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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

PART IA PART 16

Index Number : 111400/2009
COLWIN, MERCEDES
vs.
KATZ, BRUCE
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted to the extent provided in the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 16 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: APR 14 2014

_____, J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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MERCEDES COLWIN,

Plaintiffs,

-against-

BRUCE KATZ, M.D., BRUCE KATZ, M.D., P.C, and JUVA SKIN AND LASER CENTER, INC.,

Defendants.

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Index No. 111400/09
Motion Seq. No. 004

SCHLESINGER, J.:

Before this Court is a motion by defendant Dr. Bruce Katz, a dermatologist, and his professional corporation Bruce Katz, M.D., P.C., for summary judgment. The predicate for this action, sounding in medical malpractice, is a liposuction procedure performed on plaintiff Mercedes Colwin on February 13, 2007. The procedure included laser-assisted liposuction to the abdomen, hips, and both outer and inner thighs. It is Ms. Colwin's position that by the overly aggressive manner in which Dr. Katz performed the liposuction, he caused her to suffer lymphedema in her right ankle and leg, a condition which exists to this day.[1]

Ms. Colwin, who is an attorney and who now is attempting to represent herself, also claims other departures against Dr. Katz. These include that the procedure was contraindicated for her and that her aftercare was deficient. She has also asserted a

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[1]Earlier on in these proceedings, the plaintiff was allowed to plead alternative theories of injury. So in addition to the claim that Dr. Katz caused persistent lymphedema, she was also allowed to assert that Dr. Katz, by his liposuction, caused the aggravation of a pre-existing latent and asymptomatic degenerative condition at the same site.

claim sounding in lack of informed consent. However, after reading all the papers, it is clear to the Court that there is only one claim that may have the factual and legal predicate to allow it to continue, the one referring to Dr. Katz's overly aggressive manner of performing the surgery.

But even here, defense counsel, in his impressively detailed and thorough manner of presenting his argument, urges that this claim should fail as well. In fact, this position constitutes the thrust of his motion. He argues that Dr. Katz is entitled to summary judgment, or alternatively to a *Frye* hearing, because the liposuction that Dr. Katz performed, even if performed improperly, cannot result in the injuries claimed by the plaintiff; i.e., persistent lymphedema or aggravation/exacerbation of persistent right lower extremity lymphedema.

Defense counsel's motion is supported in major part by an affirmation from Dr. Robert H. Gotkin. He is a board certified plastic surgeon and has performed various forms of liposuction, including the type performed by Dr. Katz on February 13, 2007, laser-assisted liposuction combined with power-assisted liposuction.[2]

Dr. Gotkin first recites all of the court and medical records he has reviewed, including the transcripts of depositions given by the parties as well as depositions by Ms. Angela Caponi, defendant's Office Manager, and Ms. Joanne Davila, a Medical Assistant who aided Dr. Katz in the procedure. Dr. Gotkin has also conducted a literature search. He opines at the beginning of his statement (p 2):

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[2]In fact, Dr. Gotkin has provided the Court with two affirmations, one supporting the moving papers and one in Reply, responding to the opinions and arguments presented by Dr. Marc Siegel on behalf of the plaintiff.

> with a reasonable or higher degree of certainty that Dr. Katz did not depart from the standard of care in performing liposuction upon the plaintiff. I also believe that the liposuction did not cause her lymphedema or aggravate a preexisting condition. Based upon my experience and a search of the literature, I am unaware of medical evidence that would support the notion that liposuction on the abdomen, hips and thighs, whether performed properly or improperly, can cause unilateral lymphedema limited to the right foot/ankle.

Dr. Gotkin then provides a thorough review of Ms. Colwin's surgical and medical history. In this review, he notes that the patient's internist, Dr. Joseph Rotolo, on July 3, 2002 recorded that Ms. Colwin reported having "chronic swelling in the right foot and ankle, primarily of the ankle, for about two years. She has had an orthopedic evaluation and a podiatry evaluation but nobody has come up with an answer and she comes to me for help with this problem..."

This expert then describes what Dr. Katz actually did on February 13, 2007. He points out that before performing the surgery, the defendant did routine blood tests, took preoperative photos, and had Ms. Colwin sign an informed consent form. In the procedure itself, Dr. Katz reported how much fat/fluid was removed from which body part. The total supernatant fat volume was 800cc.

Dr. Gotkin then refers to the somewhat unusual circumstances that took place during the surgery. He does this very briefly. He notes that Ms. Colwin was late to the surgery and that Dr. Katz was "upset with her" and that Ms. Colwin described that the doctor performed the procedure more aggressively on the right side as compared to the left . He also refers to Ms. Davila's testimony, confirming Dr. Katz's unhappiness with his patient, but stating also that she observed no difference between how he performed

the procedure on the right side as compared to the left . Also, Dr. Gotkin points out that Davila, in her deposition, said that she saw no difference in how Dr. Katz performed the surgery on Ms. Colwin, as compared to the many prior procedures on other patients where she had assisted him.

Dr. Katz saw Ms. Colwin two weeks later, on February 27, 2007. Both agree that on that day, she had no discernable swelling of either leg. However, on April 3, 2007, Ms. Colwin saw an orthopedist, Dr. Neil Smith, and complained of "chronic swelling to the right ankle and distal calf for the last two weeks duration". Dr. Smith conducted an examination and took x-rays of the right ankle, which showed a 5 mm osteochondral lesion. His differential diagnosis included DVT (deep vein thrombosis) versus venous insufficiency. Therefore, he requested an MRI and a Doppler, which were done that day. It was noted in the clinical indication for the MRI that the patient had right ankle pain.

The MRI revealed extensive subcutaneous edema, findings compatible with ligament trauma, a small joint effusion and an osteochondral lesion of the medial talar dome; the last refers to a tear or fracture in the cartilage covering a bone in the joint. Here it refers to the bone that connects the leg to the foot.

The Doppler was negative for DVT. Another venous Doppler was done on May 29, 2007, and revealed no venous obstruction. However, according to Dr. Gotkin, it showed mild influx of both greater saphenous veins, which are very long veins, the longest in the body, under the skin that run from the ankle to the groin.

Ms. Colwin was referred to Dr. Howard Bush on May 22, 2007 for a vascular consult. Dr. Bush noted that the patient had had significant swelling of the right ankle

since March. He observed edema of the right foot/ankle. His diagnosis was right ankle injury, edema, asthma, and a reference Dr. Gotkin could not read.

When Ms. Colwin had her final visit with Dr. Katz on May 29, 2007, the doctor wrote that the patient had an "excellent result except for edema right foot. ? lymphedema. Seeing vascular surgeon."

The plaintiff next returned to her internist Dr. Rotolo on May 31, 2007. He noted that she had "developed RLE [right leg edema] lymphedema below the knee for which she had an extensive workup to rule out venous and arterial causes". He noted a history of osteochondritis of the right ankle and also her liposuction of February 2007. He noted that the trauma from that procedure may have been the source of the lymphedema. At the examination, he observed edema in her right leg and none in her left. He wanted to rule out certain conditions and so advised her to undergo an MRI and lymphoscintigraphy. He also referred her to a pulmonologist and to the Lymphedema Clinic in Westbury.

The lymphoscintigram was done on June 22, 2007. It is a nuclear imaging study that gives pictures of the lymphatic system. The impression was, among other things, "lymphatic drainage obstruction, right lower extremity".

On July 12, 2007, Ms. Colwin returned to Dr. Bush, who reviewed the test results. His impression was lymphedema of the right lower extremity. He advised various therapies. His examination did show that the patient's right lower leg was warm with a 2+ edema, along with other findings.

Finally, Ms. Colwin saw Dr. Rotolo on August 7, 2008 and January 22, 2010. He noted certain conditions, including lymphedema of the right leg, and was "status post liposuction procedure a couple of years ago." His examination showed a trace edema

of the right ankle and a toe nail fungus. His impression was that she was in "excellent health".

The final record reviewed by Dr. Gotkin was an Emergency Room report from Ms. Colwin's visit to Winthrop-University Hospital on August 30, 2010. The complaint was abdominal pain. However, an examination did reveal a trace of edema in her right leg.

Dr. Gotkin next states in his affirmation that he examined the medical literature on liposuction, "the most commonly performed cosmetic surgical procedure" (p.9). He then sets out a long list of possible complications and notes the expected side effects from whatever technique is used. These include "transient swelling at the site and, especially in an extremity, distal to where the liposuction is performed" (p. 10). Therefore, it appears that he acknowledges that edema in Ms. Colwin's right ankle may have resulted from Dr. Katz's liposuction. However, he adds (at p. 10) (and this is the core of the motion):

> This anticipated swelling, or edema, ... is short-lived and invariably resolves in a matter of days or weeks.

And further:

> the medical literature is devoid of any evidence that liposuction of any type can result in prolonged lymphedema, and such an occurrence is particularly without basis in terms of causing it at a remote site.

And finally (at p 11):

> The plaintiff alleges a heretofore unheard of connection between the removal of subcutaneous fat of the abdomen, hips and thighs and the disruption of the lymphatics in her lower leg, ankle and foot. The alleged causation simply does not exist.

Dr. Gotkin then discusses why he believes that no claims in the plaintiff's Bills of Particulars have medical validity in terms of departures from the performance of the liposuction. Then, while observing that most of the claims are too generally stated to make comments possible, he decides to tackle them anyway. In the following pages he opines as to the reasonableness of the liposuction plan, the soundness of using laser-assisted liposuction combined with power liposuction on the abdomen, and the fact that Dr. Katz had the "appropriate and necessary medical background, training, experience and skill." In fact, this expert echoes the deposition testimony of Dr. Katz that the doctor had qualifications "greater than the average doctor specializing in this area" (p. 12).

According to Dr. Gotkin, the defendant complied with all necessary protocols and conducted a careful and complete physical examination. He properly considered the history given by Ms. Colwin, which was essentially negative and normal. "There was no history reported by the patient of any previous lower extremity trauma or swelling" (p13).

Dr. Gotkin rejects the claim that Dr. Katz removed excess adipose tissue, insisting that the 800 cc of fat removed is not considered an excessive amount. The defendant ordered all the tests that were necessary, but it was not the standard of care to obtain the patient's prior records when performing liposuction, particularly where the patient is healthy, as Ms. Colwin was. But Dr. Gotkin maintains that even if Dr. Katz had obtained earlier records, there would have been nothing in them to make the liposuction contraindicated.

Further, according to Dr. Gotkin, there was no reason to discuss the possibility of lymphedema with the patient because, consistent with his opinion, prolonged or

permanent lymphedema has not been associated with liposuction. Serial procedures were not called for here, particularly as such a small amount of fat tissue was removed.

Dr. Gotkin then discusses what I believe to be the core of the plaintiff's complaint; that is, Dr. Katz's alleged failure to take intraoperative steps to prevent injury to the lymphatic vessels and system and further that Dr. Katz was negligent in being overly aggressive during the procedure (p. 17). Here, Dr. Gotkin relies on what he believes actually occurred during the performance of the liposuction. In that regard, he points out that the cannula was set to reciprocate at a predetermined rate, that Ms. Davila testified that she saw no difference in how the defendant treated the plaintiff's right and left sides, or how the doctor had treated other patients. Finally, he maintains that there was no evidence that the right hip or thigh was over treated.

Dr. Gotkin concludes his lengthy affirmation with the rationale for his opinion that the liposuction did not cause the development of lymphedema or the exacerbation of a preexisting condition. Here he discusses the wide study of liposuction, which he says again "has not been shown to cause lymphedema, especially in an area remote to the treated area" (p. 18). He explains that lymphedema is a "chronic progressive disorder that involves an impairment of lymphatic drainage with resultant fluid accumulation in the affected limb" (p. 18). Acquired, as opposed to primary or congenital, lymphedema is due to a reduction in lymph flow, usually from some kind of trauma or aggressive treatment, but not liposuction.

Next he comments on the appearance of the first sign of symptoms, about four weeks after the liposuction. He opines here (p. 19) that since the lymphatic system has excellent regenerative capacity:

> It is highly unlikely that the expected disruption of the adipose lymphatic in the abdomen, hips and proximal thighs would cause either early or late lymphedema of the distal leg, ankle or foot. This supposition is pure fiction.

He then refers to the imaging studies showing "defects in the saphenous veins in both lower extremities and the lymphatic in her right foot."(p. 19). He adds that these veins "were said to have valvular incompetence and mild reflux in the right and left lower extremities and the lymphatic in her right foot were said to be obstructed." He says, somewhat conclusively, that these conditions "cannot be caused by liposuction of the abdomen, hips and thighs" (p. 20). However, he does not explain why not.

Finally, he points to the pain in Ms. Colwin's ankle, which she had reportedly experienced years earlier, and a chronic osteochondral lesion of the ankle. He believes this "combination of findings is more likely the cause of her chronic RLE edema than anything related to her liposuction procedure." However, again he does not explain why this is so.

At the end of his statement, he offers a diagnosis based on a triad of findings known as "Yellow Nail Syndrome". The triad consists of chronic dystrophic nail changes. Here, Dr. Gotkin's notes that there was mention of a fungal infection of the patient's toes. He believes that these infections are chronic in nature and associated with chronic lymphedema. The third item is pulmonary disease such as adult onset asthma, which is also noted in Ms. Colwin's records. So Dr. Gotkin opines that, since Ms. Colwin had all of these conditions before her liposuction procedure, "she more likely has some chronic underlying condition unrelated in any way to the liposuction. The performance of the liposuction was purely coincidental" (p. 21).

His last statement relates again to the medical literature. He adds: "Obviously my statements about the medical literature are not opinions per se, but reflect what I knew beforehand and what I confirmed by reviewing the relevant medical literature" (p. 21). Unfortunately, he does not refer precisely to what that medical literature is. He gives the Court no specifics in this regard.

Of course, there is opposition. It comes in a somewhat unorthodox format, not so much in content, but rather in style. It is an affirmation from Dr. Marc Siegel, a board certified internist who has practiced medicine for 28 years. He has been an Attending with NYU Medical Center since 1988, an Associate Professor of Medicine at NYU Medical School since 2003, and a Medical Director at the Medical Center since 2008. Significantly, he says that he has "treated patients with Lymphedema and other vascular medical conditions since the inception of [his] clinical practice at NYU beginning in 1998." (Exh C, p. 1). Dr. Siegel has reviewed the same medical records as Dr. Gotkin, which refer to the many doctors seen and tests taken. He has also read the deposition testimony and Dr. Gotkin's affirmation. But in addition, unlike Dr. Gotkin, Dr. Siegel "conducted a directed examination of Plaintiff's lower extremities on November 20, 2013" (p. 1). Finally, he states he has "researched the correlation between lymphedema and Liposuction."

He then opines (at p 2) in a general way, but "with a reasonable or higher degree of certainty" (the same words as used by Dr. Gotkin but obviously with different conclusions reached), that Dr. Katz departed from the standard of care in performing liposuction upon the plaintiff. He also believes that the liposuction caused Ms. Colwin's lymphedema or at a minimum aggravated a preexisting condition. He says his opinions

rely on Ms. Colwin's medical history, the timing of the onset of lymphedema "shortly following the liposuction surgery", the doctor's "behavior during the surgery, and the literature on this subject ...".

He adds that Ms. Colwin's "subsequent difficulties and lack of another possible cause also confirm the association" between the liposuction and the lymphedema (p 2). He clearly does not accept Dr. Gotkin's theory of the triad, which involves the patient's nail fungus. At the very end of his statement he says that there is no medical evidence to suggest that nail fungus causes leg swelling or lymphedema. Finally, he states: "Even if that were true, which it is not, the nail fungus was cured with Lamisol in 2010 as stated by Ms. Colwin at her November 20th examination" (end of final page).

When Dr. Siegel discusses the "facts", he begins by stating his findings on November 20, 2013 when he examined Ms. Colwin. In his examination, he determined that the patient's right leg was one and one-half times the size of her left leg and that the swelling began at her right ankle and went up to the middle of her thigh. Dr. Siegel also found "no evidence of a chronic sprain or weakening of the ankle joint whatsoever."

In this regard, he points to several entries in Dr. Rotolo's records. On July 3, 2002, years before the liposuction, this doctor mentioned swelling of the patient's right ankle and concluded that this swelling with tenderness was likely caused by a chronic sprain in that area. However, on examinations on October 1, 2003 and March 22, 2006, Dr. Rotolo did not specifically note any swelling in the extremities.

Dr. Siegel then generally discusses that secondary lymphedema can be acquired through physical destruction (surgery, radiation, injection) or obstruction (malignancy or parasitic infection). He does acknowledge, based on both the medical literature and his

own experience with patients, that "lymphedema is a known complication of liposuction which generally resolves." (p. 3). He adds that: "Postliposuction lymphedema is unique in that it usually resolves spontaneously with time, typically within 2 to 6 months." He points out, however, that:

> The amount of lymphedema can be directly proportional to the amount of disruption caused to the tissues, and thereby more likely to be unremitting when associated with overly aggressive surgical technique which rents the tissues and is not followed by appropriate post operative care.

Dr. Siegel believes the following scenario occurred: Dr. Katz was angry with his patient, Ms. Colwin, who had arrived very late for her scheduled surgery, disrupting his entire schedule, that this "enraged Dr. Katz" and that "as Ms. Colwin lay naked on the operating table... Dr. Katz abruptly entered the room and began to berate Ms. Colwin for being late." Dr. Siegel continues his narration, relying solely on the testimony of Ms. Colwin and Dr. Katz's assistant, Joanne Davila. In essence, he accepts this testimony as a truthful account of these events, although he does omit Ms. Davila's other statements that Dr. Katz performed the procedure in his usual way. Dr. Siegel then makes a passing reference to the lack of adequate anesthesia, which was never claimed before. Nor was the claimed injury PTSD (post traumatic stress disorder) allegedly caused by such inadequacy.

There is no need to recount all the details Dr. Siegel discusses. But he concludes that the right side of the procedure went first, that Ms. Colwin was in pain and cried throughout the surgery, that Dr. Katz interrupted the procedure so as to chastise Ms. Davila for being too nice to the patient, that when the doctor returned, he

was calmer than he had been and continued and finished the procedure. One can glean from this order of events, and Dr. Siegel does, that the defendant was much more aggressive when he started on Ms. Colwin's right side.

Dr. Siegel then recounts Ms. Colwin's medical history after the procedure on February 13, 2007 to the present, not surprisingly naming the same doctors and tests that defendant's expert had named in his moving papers.

The most significant part of his affirmation is in his "Findings". In this regard, he first explains how lymphedema occurs. He states that acquired lymphedema can occur in surgical situations. Nothing that he says so far is controversial. But then he states: "According to my research, and according to the society for vascular surgery, lymphedema can be caused by liposuction and may well persist if not treated promptly and adequately." Here there is a footnote 5, wherein a website is given (p. 7) for the source of this opinion. The defense challenges both of these assertions, but particularly the second relating to the persistence of the condition.

Let me now discuss some of those findings, many with no factual or legal support. I will then speak to the core controversy here, whether acquired lymphedema can persist and not resolve by itself and whether it can be a result of liposuction surgery. As noted earlier, Dr. Gotkin emphatically insists that medical literature on this subject supports his position that lymphedema cannot result from liposuction and that it could not and did not continue here for months and years.

Therefore, in Reply, defense counsel provides the journal articles cited by Dr. Siegel, and he and his expert comment on them. As to the claims Dr. Siegel raises, the first here under Findings is that Dr. Katz lacked the appropriate and necessary medical

background, training, experience and skill. Dr. Siegel, an internist, opines that while both dermatologists and plastic surgeons are trained to do this procedure, Dr. Katz as a dermatologist did not receive the extensive degree of training that plastic surgeons receive. This claim was never made before and should not have been, as it has no credible or factual basis.

The plaintiff's expert then concludes that Dr. Katz was not cognizant of protocols and standards regarding the performance of liposuction and that "his behavior in the operating room was deplorable and dangerous." He explains his rather shocking characterization by saying that: "Performing the procedure by stabbing Ms. Colwin's right side with a cannula immediately following a shocking and angry outburst is a clear deviation of medical practice" (p. 8).

I interpret this criticism in a more moderate way to mean that Dr. Katz too aggressively used the cannula and that it was this over aggressiveness that caused greater than usual injury to the lymphatic system. Dr. Siegel uses terms like "sadistic" and "barbaric" in describing Dr. Katz and the surgery. These characterizations are ill advised and simply do not belong here. Frankly, their use weakens the professionalism this Court is accustomed to seeing in expert statements.

Dr. Siegel goes on to criticize the history taken by Dr. Katz and the forms he asked the patient to complete, but he fails to connect this criticism with any resulting injury. So this claim has no merit. Another area which lacks any support is Dr. Siegel's opinion that the liposuction itself, the removal of fat, was far too extensive. There is no elaboration of this opinion. Therefore, in light of the record showing that only 800 cc's of fat were removed, and Dr. Gotkin's depiction of that amount as appropriate, there is

no viable claim here either. Also in this category is the subject of post-operative care. While Dr. Siegel suggests that there really was none and proceeds to state what he believes should have been done, there is no actual connection between post-op care and any departure allegedly committed by Dr. Katz.

However, despite my criticism of some of Dr. Siegel's comments as excessive and unnecessary, I do find that he adequately explains his major criticism of Dr. Katz. His position, for which he states he finds support in the medical literature, is that Dr. Katz was negligent in failing to take steps intra-operatively to prevent injury to the lymphatic vessels and system and that he violated the standard of care by proceeding too aggressively and causing such injury. Dr. Siegel states that the research he has conducted "indicates that the more the cannula rents the tissues, the greater the chance of persisting unremitting lymphedema" (p. 9).

In this regard, he touches on what Dr. Gotkin said about the cannula being calibrated to perform the suctioning of fat. Dr. Siegel states that despite this calibration, the cannula "is still manually inserted into the patient's body by the surgeon." He concludes this discussion by stating (p. 9):

> Thus, even a perfectly calibrated cannula can cause injury when a surgeon takes out his anger on a patient and inserts the instruments in the patient's body. The damage led to lymphedema [which] still afflicts Ms. Colwin to this day.

The Reply consists of a second, shorter affirmation from Dr. Gotkin, limited to Dr. Siegel's "factual inaccuracies" (p. 1). There is also a lengthy affirmation from moving counsel, arguing that the Court should essentially disregard the statements by Dr.

Siegel as they are "replete with speculative, conclusory and inconsistent opinions" and do not establish either a triable issue of fact on either liability or causation. But what was most useful was that counsel provided the Court with the five articles Dr. Siegel footnoted as the research material upon which he relied. Moving defendant urges that they offer no support "to the novel notion that liposuction can result in permanent, acquired/secondary, chronic lymphedema." (p. 38 of Reply Affirmation). However, counsel did acknowledge at oral argument, that if the Court finds that the articles do support a connection between liposuction and chronic lymphedema, there would be no need for a *Frye* hearing.

The first reference made by Dr. Siegel to his research on the correlation between lymphedema and liposuction appears in his footnote 1 and that is to Liposuction 101 Liposuction Textbook, chapter 11 "Postliposuction Edema". He also uses it as a reference in his footnote 4. (Unfortunately, no page numbers appear in Dr. Siegel's Affirmation). In both instances, the citation is for the general point that when "drainage fluid is allowed to become trapped within interstitial micro loculations, the edema becomes persistent, resolving only if the injured lymphatic capillaries regenerate" (n. 1 & n. 4). Dr. Siegel says that here the injured lymphatic capillaries did not effectively regenerate (n. 4).

The cited article does support this general point. However, it should also be noted that Dr. Jeffrey Klein, the author of this website textbook, states that "lymphatic damage from liposuction is not permanent, lymphatic capillaries regenerate within a few weeks after being torn asunder by a liposuction cannula". Of course, Dr. Klein provides additional information but nothing more relevant to the issues extant here.

The second article, from an attorney's blog regarding medical malpractice, has nothing to do with the controversy here.[3]

The third article, entitled Awareness during Anesthesia (Exh F in Reply) is also not relevant. It was never contemplated that Ms. Colwin would be given general anesthesia. Further, there are no claims here with regard to PTSD or for that matter, as pointed out earlier, that Dr. Katz provided Ms. Colwin with insufficient local anesthesia.

The fourth article, also by Dr. Jeffrey Klein, is titled Post Tumescent Liposuction Care (Exh G in Reply). There, Dr. Klein returns to the subject of care after liposuction "to optimize patient recovery." I have reviewed the plaintiff's Bill of Particulars and do not see claims relating to inadequate post-operative treatment. But again, Dr. Klein states that while "the surgical effect of liposuction upon the lymphatics is unique" by disrupting or destroying "most lymphatic capillaries within the targeted adipose tissues," he significantly adds that "lymphatic damage from liposuction is not permanent". Much in this article is a repeat of what was in Dr. Klein's earlier cited article.

The fifth and last article cited by Dr. Siegel is published on a Vascular Website and is titled simply Lymphedema. (H in Reply). What Dr. Siegel suggests this article says is the following:

> According to my research, and according to the Society for Vascular Surgery, lymphedema can be caused by liposuction and may well persist if not treated promptly and adequately.

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[3]This Court is extremely unhappy, not only with the omitted pagination for Dr. Siegel's affirmation, but the manner in which he cites to a reference. The article (Exhibit E in the Reply) discusses many issues facing patients. Dr. Siegel fails to give anything more specific than the title of the blog. This is unsatisfactory.

But in this relatively short piece, what the article actually does say under the subheading "What Causes Lymphedema?" is:

> The most common causes of secondary lymphedema (not the less common type that one is born with) are surgery or radiation treatment for certain types of cancer, such as breast and testicular cancers. Other causes of lymphedema include surgery on the blood vessels in your limbs or other surgical procedures, like liposuction, as well as burns.

Moving defense counsel argues that this article also fails to support the issue under consideration; that is, the connection, if any, between liposuction and lymphedema. And explicitly, it does not. Nevertheless, it includes liposuction as an example of a surgical procedure that can cause lymphedema. Further, it defines lymphedema as a condition when the lymph vessels or lymph nodes "become damaged or are missing [and] the lymph fluid cannot move freely through the system. The fluids can then build up and cause swelling, known as lymphedema, in the affected arms or legs." It thus seems that the article is positing that liposuction can cause the lymphedema.

Ms. Colwin complained of swelling or edema in her right ankle about one month after undergoing the liposuction procedure. That complaint has continued to this day or at least to Dr. Siegel's examination of the plaintiff's lower extremities on November 20, 2013.

The liposuction occurred on February 13, 2007. On April 3, 2007, Ms. Colwin went to see Dr. Neil Smith, an orthopedist, to consult on the swelling that had been present in her foot and leg for about two weeks. From there she was referred to Dr.

Jonathan Deland at the Hospital for Special Surgery, who further referred her for a vascular consult, which she had with Dr. Harry Bush on May 22, 2007. Various tests were ordered by Dr. Bush and Dr. Rotolo. These seemed to rule out vascular problems and a deep vein thrombosis. However, the lymphoscintigraphy did find "lymphatic drainage obstruction, right lower extremity" and that the lymphatic flow on the right had "a marked lag compared to the left".

I agree with defense counsel that many of the claims urged by Dr. Siegel either have no merit, no evidentiary support (for example that Dr. Katz removed an excess amount of fat), or fail to meet the legal requirements of the cause of action pled. For example, the claim of lack of informed consent is dismissed as it fails to contain the necessary prerequisites spelled out in *Orphan v. Pilnik*, 66 AD3d 543 (1st Dep't 2009), *aff'd* 15 NY3d 907 (2010). What is lacking here, as in *Orphan,* is expert testimony that if Ms. Colwin had been informed that lymphedema might result, she as a reasonable person would not have agreed to this elective procedure.[4]

However, despite Dr. Gotkin's strong disagreement with Dr. Siegel on many points, I do find that there is an issue of fact here as to whether, in the first instance, Dr. Katz acted too aggressively during the liposuction procedure and, assuming that he did, whether he caused a chronic edema (lymphedema) in the patient's right ankle or exacerbated an earlier condition. I find there is some medical support for the connection between the procedure and the lymphedema. This, together with objective, nuclear

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[4]The informed consent cause of action has other problems. The decision here, while finding an "implicit" link between liposuction and lymphedema, also finds that such a connection, for a long term condition, is tenuous. Thus, it is questionable that this condition, chronic lymphedema, is one that a surgeon must discuss with his patient as a reasonable risk of the procedure.

tests that confirm a problem with lymphatic flow on the right side and continued complaints by Ms. Colwin and findings by Dr. Siegel that this symptom continues to exist, is enough here to allow the action to go forward in the opinion of this Court.

In other words, I am hard pressed to accept Dr. Gotkin's characterization of all this evidence as being due to "coincidence". I find that a jury is needed to sort out the various circumstances here and determine whether overly aggressive surgery, if such occurred, by Dr. Katz caused or exacerbated a permanent condition. All other claims, however, are dismissed.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the cause of action for lack of informed consent and the various claims for medical malpractice identified above, except for the claim that Dr. Katz departed from accepted standards of care by performing overly aggressive surgery; and it is further

ORDERED that counsel shall appear for a pre-trial conference on May 21, 2014 at 9:30 a.m. prepared to discuss settlement and select a firm trial date.

Dated: April 14 , 2014 APR 14 2014

J.S.C.
ALICE SCHLESINGER

FILED
APR 16 2014
COUNTY CLERK'S OFFICE
NEW YORK