for the ordinary purposes for which such goods are used.

[11] Sales 343 ↪427

343 Sales

343VIII Remedies of Buyer

343VIII(D) Actions and Counterclaims for Breach of Warranty

343k427 k. Right of Action. **Most Cited**

Cases

Under New York law, claim for breach of implied warranty requires plaintiff to establish causation.

[12] Fraud 184 ↪3

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k2 Elements of Actual Fraud

184k3 k. In General. **Most Cited Cases**

To state a claim for fraudulent misrepresentation under New York law, plaintiff must show that (1) defendant made a material false representation, (2) defendant intended to defraud plaintiff thereby, (3) plaintiff reasonably relied upon the representation, and (4) plaintiff suffered damage as a result of that reliance.

[13] Fraud 184 ↪16

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k16 k. In General. **Most Cited Cases**

Fraud 184 ↪17

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k15 Fraudulent Concealment

184k17 k. Duty to Disclose Facts. **Most Cited Cases**

Under New York law, claim for fraudulent concealment requires the same showing as that for fraudulent misrepresentation, with the additional requirement that plaintiff demonstrate that defendant had a duty to disclose material information.

[14] Fraud 184 ↪25

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k25 k. Injury and Causation. **Most Cited Cases**

Under New York law, damages element of claim for fraudulent misrepresentation or for fraudulent concealment includes a requirement that plaintiff establish proximate causation.

[15] Antitrust and Trade Regulation 29T ↪134

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk134 k. In General. **Most Cited Cases**

Antitrust and Trade Regulation 29T ↪138

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk133 Nature and Elements

29Tk138 k. Reliance; Causation; Injury, Loss, or Damage. **Most Cited Cases**

To establish a claim for deceptive business prac-

tices pursuant to New York statute, plaintiff must prove (1) a consumer-oriented act or practice (2) that was likely to mislead a reasonable consumer in a material way and (3) that caused injury to plaintiff; causation element is essential, in that plaintiff must show that defendant's material deceptive act caused plaintiff's injury. N.Y.McKinney's [General Business Law § 349\(a, h\)](#).

[16] Death 117 14(1)

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

117k12 Grounds of Action

117k14 Nature of Act or Omission

Causing Death

117k14(1) k. In General. [Most](#)

Cited Cases

Death 117 17

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

117k12 Grounds of Action

117k17 k. Proximate Cause of Death.

Most Cited Cases

To succeed on a cause of action to recover damages for wrongful death under New York law, personal representative must establish, inter alia, that defendant's wrongful act, neglect, or default caused death.

[17] Husband and Wife 205 209(3)

205 Husband and Wife

205VI Actions

[205k206](#) Rights of Action by Husband or Wife or Both

[205k209](#) For Torts

[205k209\(3\)](#) k. Personal Injuries to Wife Resulting in Loss of Services or Consortium, Impairment of Earning Capacity, or Expenses. [Most Cited Cases](#)

Husband and Wife 205 209(4)

205 Husband and Wife

205VI Actions

[205k206](#) Rights of Action by Husband or Wife or Both

[205k209](#) For Torts

[205k209\(4\)](#) k. Personal Injuries to Husband. [Most Cited Cases](#)

Under New York law, a claim for loss of companionship, society, services, or support is derivative of the related primary causes of action, and dismissal of the primary claims requires the court to dismiss any dependent derivative claims.

[18] Death 117 10

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

[117k10](#) k. Survival of Right of Action of Person Injured. [Most Cited Cases](#)

Death 117 15

117 Death

117III Actions for Causing Death

117III(A) Right of Action and Defenses

117k12 Grounds of Action

[117k15](#) k. Right of Action of Person Injured. [Most Cited Cases](#)

Under New York law, a survival claim is essentially a decedent's personal injury lawsuit, such that the viability of a survival claim is dependent upon the viability of the underlying personal injury claim.

[19] Antitrust and Trade Regulation 29T 369

29T Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(E\)](#) Enforcement and Remedies

[29TIII\(E\)6](#) Evidence

[29Tk369](#) k. Weight and Sufficiency. [Most Cited Cases](#)

Death 117 76

117 Death**117III Actions for Causing Death****117III(G) Evidence**

117k74 Weight and Sufficiency of Evidence

117k76 k. Cause of Death. **Most Cited Cases**

Products Liability 313A**313A Products Liability****313AIV Actions****313AIV(A) In General**

313Ak302 Grounds and Conditions Precedent

313Ak304 k. Affidavit or Certification of Expert. **Most Cited Cases**
(Formerly 313Ak71)

Sales 343**343 Sales****343VIII Remedies of Buyer**

343VIII(D) Actions and Counterclaims for Breach of Warranty

343k438 Evidence**343k441 Weight and Sufficiency**

343k441(3) k. Breach of Warranty. **Most Cited Cases**

Administratrix's contention that patient's gastrointestinal hemorrhage and subsequent death were caused by malfunction of surgical stapler used in patient's gastric bypass procedure was medical in nature and well outside sphere of layperson's common knowledge, and therefore administratrix was required to submit expert medical opinion supporting her theory of causation to establish her claims against stapler's purported manufacturer under New York law for negligence, strict liability, breach of express warranty, breach of implied warranty, fraudulent misrepresentation, fraudulent concealment, violation of consumer protection statutes, loss of companionship, and wrongful death, and also her survival claim. N.Y.McKinney's **General Business Law § 349(a, h)**.

[20] Federal Civil Procedure 170A**170A Federal Civil Procedure****170AXVII Judgment****170AXVII(C) Summary Judgment****170AXVII(C)2 Particular Cases****170Ak2515 k.** Tort Cases in General.**Most Cited Cases**

Medical consultant's letter stating that patient's treating doctors had "departed from the normal standard of care," and had "killed your daughter" did not satisfy, on motion for summary judgment, New York requirement of expert medical testimony demonstrating that allegedly defective surgical staplers used in gastric bypass procedure caused patient's fatal hemorrhage, where letter made no mention of use of staplers and did not state that any malfunction or defect in staplers used caused patient's injuries, but rather, placed blame entirely on treating physicians. N.Y.McKinney's **General Business Law § 349(a, h)**.

[21] Limitation of Actions 241**241 Limitation of Actions****241II Computation of Period of Limitation**

241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War

241k104.5 k. Suspension or Stay in General; Equitable Tolling. **Most Cited Cases**

Limitation of Actions 241**241 Limitation of Actions****241V Pleading, Evidence, Trial, and Review****241k194 Evidence**

241k195 Presumptions and Burden of Proof

241k195(3) k. Burden of Proof in General. **Most Cited Cases**

Litigant seeking equitable tolling of a statute of limitations bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.

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[22] Limitation of Actions 241 ↪104.5

241 Limitation of Actions

241II Computation of Period of Limitation

241II(G) Pendency of Legal Proceedings, Injunction, Stay, or War

241k104.5 k. Suspension or Stay in General; Equitable Tolling. **Most Cited Cases** Pro se filings, although held to more lenient standards, are not excused from establishing elements of request for equitable tolling of statute of limitations.

*582 Brenda Nealy, New York, NY, pro se.

Patrick A. Hamilton, James E. Berger, Teresa R. Laidacker, Shook Hardy & Bacon, LLP, Kansas City, MO, **William Edward Vita**, Westerman, Ball, Ederer, Miller & Sharfstein, LLP, Mineola, NY, for Defendant.

DECISION AND ORDER

VICTOR MARRERO, District Judge.

Plaintiff Brenda Nealy (“Nealy”), as Administratrix of the Estate of Erica Nealy (the “decedent”), brought this action against United States Surgical Corporation (“U.S. Surgical”) in New York State court alleging claims of negligence, strict liability, breach of express warranty, breach of implied warranty, fraudulent misrepresentation, fraudulent concealment, violation of consumer protection statutes, loss of companionship, and wrongful death, as well as a survival claim. These claims are based on the use of a surgical stapler-which allegedly was designed, manufactured, and sold by U.S. Surgical-in a **gastric bypass** procedure performed on the decedent approximately three weeks before her death. The action was timely removed to federal court pursuant to 28 U.S.C. § 1446(b) on the grounds of this Court's diversity of citizenship jurisdiction under 28 U.S.C. § 1332.

U.S. Surgical now moves for summary judgment pursuant to **Federal Rule of Civil Procedure 56** (“

Rule 56”). For the reasons discussed below, U.S. Surgical's motion is GRANTED.

I. BACKGROUND^{FN1}

FN1. The factual summary below is derived from Nealy's Complaint, dated September 19, 2006 (“Complaint”), and U.S. Surgical's Memorandum of Law in Support of Its Motion for Summary Judgment, dated July 25, 2008 (“Def.'s Mem.”). Except as quoted or otherwise cited, no other specific reference to these documents will be made. By Order dated Aug. 25, 2008, the Court granted Nealy an extension of time until October 13, 2008 to respond to U.S. Surgical's instant motion. Having received no opposition from Nealy, the Court decides the motion on the basis of the Complaint and Def.'s Mem., the papers currently on file in the public record.

On August 31, 2004, the decedent underwent a laparoscopic **gastric bypass** with laparoscopic gastric transection and laparoscopic **intestinal anastomosis** procedure. Nealy alleges that the decedent suffered a **gastrointestinal hemorrhage** due to the malfunction of U.S. Surgical's ENDO GIA stapler used in this procedure. The decedent died on September 21, 2004.

II. LEGAL STANDARD

In connection with a **Rule 56** motion, “[s]ummary judgment is proper if, viewing all facts of record in a light most favorable to the non-moving party, no genuine issue of material fact remains for adjudication.” *Samuels v. Mockry*, 77 F.3d 34, 35 (2d Cir.1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The role of a court in ruling on such a motion “is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reas-

onable inferences against the moving party.” *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986). The moving party bears the burden of proving *583 that no genuine issue of material fact exists, or that due to the paucity of evidence presented by the non-movant, no rational jury could find in favor of the non-moving party. See *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1223 (2d Cir.1994). The party opposing summary judgment must come forward with materials setting forth specific facts showing that there is a genuine issue of material fact; the opposing party cannot defeat summary judgment by relying on the allegations in the complaint, conclusory statements, or mere assertions that affidavits supporting the motion are not credible. See *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir.1996).

[1][2][3] In addition, the Court is mindful that where, as here, a party appears *pro se*, courts are required to broadly construe *pro se* pleadings and interpret them “to raise the strongest arguments that they suggest.” *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir.1996) (quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir.1994)). The submissions of *pro se* litigants are to be liberally construed. See, e.g., *Burgos*, 14 F.3d at 790. However, that Nealy is proceeding *pro se* “does not relieve [her] of [her] duty to meet the requirements necessary to defeat a motion for summary judgment.” *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir.2003) (internal citations omitted).

III. DISCUSSION

U.S. Surgical moves for summary judgment on the grounds that: (1) medical expert opinion evidence is required to address the issue of whether the **surgical stapler** used may have been defective, malfunctioned, and caused the decedent a fatal hemorrhage; (2) Nealy has failed to submit any expert evidence as to whether the **surgical stapler** caused the decedent's fatal hemorrhage; and (3) such causation evidence is required for all of Nealy's claims, either directly or derivatively. The Court agrees.

A. EVIDENCE OF CAUSATION NECESSARY FOR ALL CLAIMS

Nealy's claims include negligence, strict liability, breach of express warranty, breach of implied warranty, fraudulent misrepresentation, fraudulent concealment, violation of consumer protection statutes, wrongful death, and loss of companionship, as well as a survival claim. Causation is a required element of each of these claims, either directly or, in the cases of the loss of companionship and survival claims, derivatively.

1. Negligence

[4][5] To state a claim for negligence under New York law, a plaintiff must show: “(1) that the manufacturer owed plaintiff a duty to exercise reasonable care; (2) breach of that duty so that a product is rendered defective, *i.e.*, reasonably certain to be dangerous; (3) that the defect was the proximate cause of the plaintiff's injury; and (4) loss or damage.” *Santoro ex rel. Santoro v. Donnelly*, 340 F.Supp.2d 464, 484 (S.D.N.Y.2004) (citing *McCarthy v. Olin Corp.*, 119 F.3d 148, 156 (2d Cir.1997)). “Causation is an essential element of any negligence claim; if the plaintiff is unable to establish that [her] injuries were proximately caused by the defendant's conduct, summary judgment is proper.” *Petitt v. Celebrity Cruises, Inc.*, 153 F.Supp.2d 240, 252 (S.D.N.Y.2001); see also *Schipani v. McLeod*, 541 F.3d 158, 162-63 (2d Cir.2008) (“In order for the defendant to be held liable, the plaintiff must show not only that the defendant was negligent, but also that ‘the defendant's negligence was a substantial cause of the events which produced the injury.’ ” (quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 434 N.Y.S.2d 166, 414 N.E.2d 666 (1980))).

*584 2. Strict Liability

[6][7] To state a claim for strict liability under New York law, a plaintiff must show: “(1) the product is ‘defective’ because it is not reasonably safe as mar-

keted; (2) the product was used for a normal purpose; (3) the defect was a substantial factor in causing the plaintiff's injuries; (4) the plaintiff by the exercise of reasonable care would not have both discovered the defect and apprehended its danger; (5) the plaintiff would not have otherwise avoided the injury by the exercise of ordinary care." *Fane v. Zimmer, Inc.*, 927 F.2d 124, 128 (2d Cir.1991) (quoting *Wolfgruber v. Upjohn Co.*, 72 A.D.2d 59, 423 N.Y.S.2d 95, 97 (1979), *aff'd*, 52 N.Y.2d 768, 436 N.Y.S.2d 614, 417 N.E.2d 1002 (1980)); see also *Cosby v. City of White Plains, N.Y.*, No. 04 Civ. 5829, 2007 WL 853203, at *7 (S.D.N.Y. Feb. 9, 2007). "[T]o establish a prima facie case, the plaintiff is required to show that the defectively designed product caused his injury and that the defect was the proximate cause of the injury." *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 463 N.Y.S.2d 398, 450 N.E.2d 204, 209 (1983); see also *Derienzo v. Trek Bicycle Corp.*, 376 F.Supp.2d 537, 560 (S.D.N.Y.2005); *Olsovi v. Salon De-Barney*, 118 A.D.2d 839, 500 N.Y.S.2d 325, 326 (1986).

3. Breach of Express Warranty

[8][9] A prima facie claim for breach of express warranty requires the plaintiff to "show that there was an 'affirmation of fact or promise by the seller, the natural tendency of which [was] to induce the buyer to purchase' and that the warranty was relied upon to the plaintiff's detriment." *Tyler v. Kawaguchi, Inc.*, No. 00 Civ. 6366, 2006 WL 581184, at *5 (W.D.N.Y. March 8, 2006) (quoting *Friedman v. Medtronic, Inc.*, 42 A.D.2d 185, 345 N.Y.S.2d 637, 643 (1973)). When a plaintiff brings a claim for breach of express warranty premised upon an allegation that a product was defective, it is the plaintiff's burden to establish causation. See, e.g., *Beckford v. Pantresse, Inc.*, 51 A.D.3d 958, 858 N.Y.S.2d 794, 795 (2008) ("Whether the action is pleaded in strict products liability, breach of warranty, or negligence, the consumer has the burden of showing that a defect in the product was a substantial factor in causing the injury."); *Bloomer v.*

Empire Forklift, Inc., No. 04-3182, 21 Misc.3d 1115(A), 2007 WL 5613616, at *2 (N.Y. Sup.Ct. Ulster Cty. Feb. 26, 2007) (slip copy) (stating that plaintiff's cause of action for breach of express warranty must be dismissed "for the plaintiff's failure to establish any causal connection between the ... incident and his alleged back injuries"), *aff'd*, 46 A.D.3d 1324, 850 N.Y.S.2d 224 (2007).

4. Breach of Implied Warranty

[10] A prima facie claim for breach of implied warranty "requires that the plaintiff prove that the product is not 'fit for the ordinary purposes for which such goods are used.'" *Macaluso v. Herman Miller, Inc.*, No. 01 Civ. 11496, 2005 WL 563169, at *4 (S.D.N.Y. March 10, 2005) (citing *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 639 N.Y.S.2d 250, 662 N.E.2d 730, 736 (1995); *Robinson v. Reed-Prentice Div.*, 49 N.Y.2d 471, 426 N.Y.S.2d 717, 403 N.E.2d 440, 443 (1980)).

[11] As is the case with a claim for breach of express warranty, a claim for breach of implied warranty requires the plaintiff to establish causation. See, e.g., *Clarke v. Helene Curtis, Inc.*, 293 A.D.2d 701, 742 N.Y.S.2d 325, 327 (2002) ("The defendant established its prima facie entitlement to summary judgment by demonstrating that there was no causal relationship between its product and the plaintiff's disease, an essential element of the cause of action to recover damages for breach of implied warranty." (citations omitted)); *585 *Finkelstein v. Chevron Chem. Co.*, 60 A.D.2d 640, 400 N.Y.S.2d 548, 549 (1977); see also *Derienzo*, 376 F.Supp.2d at 551.

5. Fraudulent Misrepresentation and Fraudulent Concealment

[12][13][14] To state a claim for fraudulent misrepresentation under New York law, a plaintiff must show: "(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably

relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance.” *Swersky v. Dreyer & Traub*, 219 A.D.2d 321, 643 N.Y.S.2d 33, 36 (1996) (citing *Banque Arabe et Internationale D’Investissement v. Maryland Nat’l Bank*, 57 F.3d 146, 153 (2d Cir.1995)), *reh’g denied*, 232 A.D.2d 968, 656 N.Y.S.2d 857 (1996). A claim for fraudulent concealment requires the same showing as a that for fraudulent misrepresentation, with the additional requirement that the plaintiff must demonstrate that the defendant had a duty to disclose material information. See *Banque Arabe*, 57 F.3d at 153; *Allied Irish Banks, P.L.C. v. Bank of America, N.A.*, No. 03 Civ. 3748, 2006 WL 278138, at *6 (S.D.N.Y. Feb. 2, 2006). For both forms of fraud, the element of damage includes a requirement that the plaintiff establish proximate causation. See, e.g., *Hunt v. Enzo Biochem, Inc.*, 471 F.Supp.2d 390, 399-400 (S.D.N.Y.2006) (stating that a claim of common law fraud under New York law “requires a showing of proximate causation”); *Allied Irish Banks*, 2006 WL 278138, at *9.

6. Deceptive Business Practices

[15] To establish a claim for deceptive business practices pursuant to New York General Business Law § 349, a plaintiff must prove: “(1) a consumer-oriented act or practice (2) that was likely to mislead a reasonable consumer in a material way and (3) that caused injury to the plaintiff.” *Deen v. New School Univ.*, No. 05 Civ. 7141, 2007 WL 1032295, at *5 (S.D.N.Y. March 27, 2007) (citing *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 709 N.Y.S.2d 892, 731 N.E.2d 608, 611 (2000)); see N.Y. Gen. Bus. Law § 349(a); see also *id.* § 349(h) (creating a private right of action for injured parties). “The causation element is essential: ‘The plaintiff ... must show that the defendant’s ‘material deceptive act’ caused the injury.’” *In re Currency Conversion Fee Antitrust Litig.*, 230 F.R.D. 303, 310 (S.D.N.Y.2004) (quoting *Stutman*, 709 N.Y.S.2d 892, 731 N.E.2d at 612); see also *Petitt*, 153 F.Supp.2d at 266.

7. Wrongful Death

[16] “To succeed on a cause of action to recover damages for wrongful death, the decedent’s personal representative must establish, inter alia, that the defendant’s wrongful act, neglect, or default caused the decedent’s death.” *Eberts v. Makarczuk*, 52 A.D.3d 772, 861 N.Y.S.2d 731, 732 (2008) (citing *Chong v. New York City Transit Auth.*, 83 A.D.2d 546, 441 N.Y.S.2d 24, 25-26 (1981)); see also *Dineen ex rel. Dineen v. Stramka*, 228 F.Supp.2d 447, 454 (S.D.N.Y.2002) (“Plaintiff’s wrongful death claim must also be dismissed because he has failed to allege a sufficient causal or proximate nexus between any action by the defendant and the death of [decedent].”).

8. Derivative Claims: Loss of Companionship and Survival Action

[17] Under New York law, a claim for loss of companionship, society, services, or support is derivative of the related primary causes of action; dismissal of the primary claims requires the Court to dismiss any dependent derivative claims. See, e.g., *In re Air Crash at Belle Harbor, N.Y. on November 12, 2001*, 508 F.Supp.2d 244, 249 (S.D.N.Y.2007) (“The father’s claims [for loss of companionship, comfort, and services of his son] also fail because they are derivative of Morley’s underlying *586 claim, which lacks a basis in law.”); *Moore v. Ewing*, 9 A.D.3d 484, 781 N.Y.S.2d 51, 55-56 (2004) (“New York courts ... consider a parent’s claim for loss of services and medical expenses associated with a child’s injury to be derivative of the child’s claim.”); *Slobin v. Boasiako*, No. 18143/02, 19 Misc.3d 1110(A), 2008 WL 818940, at *12 (N.Y. Sup.Ct. Nassau Cty. March 8, 2008) (slip opinion) (describing claim for loss of services, society, support, and maintenance as a “derivative claim” that “stand[s] or fall[s] with plaintiff’s [underlying] cause of action”); *Diaz ex rel. Clark v. State*, No. 107637, 18 Misc.3d 1108(A), 2004 WL 5496243, at *1 n. 1 (N.Y.Ct.Cl. Oct. 25, 2004) (characterizing parent’s claim for “loss of services,

aid, comfort and society of her [deceased] daughter” as a derivative claim); *c.f. Jones v. United States*, 720 F.Supp. 355, 369 (S.D.N.Y.1989) (“A claim for loss of consortium is a derivative one, and can only be sustained if defendant is found to have been negligent on the primary claim.” (citations omitted)); *Liff v. Schildkrout*, 49 N.Y.2d 622, 427 N.Y.S.2d 746, 404 N.E.2d 1288, 1291 (1980); *Paisley v. Coin Device Corp.*, 5 A.D.3d 748, 773 N.Y.S.2d 582, 583 (2004).

[18] Similarly, because a survival claim is “essentially a decedent’s personal injury lawsuit,” *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 851 (2d Cir.1992), the viability of a survival claim is dependent upon the viability of the underlying personal injury claim. See *Corcoran v. New York Power Auth.*, Nos. 95 Civ. 5357, 95 Civ. 8102, 1997 WL 603739, at *4 (S.D.N.Y. Sept. 29, 1997) (citing N.Y. Est. Powers & Trusts Law § 11-3.2(b) (McKinney 1967)). Therefore, if Nealy cannot establish the requisite causation for her personal injury claims, her survival claim must fail as well.

B. EXPERT OPINION EVIDENCE NECESSARY TO DEMONSTRATE CAUSATION

[19] “Expert medical opinion evidence is usually required to show the cause of an injury or disease because the medical effect on the human system of the infliction of injuries is generally not within the sphere of the common knowledge of the lay person.” *Barnes v. Anderson*, 202 F.3d 150, 159 (2d Cir.1999) (quoting *Shegog v. Zabrecky*, 36 Conn.App. 737, 654 A.2d 771, 776 (1995)); see also *Fane*, 927 F.2d at 131 (holding that New York law required expert medical testimony to attribute a bone fracture to the breakdown of hip implant in order to establish proximate causation on a negligent failure to warn claim); *Gold v. Dalkon Shield Claimants Trust*, No. B-82-383, 1998 WL 351456, at *3 (D.Conn. June 15, 1998) (“Medical evidence relating to causes of injury to the human body is not normally considered to dwell within the common knowledge of a layperson.”), *aff’d*, No. 98-9346,

1999 WL 627689 (2d Cir.1999).^{FN2}

FN2. The Court appreciates the similarities of this case to *Buckley v. General Motors Corp.*, 54 Fed.Appx. 712 (2d Cir.2003) (unpublished opinion), where the district court granted the defendant’s motion for summary judgment against a *pro se* plaintiff in a products liability and personal injury action brought in New York state court that was removed to federal court. After vacating and remanding the district court’s decision on procedural grounds, the Second Circuit noted that “[i]t would appear that New York law does not require expert witnesses to prove causation in a products liability action, but permits proximate causation to be established solely on the basis of the jury’s ‘consideration of the characteristics of the [product] and plaintiff’s description of how the accident happened.’ ” *Id.* at 713 (quoting *Voss*, 463 N.Y.S.2d 398, 450 N.E.2d at 209) (alteration in original). The theory of causation at issue in *Buckley*, however, was mechanical and not medical. See *id.* (plaintiff alleged that a defect in her car’s axle caused her car to leave the road and roll over). In contrast, causation of a medical nature generally requires expert medical testimony. See, e.g., *Fane*, 927 F.2d at 131 (“The issue of causation in such a complicated medical case ... was one beyond the sphere of the ordinary juryman and required expert testimony.”).

In this case, Nealy claims that the decedent’s gastrointestinal hemorrhage and subsequent death were caused by the malfunction*587 of ENDO GIA staplers used in her gastric bypass procedure—a claim that is indisputably medical in nature and well outside the sphere of a layperson’s common knowledge. Therefore, to defeat U.S. Surgical’s Rule 56 motion, Nealy must submit expert medical opinion supporting her theory of causation; without

such evidence, the Court must grant U.S. Surgical's motion.

C. NEALY'S SUBMISSION

[20] Nealy submitted a letter to the Court from Paula F. Stone ("Stone"), a medical consultant, dated September 8, 2008 (the "Stone Letter"). The Stone Letter details the decedent's post-surgery condition and states that the decedent's treating doctors had "departed from the normal standard of care," and had "killed your daughter." (Stone Letter at 2-3.) The Stone Letter makes no mention of the use of ENDO GIA staplers during the procedure, and in particular, does not state that any malfunction or defect in the ENDO GIA staplers used caused the injuries to the decedent. Rather, the Stone Letter places the blame for the decedent's death entirely on the decedent's treating physicians. Nor does the Stone Letter establish that Stone possesses sufficient professional education, training, and experience to qualify as a medical expert in the relevant area. As such, the Stone Letter does not provide the expert medical opinion evidence required for Nealy to sustain her claims against U.S. Surgical.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). For each of Nealy's causes of action, causation is an essential element, either directly or derivatively. Because Nealy failed to provide the Court with expert medical testimony demonstrating causation that would sustain her burden of proof as to each of her claims, summary judgment must be granted to U.S. Surgical.

D. NEALY'S REQUEST FOR LEAVE TO AMEND HER COMPLAINT

Nealy's submission of the Stone Letter seems addressed not so much to the instant motion, but in support of Nealy's separate request for leave to amend the Complaint so as to assert malpractice claims against the individual physicians involved in the decedent's surgery. (Letter from Brenda Nealy, dated September 16, 2008 (the "Nealy Letter").) The statute of limitations on such claims expired almost two years ago, N.Y. C.P.L.R. § 214-a (McKinney 2003) ("An action for medical ... malpractice must be commenced within two years and six months of the act ..."), which Nealy concedes. (Nealy Letter at 1.)^{FN3}

FN3. Applying a liberal reading to the Nealy Letter, to the extent that she indicates she would amend the Complaint to assert claims sounding in negligence but not involving the provision of medical care itself, the statute of limitations has expired on such claims. See N.Y. C.P.L.R. § 214 (McKinney 2003) (three-year statute of limitations for personal injury action); see also *Mylon v. Hackensack Univ. Med. Ctr.*, No. 5:06-CV-268; 2007 WL 778137, at *1 (N.D.N.Y. March 9, 2007) ("Related claims sounding in negligence but not involving the provision of medical care itself ... are governed by the three-year limitations period generally applicable to personal injury claims."). Over one year has passed since the statute of limitations expired on any such claims.

*588 [21][22] Nealy urges the Court to exercise its equitable powers to toll the statute. A litigant seeking equitable tolling "bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005) (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990)); see also *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir.2000) (stating that

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equitable tolling requires a showing that “the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll” and “extraordinary circumstances prevented him from filing his petition on time”) (citations omitted). *Pro se* filings, although held to more lenient standards, are not excused from establishing these elements. *See, e.g., Valverde v. Stinson*, 224 F.3d 129 (2d Cir.2000) (applying general equitable tolling principles against *pro se* litigant); *see also Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir.2004) (holding that “*pro se* status does not in itself constitute an extraordinary circumstance meriting tolling”). The Court does not find sufficient ground to grant this request so long after the statutory deadline for filing Nealy's proposed claims. Accordingly, her request is DENIED.

IV. ORDER

For the reasons stated above, it is hereby

ORDERED that the motion (Docket No. 53) of defendant, U.S. Surgical Corporation, for summary judgment is GRANTED.

ORDERED that the motion (Docket No. 60) of plaintiff, Brenda Nealy, as Administratrix of the Estate of Erica Nealy, seeking leave to file an amended complaint is DENIED.

The Clerk of Court is directed to withdraw any pending motions and to close this case.

SO ORDERED.

S.D.N.Y.,2008.

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- [2008 WL 5372407](#) (Trial Motion, Memorandum and Affidavit) U.S. Surgical's Reply Memorandum in Support of Its Motion for Summary Judgment (Oct. 22, 2008) Original Image of this Document

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- [2008 WL 4497667](#) (Trial Motion, Memorandum and Affidavit) U.S. Surgical's Memorandum of Law in Support of Its Motion for Summary Judgment (Jul. 28, 2008) Original Image of this Document (PDF)
- [2006 WL 4982236](#) (Trial Pleading) United States Surgical Corporation's Answer to Plaintiff's Verified Plaintiff's Verified Complaint (Nov. 2, 2006)
- [2006 WL 4982237](#) (Trial Motion, Memorandum and Affidavit) Tyco International (US) Inc.'s Memorandum in Support of its Motion to Dismiss (Nov. 2, 2006)
- [2006 WL 4982235](#) (Trial Pleading) Notice of Removal (Oct. 26, 2006)
- [1:06cv11390](#) (Docket) (Oct. 26, 2006)

Judges and Attorneys([Back to top](#))

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Judges

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United States District Court, Southern New York
New York

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