

# State of New York Court of Appeals

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## MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 97 SSM 14  
Benedicta Brito,  
Respondent,  
v.  
Rafael Gomez et al.,  
Appellants.

Submitted by Nicholas P. Hurzeler, for appellants.  
Submitted by Brian J. Isaac, for respondent.

### MEMORANDUM:

The order of the Appellate Division should be reversed, with costs, the case remitted to Supreme Court for further proceedings in accordance with this memorandum, and the certified question answered in the negative.

Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages (see generally Arons v Jutkowitz, 9 NY3d 393, 409 [2007]; Dillenbeck v Hess, 73 NY2d 278, 287 [1989]). Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of plaintiff’s knees is “material and necessary” to defendants’ defense of the action (CPLR 3101 [a]). Accordingly, Supreme Court erred in denying defendants’ motion to compel plaintiff to provide discovery related to the prior treatment of her knees.

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On review of submissions pursuant to section 500.11 of the Rules, order reversed, with costs, case remitted to Supreme Court, Bronx County, for further proceedings in accordance with the memorandum herein and certified question answered in the negative. Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided September 10, 2019