

**Kaplan v Antell**

2020 NY Slip Op 32698(U)

August 17, 2020

Supreme Court, New York County

Docket Number: 805206-2016

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 805206-2016

ROSEMARY KAPLAN and STUART KAPLAN,  
Plaintiffs,

-against-

DERRICK E. ANTELL, M.D., DERRICK E. ANTELL, M.D.,  
P.C., NYC RECONSTRUCTIVE SURGERY, P.C. and  
COLUMBIA EAST SIDE AMBULATORY SURGERY  
FACILITY,

Defendants,

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JOAN A. MADDEN, J.:

In this action alleging medical malpractice and lack of informed consent, defendants move for summary judgment dismissing the complaint against them. Plaintiffs oppose the motion, which is denied for the reasons below.

Background<sup>1</sup>

This action arises out of the treatment of then 61-year-old plaintiff Rosemary Kaplan (hereinafter “plaintiff” or “Mrs. Kaplan”) by Darrick E. Antell, M.D., who performed suction assisted liposuction on Mrs. Kaplan on February 25, 2015. During the procedure, plaintiff’s small bowel was perforated requiring her to undergo an emergency small bowel resection surgery, which allegedly resulted in a large abdominal scar, the risk of intestinal adhesions and bowel obstruction, as well as trunk weakness, cramping pain, and emotional suffering.

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<sup>1</sup> Unless otherwise noted, the following facts are based on the undisputed medical records submitted by the parties.

On January 15, 2015, Mrs. Kaplan met with Dr. Antell, who she had treated with previously,<sup>2</sup> regarding the appearance of her abdomen and legs. (Kaplan EBT at 125). Dr. Antell offered to perform suction assisted liposuction on plaintiff's abdomen, lower back and outer thighs. (Id). According to Mrs. Kaplan, she told Dr. Antell that a friend underwent a "tummy tuck," and that Dr. Antell told her that she was not a good candidate for this procedure, but could get very similar results from liposuction, which was less invasive, would not involve cutting below the muscle, would take shorter to heal, and that there would be no scarring. (Id at 123, 126, 135, 136).

Mrs. Kaplan testified that she did not recall any discussion with Dr. Antell about any major risks of the liposuction procedure, that she believed the risks were minimal and the procedure was simple, and that she assumed it would be similar to a procedure Dr. Antell had performed on her in 1992, after which she was black and blue and had some bleeding. (Id at 130, 133). According to Mrs. Kaplan, Dr. Antell described the procedure as involving the insertion of instruments between the muscle and the skin to suck fat cells out in a couple of places, that she believed that the instruments would be inserted in the left and right side of the hip, and that the drainage tubes would also be placed there. (Id at 135-36). Plaintiff testified that there was no discussion about bleeding or infection, and she did not recall any discussion regarding "damage to deeper structures." (Id at 144-145).

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<sup>2</sup> Dr. Antell performed a septal repair on Mrs. Kaplan in 1992; an "excision and flap closure of lower extremity lesion and [suction assisted liposuction] of the lower extremities" in 1994; and a facelift and a "four-eyelid blepharoplasty" in 2013.

Dr. Antell testified that he explained to plaintiff the risks, benefits, complications and alternatives to the liposuction procedure, and that plaintiff indicated that she had read “many articles” about the procedure on the internet, including about the procedure’s complications. (Antell EBT at 224-225). Mrs. Kaplan testified, however, that she had not discussed with Dr. Antell having researched or read online about the liposuction and that she had not researched or read about it. (Mrs. Kaplan EBT at 147).

On February 25, 2015, prior to undergoing surgery, plaintiff signed a document entitled “Out-Patient Anesthesia Consent,” initialed a 9-page document entitled “Informed Consent - Liposuction Surgery (suction-assisted lipectomy and ultrasound-assisted lipectomy),” and signed a “Consent for Surgery/Procedure or Treatment,” (together “Consent Form”). The Consent Form provides general information about the nature of the liposuction technique and how the procedure is performed, and describes alternative treatments including diet and exercise.

Under the heading “Risks of Liposuction Surgery,” the document states that:

Every surgical procedure involves a certain amount of risk and it is important that you understand these risks and the possible complications associated with them. In addition, every procedure has limitations. An individual's choice to undergo a surgical procedure is based on the comparison of the risk to potential benefit. Although the majority of patients do not experience these complications, you should discuss each of them with your plastic surgeon to make sure you completely understand all possible consequences of liposuction.

Under the heading, “Specific Risks of Liposuction” it states:

**Patient Selection:** Individuals with poor skin tone, medical problems, obesity, or unrealistic expectations may not be candidates for liposuction.

**Pubic Distortion:** It is possible, though unusual, for women to develop distortion of their labia and pubic area. Should this occur, additional treatment including surgery may be necessary.

**Umbilicus:** Malposition, scarring, unacceptable appearance or loss of the umbilicus (navel) may occur.

**Tumescent Liposuction:** There is the possibility that large volumes of fluid containing dilute local anesthetic drugs and epinephrine that is injected into fatty deposits during surgery may contribute to fluid overload or systemic reaction to these medications. Additional treatment including hospitalization may be necessary.

Under the heading, "General Risks of Surgery," it states, in relevant part:

**Damage to Deeper Structures:** There is the potential for injury to deeper structures including nerves, blood vessels, muscles, and lungs (pneumothorax) during any surgical procedure. The potential for this to occur varies according to the type of procedure being performed. Injury to deeper structures may be temporary or permanent.

Dr. Antell's records reflect that a "Preoperative History and Physical Examination" was performed. Dr. Antell recorded a "History" which included a past medical history of "fibroid removal, rhinoplasty, lipo. thighs, facelift" and a review of systems that was normal. It also documents a "Physical Examination - Day of Surgery" with vitals and a pre-operation assessment of the heart, lungs, other (applicable to area to be treated) and general appearance. Of relevance here, under the section for "Other Pertinent Findings" Dr. Antell wrote "?umbilical hernia."

With regard to this notation, Dr. Antell testified that he believed Mrs. Kaplan had a "questionable little weakness in the area on the umbilical stock and noted it." (Antell EBT at 111). He testified that he did an exam, that he put his finger on the umbilicus, felt around, and had the patient cough. (Id at 125). He called it "questionable" because it was smaller than his [own] umbilical hernia; that an umbilical hernia is a weakness in that area of the fascia of the abdominal wall; that Mrs. Kaplan's umbilical hernia was right under the umbilicus in the center

and that there was no involvement on the left or right lateral sides or the supra-umbilical. (Id at 126-128). He further testified that her “umbilical hernia did not protrude with exhaling or coughing, that it was just a little weakness there which was important to note and that it meant ‘to take extra caution in that area,’” meaning he would have to slow down, be more cautious in the area, pay a little more attention beyond the usual, and to slow down while performing the liposuction, including during the installation and pre-tunneling. (Id at 129, 131). Dr. Antell testified that he believed that an abdominal hernia is a risk factor for liposuction and that was why he noted it and examined it. (Id at 122). He testified that he told Mrs. Kaplan that she had a little weakness in that area and that, “[w]e’ll be a little but more careful when going through that spot.” (Id at 138). He did not recall whether he told her that the hernia posed an increased risk for abdominal perforation during liposuction. (Id). He also testified that he discussed with Mrs. Kaplan that bowel perforation is a known risk of the procedure, and that there was a risk of “damage to deeper structures,” but acknowledged that he did not explain that the risks specifically included damage to the small intestines. (Id at 138, 167).

According to Dr. Antell, he did not investigate or diagnose “this questionable umbilical hernia” during the liposuction, and that before the surgery he did not order any studies to evaluate the area of weakness around the umbilical area and did not refer Mrs. Kaplan to get studies. (Id at 114). Dr. Antell testified that he did not do an abdominal ultrasound as “it wasn’t necessary” since he already made the diagnosis. (Id at 134). Dr. Antell also testified that he assumed plaintiff had a diastasis, which is a separation of the rectus abdominal muscle since virtually “all women that have kids have some degree of a diastasis.” (Id at 115, 117). He also testified that he did not document this assumed diagnosis in Mrs. Kaplan’s records and that he did not know in February 2015 if diastasis can be a risk for abdominal perforation from

liposuction. (Id. at 121-122). Dr. Antell testified that he “could not recall” whether he discussed with Mrs. Kaplan his assumption that she probably had some form of diastasis. (Id at 118).

Following the liposuction surgery, plaintiff was taken to the recovery room at approximately 10:40 am, where she reported experiencing severe abdominal pain, which she described as ten out of ten and was administered pain narcotics. Mrs. Kaplan continued to experience severe pain and was administered additional narcotics. Dr. Antell examined plaintiff at 2:30 pm. According to Dr. Antell, this examination occurred one hour before discharge, and that he touched plaintiff’s belly, examined her with palpitation and auscultation, and for rebound since he was concerned for possible intraperitoneal process. (Antell EBT at 216, 227, 228). At approximately 5:00 pm, Mrs. Kaplan was discharged to home, but continued to experience severe pain and according to her husband, plaintiff Stuart Kaplan, he called Dr. Antell’s office several times to report that his wife was in pain and was told to give her additional painkillers. (Stuart Kaplan EBT at 100-102).

At approximately, 7:00 pm, Dr. Antell recommended that Mrs. Kaplan return to his office and after examining her, Dr. Antell referred her to the emergency room at Lenox Hill hospital for a work-up. Plaintiff was admitted to Lenox Hill where tests performed suggested free air beneath the hemidiaphragms. Dr. Parswa Ansari operated on Mrs. Kaplan, performing a diagnostic laparoscopy, exploratory laparotomy, small bowel resection with primary anastomosis. The surgical report indicated “proximal ileum-hemorrhage and acute serositis, consistent with history of perforation.”

Plaintiffs allege that Dr. Antell and the other defendants, who are associated with his practice, departed from good and accepted medical practice in improperly performing the liposuction procedure in light of his concern of weakness in the abdominal wall and specifically

a potential umbilical hernia, without work-up and evaluation; in failing to perform a proper physical exam and testing and to obtain a pertinent history before performing the procedure; in failing to exercise proper surgical care and technique in performing the liposuction procedure; in failing to render proper post-operative care such as timely referral to the emergency room and improperly administering narcotics without physical examination. Plaintiffs also allege that defendants failed to properly inform plaintiff of the risks associated with the procedure, including the additional risks associated with a possible umbilical hernia and weakness of the abdominal rectus muscle.

Following the completion of discovery, defendants made this motion for summary judgment, arguing, *inter alia*, that Dr. Antell performed an appropriate procedure using correct surgical technique and equipment, ensured correct pre-operative and post-operative care, and that the risks of the procedure, which was performed at the request of plaintiff, were sufficiently explained by Dr. Antell and in the consent forms signed by plaintiff before the surgery.

In support of their motion, defendants submit the affirmation of John F. Reilly, M.D., a physician who is licensed to practice medicine in the State of Connecticut and is board certified by the American Board of Plastic Surgeons. Dr. Reilly states that he is familiar with the standards of accepted practice of plastic surgery, including in 2015, when the events underlying this action occurred, and that he has reviewed the pleadings, the parties' deposition transcripts, and the relevant medical records, and that his opinions are made with a reasonable degree of medical certainty. With regard to allegations that Dr. Antell failed to perform a proper physical examination, including by failing to take a complete history, and to perform pre-operative testing, Dr. Reilly opines that "Dr. Antell appropriately examined and treated [plaintiff] preoperatively," "obtained a proper history," and "properly examined plaintiff prior to the ...

procedure.” As to the performance of the liposuction procedure, Dr. Reilly opines “Dr. Antell at all times performed the appropriate procedure” and in doing so “used the correct surgical technique and equipment.” With regard to whether Dr. Antell departed from the applicable standard of care in performing the surgery on Mrs. Kaplan, Dr. Reilly opines that that:

The fact that the plaintiff was subject to a known risk of the type of surgery performed by Dr. Antell is in no way indicative of any negligence or a departure from accepted standards. Even with the best of surgical care, this surgery may result in perforation of internal organs. In fact, bowel perforation is widely known in the plastic surgery community to be a risk associated with surgeries involving the abdomen, and the complications the plaintiff allegedly suffered as a result of her procedure with Dr. Antell are indeed known complications of abdominal liposuction.

With respect to allegations that defendants departed from the standard of care by failing to properly monitor and evaluate plaintiff following the procedure, Dr. Reilly opines that “Dr. Antell provided appropriate post-operative care...[as] [p]laintiff was properly evaluated and discharged following the completion of abdominal surgery [and] [w]hen plaintiff called Dr. Antell reporting that she was still in pain, Dr. Antell ensured that the plaintiff was taken [care] of and walked her to Lenox Hill Hospital for further workup.”

With respect to the claim of lack of informed consent, Dr. Reilly opines that “the procedure adequately was explained to plaintiff as documented by the presence of plaintiff’s signature on each page of a detailed nine-page consent form...[and that] [and that]...plaintiff initialed each page of the informed consent for liposuction surgery, which included a section on the potential risk to deeper structures.”

He also opines that Dr. Antell “fully explained the risks and benefits of undergoing the abdominal liposuction procedure and gave the patient reasonable expectations so that an informed decision to proceed was made by Ms. Kaplan ...[and that Mrs. Kaplan] verbalized her

understanding as the risks and benefits, and alternatives to the abdominal liposuction surgery.. [and that] each of Dr. Antell's operative reports reflect that he explained the risks, benefits and alternatives of surgery prior to the procedure.”

As for causation, Dr. Reilly opines that “the damages as alleged by the plaintiff in this case were not the result of any negligence or medical malpractice on the part of Dr. Antell [and that]... [t]he elective abdominal liposuction procedure performed by Dr Antell on the plaintiff was properly performed and he did not deviate from the prevailing accepted standard of medical care for a plastic surgeon,” and that Mrs. Kaplan was fully aware of the risks from the elective surgery.

Plaintiffs oppose the motion, asserting that the conclusory opinions of Dr. Reilly are insufficient to make a prima facie showing entitling defendants to summary judgment. In support of their opposition, plaintiff submit the affirmation of a physician licensed to practice medicine in the State of New York and California, and board certified through the Academy of Aesthetic Medicine, whose identity is redacted, and who attests to performing thousands of liposuction surgeries, and having experience in all aspects of a liposuction procedure, “including the pre-operative testing and evaluation, performing the surgery itself and the post-operative and recovery of liposuction.” Plaintiff’s expert states that the opinions in the affirmation are stated within a reasonable degree of medical certainty and based on a review of the relevant medical records, the parties’ depositions and Dr. Reilly’s expert affirmation.

As for plaintiff’s pre-operative treatment, plaintiff’s expert opines that Dr. Antell “failed to perform proper physical exams and testing and obtain the pertinent history that was needed before proceeding with the abdominal liposuction procedure [and that]...if Dr. Antell had felt there was a questionable hernia, he should have evaluated it [and]...if [he] believed there was a

weakness in the abdomen ... he needed to work Mrs. Kaplan up for these findings.”

Specifically, the expert opines that Dr. Antell “could have and should have ordered abdominal imaging studies, including abdominal ultrasound.” The expert also opines that “good and accepted medical practice requires obtaining an exhaustive surgical history...[and that]...[h]ad a complete history been obtained and an abdominal ultrasound performed, any anatomical ‘variant’ would have been detected and made part of the surgical plan for the abdominal liposuction...[or] it would have been apparent that Mrs. Kaplan was not a candidate for liposuction surgery.” Thus, the expert concludes “[t]he failure to workup and evaluate Mrs. Kaplan ... was a substantial contributing factor in Mrs. Kaplan’s injuries.”

The expert next opines that “Dr. Antell departed from good and accepted medical practice in failing to exercise proper surgical care and technique when performing the liposuction procedure [and that] Dr. Antell did not use careful technique which is required in such plastic surgery and was unaware of the anatomy during the procedure, and that had careful surgical care been exercised, Mrs. Kaplan’s injuries would have been avoided.” The expert further opines that “the perforation of the viscera and intestines occurred during either the instillation of fluid, the pre-tunneling and/or the actual liposuction itself from the cannulas that were used.” The expert opines that “it is clear that in performing this procedure, careful technique was not used by Dr. Antell given her history and her condition, as well as not being aware of the anatomy during each phase of the procedure [and] this combination resulted in injury to the small bowel.” In this connection he opines that “[w]hen there is an umbilical hernia (confirmed or suspected), good and accepted medical practice requires that an umbilical incision be avoided altogether.” The expert also opines that “the failure to exercise careful surgical care was a substantial contributing

factor in Mrs. Kaplan's injuries and had careful surgical care and technique been followed...Mrs. Kaplan's injuries could have been avoided."

With respect to Mrs. Kaplan's post-surgical care, the expert opines that Dr. Antell and the recovery team failed to render proper post-operative care by failing to immediately send Mrs. Kaplan to the emergency room based on her complaints in the recovery room "with concern for abdominal injury given her clinical presentation and complains post-operatively ... [including Mrs. Kaplan's complaints of] unprecedented pain without relief from strong narcotics being administered." The expert further opines that "this level of pain is not typical after liposuction [and] ... [t]he pain level and abdominal distension were signs of a potential bowel injury and should have been on the differential diagnosis and ruled out immediately." The expert opines in this connection that "the recovery room nurse should have alerted Dr. Antell immediately [of Mrs. Kaplan's pain and], much earlier than 2:30 p.m. (approximately 3.5 hours after Mrs. Kaplan had been complaining of the 10/10 abdominal pain) and sent Mrs. Kaplan immediately ... for a work-up for potential bowel injury;" alternatively, if Dr. Antell had been alerted, "it was departure from good and accepted medical practice for him not to immediately respond to Mrs. Kaplan's complaints before performing a physical exam." The expert also opines that the delay in performing a physical exam of Mrs. Kaplan's pain, and instead treating it with strong narcotics without evaluation created a delay of the diagnosis of the bowel perforations and is a departure from and accepted medical practice.

With regard to causation, the expert opines that had the emergency surgery been performed earlier, the surgery would have been less extensive from the early intervention. The expert also opines that when Dr. Antell completed a physician exam at 3:15 pm, Mrs. Kaplan should have been sent to the emergency room at this time, and had Dr. Antell responded

appropriately to the complaints, “the perforations could have been sutured, making bowel resection less likely and the consequent injuries that result from that.”

With respect to the claim of lack of informed consent, plaintiff’s expert opines that Dr. Antell failed to provide proper informed consent as he did not to inform Mrs. Kaplan of “specific risk factors,” and in particular that while Dr. Antell testified that he informed plaintiff of the risk to damage to deeper structures, and that a bowel perforation is a known risk of liposuction, “he did not use ‘that specific word’ of risk of injury to her ‘small intestines.’” In addition, the expert opines that good practice required Dr. Antell to “explain[] the increase risk factor that Mrs. Kaplan’s anatomy presented due to her potential umbilical hernia and weakness of the rectus abdominal muscle, and that had he explained these additional risk factors, “[a] reasonable person in Mrs. Kaplan’s position...if properly informed would not have agreed to the procedure.”

Plaintiff’s expert further opines that “the informed consent document was deficient because it failed to explain the risks for liposuction as it pertained to Mrs. Kaplan’s risk factors.” In this connection, the expert states that the “[d]iscussion on ‘damages to deeper structures’ does not appear in the specific risks of liposuction but appears in the general risks of surgery [and that] those ‘deeper structures’ cite to nerves, blood vessels, muscles, and lungs [and] there is nothing about intestines and a layperson would not understand that intestines were included in any other these categories.” The expert also states that “there is nothing [in the document] about Mrs. Kaplan’s increased risk factors including a possible umbilical hernia or a weakness ...of the rectal muscle.”

In reply, defendants argue that their expert’s opinion establishes that Dr. Antell did not depart from the standard of care in his treatment of Mrs. Kaplan, and that the injuries sustained by plaintiff were the result of known risks of the type of surgery at issue, and were not indicative

of any negligence, and that the plaintiffs' expert failed to raise an issue of fact in this regard. Defendants also assert that plaintiffs' expert opinion is unreliable, speculative, conclusory, and self-serving and thus insufficient to defeat summary judgment. In particular, defendants argue that the plaintiff's expert fails to explain how Dr. Antell's performance of the February 25, 2015 surgery deviated from the accepted standard of care, and that plaintiffs have not raised a triable issue as to the proximate cause of the alleged injury and therefore plaintiff cannot sustain a cause of action for lack of informed consent. Lastly, defendants argue the record shows that the liposuction surgery and subsequent surgery were unaffected in any way by the umbilical hernia.

#### Discussion

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dept. 2010). To satisfy this burden, a defendant must present expert opinion testimony that addresses the essential allegations in the Bill of Particulars. Id. The expert opinion relied on by defendant must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dept. 2010). A defendant's expert opinion must also "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 (1st Dept. 2003)). When the opinion of a defendant's expert is insufficient, the burden does not shift to plaintiff to submit evidence creating a triable issue of fact. Applewhite v. Accuhealth, Inc., 81 AD3d 94, 99 (1st Dept 2010).

If a defendant makes a prima facie showing, the burden shifts to plaintiff “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325 (1986). Specifically, in a medical malpractice action, this requires that a plaintiff opposing a defendant’s summary judgment motion to “submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact... General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant[‘s]... summary judgment motion.” Id.

In addition, a plaintiff’s expert’s opinion “must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1st Dept. 2007) (internal citations and quotations omitted). If “the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to withstand summary judgment.” Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002). On the other hand, summary judgment is improper when competing experts present adequately supported, but differing opinions on the propriety of the medical care, raising a triable issue of fact. Boston v. Weissbart, 62 AD3d 517, 518 (1st Dept. 2009); See generally Rojas v. Palese, 94 AD3d 557 (1st Dept. 2012).

Here, as set forth below, the court finds that defendants’ expert affirmation, which provides bare and conclusory denials of the departures set forth in the Bill of Particulars is insufficient to meet their burden on summary judgment and therefore the burden does not shift to plaintiffs to raise a triable issue of fact. See Wasserman v. Carella, 307 AD2d at 226 (“bare

conclusory denials of negligence without any factual relationship to the alleged injuries, and the submission of the affidavit of a medical expert which fails to address the essential factual allegations set forth in the complaint, are insufficient to establish that defendant is entitled to summary judgment...regardless of the sufficiency of plaintiff's opposition"); Santiago v. Filstein, 35 AD3d 184, 186 (1<sup>st</sup> Dept 2006)(expert affidavit that "merely provides a factual account of defendant's appointments with and treatment of plaintiff, accompanied by broad statements such as 'at no point in time during my treatment of [plaintiff] did I depart from good and accepted medical practice,' ...were insufficient to meet defendant's initial burden on the motion for summary judgment).

With regard to plaintiffs' allegations that defendants departed from the standard of care during the pre-operative treatment of Mrs. Kaplan, the conclusory opinion of defendants' expert that Dr. Antell "properly examined" Mrs. Kaplan, and took a "proper history" is insufficient to meet defendants' burden, particularly as defendants' expert does not address plaintiffs' allegations that Dr. Antell should have conducted pre-operative exams to test the integrity of Mrs. Kaplan's abdominal wall, in view of the concern of that she had an umbilical hernia.<sup>1</sup> In light of defendants' failure to meet their burden, the court need not reach whether plaintiffs' expert opinion as to Mrs. Kaplan's pre-operative care is sufficient to raise an issue of fact.

As for plaintiffs' allegations that Dr. Antell departed from the standard of care by failing to exercise proper surgical care and technique in performing the liposuction procedure, the unsupported conclusions of defendants' expert that the procedure was "properly performed" and

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<sup>1</sup> As for defendants' argument that Mrs. Kaplan did not have an umbilical hernia at the time of her liposuction procedure and that the surgery was unaffected by the hernia, such argument is not substantiated by defendants' expert.

that Dr. Antell was “not negligent in his method, approach, or choice of surgical methods or instruments” and the perforation is a known risk of the procedure does not satisfy defendants’ burden. Notably, defendants’ expert fails to address plaintiffs’ allegations that Dr. Antell did not exercise sufficient care during the surgery in light of Mrs. Kaplan’s abdominal weakness and her potential umbilical hernia, and that an incision therefore should not have been made in that area. In reaching this conclusion, the court need not determine whether plaintiffs’ experts’ opinion is sufficient with regard to this issue in light of defendants’ failure to make a prima facie showing.

Next, as for the alleged departures related to Mrs. Kaplan’s post-operative care, defendants’ expert’s broad and unsubstantiated opinion that Dr. Antell provided “proper post-operative care,” and “properly evaluated and discharged” Mrs. Kaplan is insufficient to demonstrate the absence of malpractice. In any event, assuming defendants met their burden, plaintiffs have controverted such showing based on their expert’s opinion, which is substantiated by the record, that defendants departed from the standard of care by failing to timely refer Mrs. Kaplan to the emergency room and by improperly administering narcotics without examining her, and that these departures delayed the diagnosis of bowel perforations and were a substantial factor in exacerbating her injuries and making a bowel resection more likely.

As for the claim of lack of informed consent, “[l]ack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.” (Public Health Law § 2805-d[1]). To prevail on a claim for lack of informed consent “it must ... be established that a reasonably prudent person in the patient's position would not have undergone the treatment ... if

[he] had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.” (Public Health Law § 2805–d[3]).

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept. 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1st Dept. 2003)(defendant entitled to summary judgment where “documentary evidence establishes that before each of plaintiff’s seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment”).

When the evidence is sufficient to meet defendants’ burden, a plaintiff must demonstrate that (1) the defendant doctor failed to fully apprise her of the reasonably foreseeable risks of the procedure, (2) a reasonable person in plaintiff’s position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805–d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept.1994). In addition, “[e]xpert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff.” Orphan v. Pilnik, 15 NY3d at 908.

In this case, plaintiffs’ claim of lack of informed consent claim alleges that Dr. Antell failed to adequately inform Mrs. Kaplan of the foreseeable risks of the surgery and, in particular, risk factors of intestinal perforation, particular in light of to her “questionable umbilical hernia,” and that the consent form signed by Mrs. Kaplan was insufficient to inform her of these risks.

Here, defendants failed to establish their prima facie entitlement to summary judgment as to the lack of informed consent claim even though Mrs. Kaplan signed the Consent Form, particularly as such form did not warn of the specific risk of perforation of the intestines based

on her possible umbilical hernia, and Dr. Antell testified that he did not warn her of this risk. See e.g., Halloran v. Kiri, 173 AD3d 509, 511 (1st Dept. 2019)(finding that the appellants failed to make a prima facie showing that they obtained decedent's informed consent because the appellants' expert opinion were conclusory and did not set forth what reasonably foreseeable risks should have been disclosed regarding the decedent's risk of taking the prescribed Xanax); Schussheim v. Barazani, 136 AD3d 787 (2d Dept. 2016)(determining that the defendants failed to refute lack of informed consent despite the plaintiff signing a consent form because plaintiff's testimony revealed a factual dispute as to whether the defendant properly and fully advised the plaintiff of the risks); See Generally Walker v. Saint Vincent Catholic Med. Ctrs., 114 AD3d 669, 670-71 (2d Dept. 2014).

In any event, to the extent it could be argued that defendants met their burden as to this claim, plaintiffs have controverted this showing based on their experts' opinion that Mrs. Kaplan was not adequately informed of the specific risks of injuries to her intestines associated with the liposuction surgery and the additional risks posed by her potential umbilical hernia and a weakness in her rectus abdominal muscle, and that the failure to adequately inform Mrs. Kaplan of these specific risks was a substantial factor in causing her injuries. Orphan v. Pilnik, 15 NY3d at 908; Eppel v. Fredericks, 203 AD2d at 152.

Therefore, defendants are not entitled to summary judgment dismissing the lack of informed consent claim.

### Conclusion

In view of the above, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that that a pre-trial conference shall be held remotely on September 24, 2020 at 12:30 pm, and the parties shall contact the court at [SFC-PART11@nycourts.gov](mailto:SFC-PART11@nycourts.gov) to set up the conference call with the court.

DATED: August 17, 2020

  
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J.S.C.

**HON. JOAN A. MADDEN**  
**J.S.C.**