At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 18th of December 2020.

PRESENT:
HON. GENINE D. EDWARDS,
Justice.

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CHRISTINE TULLEY,

Plaintiff,

-against-

JEREMY FENTON, MD, MARIANNE PISTILLI, PA, and SCHWEIGER DERMATOLOGY GROUP, LLC,

Defendants.

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Index No. 508537/2018
Motion Sequences: 3, 4

DECISION/ORDER

PAPERS	NUMBERED
Notice of Motion/Exhibits	1
Cross-Motion/Affirmation in Opposition/Exhibits	2, 3
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In an action to recover damages for medical malpractice, lack of informed consent, and negligent hiring, retention and supervision, defendants Jeremy Fenton, MD, Marianne Pistilli, PA and Schweiger Dermatology Group, LLC moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion and cross-moves to amend the complaint to add Schweiger Dermatology Group, PLLC as a defendant.

On January 9, 2016, plaintiff had a consultation at Schweiger Dermatology Group, PLLC for the removal of a wraparound barb wire tattoo with a Capricorn symbol on the top right forearm. Plaintiff was seen by physician assistant Marianne Pistilli, who advised that laser tattoo removal would entail six to twelve treatments and up to three treatments per session could be done.

Plaintiff returned to Schweiger Dermatology Group, PLLC on February 13, 2016 for the removal of the tattoo. A consent form bearing her signature acknowledged the potential risks of the treatment, including blistering and permanent scarring.[1] Pistilli, PA used a Revlite laser during the treatment. She made two laser passes - the first used a 6 mm spot size and 3.8 joules for the first pass and the second used a 5.6 mm spot size and 4.2 joules for the second pass. Following treatment, plaintiff received written post-treatment instructions via email.[2] The next appointment was scheduled for March 12, 2016. Plaintiff did not return. Dr. Fenton, the supervising physician at Schweiger Dermatology Group, PLLC, did not perform the treatment or meet the plaintiff.

On July 20, 2017, plaintiff saw Mitalee Christman, M.D. and reported she received ulcers from the February 13, 2016 laser treatment. She complained of allodynia and itching in the area of the ulcer scar.[3] Dr. Christman referred plaintiff to another doctor for further evaluation and tattoo removal. Plaintiff did not follow-up.

DEFENDANTS' SUMMARY JUDGMENT MOTION

A. Defendant Schweiger Dermatology Group, LLC

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[1] At plaintiff's EBT, she indicated that no one spoke to her about the potential risks of laser tattoo removal. *See Christine Tulley's EBT, pg. 43, lines 7-13.* She also did not believe it was her signature on the consent form. *See Christine Tulley's EBT, pg. 46, lines 7-23.*

[2] At plaintiff's EBT, she could not recall whether she was given any verbal instructions on how to care for the treatment area. She stated that she was told "she would receive instructions on how to care for the area but while waiting she was told that it would be emailed to her later that afternoon. It was not so later that evening she requested the information and did not hear back for two days." *Christine Tulley's EBT, pg. 52, lines 18-25 to pg. 53, lines 2 -23.*

[3] According to plaintiff's testimony, her current complaints include the following: "So, nothing has changed. The scarring is still there. I still -- it still swells. I still get constantly itchy and swollen. It throbs. When I run or do anything like clean the apartment could cause it to swell. Aside from being extremely embarrassing, it's predominantly that it bothers me when I am doing anything physical. So it's once a day, it's there in my face that it's, you know, constantly still there." *Christine Tulley's EBT, pg. 80, lines 3-21.*

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993), *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zapata v. Buitriago*, 107 A.D.3d 977, 969 N.Y.S.2d 79 (2013). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact that warrant a trial of the action. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Defendants established that Schweiger Dermatology Group, LLC only provided non-medical services and did not employ medical care providers. Plaintiff did not oppose this branch of defendants' motion.

B. Defendants Jeremy Fenton, MD, and Marianne Pistilli, PA

A defendant who moves for "summary judgment dismissing a complaint alleging medical malpractice must establish, prima facie, either that there was no departure from accepted standards of medical care or that any departure was not a proximate cause of the plaintiff's injuries." *Schwartzberg v. Huntington Hospital*, 163 A.D.3d 736, 81 N.Y.S.3d 118 (2d Dept. 2018) quoting *Mackauer v. Parikh*, 148 A.D.3d 873, 49 N.Y.S.3d 488 (2d Dept. 2017). To sustain the burden, defendant "must address and rebut any specific allegations of malpractice set forth in the plaintiff's bill of particulars." *Mackauer*, 148 A.D.3d 873. "A physician-patient relationship may be created, and a physician may be held liable for medical malpractice, where a physician is responsible for supervising a health-care professional such as a physician's assistant, and the physician inadequately supervises the health-care professional, thus causing or contributing to the inadequacy or impropriety of the care

rendered by that health-care professional." *Shajan v. South Nassau Communities Hosp.*, 99 A.D.3d 786, 952 N.Y.S.2d 448 (2d Dept. 2012).

"In opposition, a plaintiff must submit the affidavit of a[n expert] physician attesting to a departure from good and accepted practice, and stating the physician's opinion that the alleged departure was a competent producing cause of the plaintiff's injuries." *Sheetman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009). "Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions." *Simpson v. Edghill*, 169 A.D.3d 737, 93 N.Y.S.3d 399 (2d Dept. 2019); *M.C. v. Huntington Hospital*, 175 A.D.3d 578, 106 N.Y.S.3d 382 (2d Dept. 2019).

Here, Pistilli, PA and Dr. Fenton's submission, including their expert affidavit, established that the laser treatment conformed in all respects to good and accepted standards of care, that Pistilli, PA possessed the requisite knowledge, training, and experience, and that Dr. Fenton was always available to answer questions and provide assistance as necessary, thus providing the appropriate level of supervision. In opposition, plaintiff's expert's opinion raised triable issues of fact concerning Pistilli, PA's (1) utilizing the laser to treat the entirety of plaintiff's circumferential tattoo in a single session, (2) improperly utilizing the "R20 method" during the procedure, and (3) exceeding the manufacturer's recommendations on both passes of the laser. Plaintiff's expert opined that Pistilli, PA's training and experience in the use of the Revlite laser was insufficient, that Dr. Fenton, whose alleged malpractice arose from his supervision of Pistilli, PA, and Schweiger Dermatology Group, PLLC improperly delegated plaintiff's treatment to the physician assistant, and that Schweiger Dermatology Group, PLLC failed to have written treatment parameters in place. *See* 10 NYCRR 94.2 [medical acts, duties and responsibilities performed by a licensed physician assistant must be appropriate to the education, training and experience of the licensed physician assistant].

The Court of Appeals holds that lack of informed consent is a form of medical malpractice. It "is meant to redress a '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.'" *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 690 N.Y.S.2d 495 (1999), quoting Public Health Law § 2805–d [1]. Plaintiff must prove "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances; (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed; and (3) that the lack of informed consent is a proximate cause of the injury." *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 21 N.Y.S.3d 143 (2d Dept. 2015). "The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law" as insufficient information upon which a consent is obtained will render the consent qualitatively insufficient. *Godel v. Goldstein*, 155 A.D.3d 939, 64 N.Y.S.3d 127 (2d Dept. 2017) quoting *Schussheim v. Barazani*, 136 A.D.3d 787, 24 N.Y.S.3d 756 (2d Dept. 2016).

Defendants' proffer of the consent form signed by plaintiff and the parties' deposition testimony, including plaintiff's testimony wherein she stated that she had no prior discussion with Dr. Fenton or Pistilli, PA, regarding the risks, benefits or alternatives to the treatment revealed a factual dispute as to whether the plaintiff was properly informed about the risks of laser tattoo removal. Therefore, defendants failed to shoulder their prima facie burden regarding lack of informed consent.

Finally, defendants move to dismiss the claim of res ipsa loquitur that was raised in plaintiff's Bill of Particulars. "[R]es ipsa loquitur is applied to occurrences '[w]here the actual or specific cause of an accident is unknown.'" *James v. Wormuth*, 21 N.Y.3d 540, 974 N.Y.S.2d 308 (2013), citing (*Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 655 N.Y.S.2d 844 (1997)). Plaintiff must establish three elements: (1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489. *See also McCarthy v. Northern Westchester Hosp.*, 139 A.D.3d 825, 33 N.Y.S.3d 77 (2d Dept. 2016). In this instance, plaintiff's circumstantial evidence missed the mark, specifically that the event must be of a kind that ordinarily does not occur in the absence of someone's negligence and that the resulting injuries were not due to any voluntary action or contribution on the part of the plaintiff.

PLAINTIFF'S SUMMARY JUDGMENT MOTION

Plaintiff cross-moves to amend the complaint to include Schweiger Dermatology Group, PLLC ("PLLC") as a defendant based upon defendants' representation that Schweiger Dermatology Group, PLLC and not Schweiger Dermatology Group, LLC provided medical services to the plaintiff. The defendants oppose based upon statute of limitations grounds.

Whether the PLLC can be added as a defendant depends upon the relation back doctrine, which requires plaintiff to demonstrate the following: (1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is "united in interest" with the original defendant, and by reason of that relationship it can be charged with such notice of the institution of the action that it will not be prejudiced in maintaining its defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by

plaintiff as to the identity of the proper parties, the action would have been brought against it as well. *See Petruzzi v. Purow*, 180 A.D.3d 1083, 120 N.Y.S.3d 159 (2d Dept. 2020).

Plaintiff satisfied each prong of the relation-back doctrine. The causes of action arose out of the same conduct, to wit, the alleged medical malpractice in treating plaintiff; the PLLC is united in interest with defendants as it can be held vicariously liable for its employees alleged negligence in providing care to plaintiff, and plaintiff was unaware of the identity of the PLLC when the suit was commenced.

Accordingly, based on the foregoing and after oral argument, defendants' Motion Sequence Number 3 is granted to the extent that (1) the complaint is dismissed as against defendant Schweiger Dermatology Group, LLC, (2) plaintiff's res ipsa loquitor claim is dismissed; and the remainder of defendants' motion is denied. Plaintiff's Motion Sequence Number 4 is granted. The complaint is amended to add Schweiger Dermatology Group, PLLC as a defendant. And it is

ORDERED that, for the avoidance of doubt, this action shall proceed against defendants Jeremy Fenton, MD, Marianne Pistilli, PA and Schweiger Dermatology Group, PLLC as to plaintiff's causes of action for medical malpractice, lack of informed consent, and negligent hiring, retention and supervision; and it is

ORDERED that plaintiff shall serve a supplemental summons and amended complaint upon defendant Schweiger Dermatology Group, PLLC, pursuant to the CPLR.

The caption is amended as follows:

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CHRISTINE TULLEY,

Plaintiff,

-against-

JEREMY FENTON, MD, MARIANNE PISTILLI, PA, and SCHWEIGER DERMATOLOGY GROUP, PLLC,

Defendants.

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This constitutes the decision and order of this Court.

ENTER:

Hon. Genine D. Edwards