At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 19th day of October 2021.

P R E S E N T:
HON. PAMELA L. FISHER,
J.S.C.

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DAWN CROOKS,

Plaintiff,

DECISION/ORDER

- against -

Index No: 503185/2019

GREGG D. ROCK, D.P.M. and FIFTH AVENUE SURGERY CENTER, LLC,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	1, 2, 3
Opposing Affidavits (Affirmations)	4, 5
Reply Affidavits (Affirmations)	6, 7, 8

Upon the foregoing papers in this podiatric malpractice action, defendant, Gregg D. Rock, D.P.M moves, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff's complaint in its entirety.

Plaintiff commenced this action by filing a summons and complaint on February 13, 2019 (Defendant's Affirmation in Support ¶ 4; Summons & Complaint, annexed as Exhibit C to defendant's motion papers). Issue was joined by Dr. Rock on April 19, 2019, and plaintiff served a bill of particulars on June 19, 2019 (Defendant's Affirmation in Support ¶¶ 4-5; Answer annexed as Exhibit D to defendant's motion papers; Verified Bill of Particulars annexed as Exhibit E to defendant's motion papers). On August 13, 2020, "the case was discontinued against" Fifth Avenue Surgery Center, LLC (Defendant's Affirmation in Support ¶ 6; Stipulation annexed as Exhibit O). In her complaint and bill of particulars, plaintiff alleges that Dr. Rock departed from acceptable standards of

podiatric practice between May 10, 2017 and October 17, 2017 by failing to obtain plaintiff's informed consent prior to performing an "exostectomy on the lateral proximal interphalangeal joint (PIPJ) of the fourth toe and the medial distal interphalangeal joint (DIPJ) of the fifth toe" on plaintiff's right foot on August 25, 2017, neglecting to keep accurate records of the plaintiff's visits to Dr. Rock's office, failing to diagnose plaintiff's infection, and "causing, creating and/or permitting fractures to occur, including" "a fracture of plaintiff's 4th toe of the right foot" (Defendant's Affirmation in Support ¶ 5; Plaintiff's Complaint ¶ 7; Verified Bill of Particulars ¶¶ 1, 3). As a result of defendant's alleged malpractice, plaintiff claims to have sustained the following injuries: "infection of the right foot/toes," "osteomyelitis of the right foot/toes," "wound dehiscence of the right 4th and 5th toes," "fracture of the 4th proximal phalanx," "cellulitis abscess of the right foot," "tenosynovitis of the right foot," "deep vein thrombosis of the right leg," "severe pain upon walking or exerting pressure on the right foot," "right foot scarring and/or disfigurement," and "decreased range of motion in the right foot with tenderness, swelling and deformity" (*Id.* at ¶ 4).

The following facts are not in dispute. Plaintiff had been Dr. Rock's patient since December 2009 (Defendant's Statement of Undisputed Material Facts ¶ 1; Trepal Expert Affidavit ¶ 7, annexed as Exhibit A to defendant's motion papers). At some point prior to August 25, 2017, plaintiff "complained of hyperkeratotic lesions (HPK) between the fourth and fifth toes of the right foot" (Defendant's Statement of Undisputed Material Facts ¶ 1; Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶ 1). Plaintiff presented to Dr. Rock's office on June 22, 2017, and the exostectomy procedure was scheduled for August 25, 2017 (*Id.* at ¶ 7; Defendant's Statement of Undisputed Material Facts ¶ 7). Surgery was performed by Dr. Rock on August 25, 2017 at the Fifth Avenue Surgery Center (*Id.*). After the surgery, "the surgical wound was wrapped, and [plaintiff] was placed in a surgical shoe" (*Id.* at ¶ 8; Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶ 8). Dr. Rock called the plaintiff on August 26, 2017, advising her to "ice and elevate

the foot, use a surgical shoe and return to the office on September 7, 2017" (*Id.*; Defendant's Statement of Undisputed Materials Facts ¶ 8).

Plaintiff returned to Dr. Rock's office for post-operative appointments on September 7, 2017 and September 20, 2017 (*Id.* at ¶¶ 9, 10; Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶¶ 9, 10). In his notes from September 7, 2017, "Dr. Rock described [plaintiff's] condition as excellent with no pain or lesions, the incisions [were] well coapted" "with primary closure," and there were "no clinical signs of infection" (Defendant's Statement of Undisputed Material Facts ¶ 9; Dr. Rock's Records at 152, annexed as Exhibit F to defendant's motion papers). In his chart from September 20, 2017, Dr. Rock wrote that "the surgical site wounds looked excellent and were well coapted, with no pain or swelling, and there were no palpable bony lesions" (Defendant's Statement of Undisputed Material Facts ¶ 10; Dr. Rock's Records at 153). On September 24, 2017, "plaintiff presented to Mount Sinai Urgent Care Center, where she was seen by Dr. Michael Verdirame with complaints of right 4th and 5th toe pain" (Plaintiff's Statement of Undisputed Material Facts ¶ 11; Dr. Verdirame's Records at 5-6, annexed as Exhibit L to defendant's motion papers). In his notes, Dr. Verdirame documented that "there was skin breakdown in the webspace between the right 4th and 5th digits with no swelling, erythema or discharge" (Defendant's Statement of Undisputed Material Facts ¶ 11; Dr. Verdirame's Records at 6-7). Further, he wrote that plaintiff "had no edema, normal right foot range of motion, no tenderness, no swelling, normal capillary refill, no crepitus, no deformity and no laceration" (*Id.* at 7; Defendant's Statement of Undisputed Material Facts ¶ 11). He also "charted [that] there was no gross infection," and prescribed Keflex, an antibiotic (*Id.*; Dr. Verdirame's Records at 7). Plaintiff presented to Dr. Rock's office at least a couple of times in September 2017 and October 2017 (Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶¶ 12, 15; Defendant's Statement of Undisputed Material Facts ¶¶ 12, 15). At the September 25, 2017 visit, Dr. Rock "charted there was no drainage, swelling, redness or clinical signs of infection other than a weakened incision"

(*Id.* at ¶ 12; Dr. Rock's Records at 154). On October 9, 2017, plaintiff had an appointment with Dr. Jasmine Catalano, a podiatrist at Mount Sinai Medical "for a second opinion regarding an open toe wound on her fifth toe and recurrent pain" (Defendant's Statement of Undisputed Material Facts ¶ 14; Dr. Catalano's Records at 95, annexed as Exhibit K to defendant's motion papers). Dr. Catalano diagnosed plaintiff with cellulitis, a skin infection, and "abscess of a right toe," and she prescribed Bactrim for 10 days (Defendant's Statement of Undisputed Material Facts ¶ 14; Dr. Catalano's Records at 96). Plaintiff went to New York Radiology to have x-rays taken of her right foot "at the request of Dr. Catalano" (Plaintiff's Statement of Undisputed Material Facts ¶ 14). The radiology report indicated that there was a "a fracture of the proximal shaft of the 4th proximal phalanx without significant displacement" (*Id.*; Dr. Catalano's Records at 96). On October 17, 2017, plaintiff returned to Dr. Rock's office, and he changed her bandage (Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶ 15; Defendant's Statement of Undisputed Material Facts ¶ 15). At this visit, plaintiff requested her records from Dr. Rock so that she could receive treatment from another podiatrist (*Id.*). She never returned to Dr. Rock after October 17, 2017 (*Id.*).

Plaintiff received treatment from Dr. Catalano for her right foot pain through 2019 (*Id.* at ¶ 16; Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶ 22). In January 2018, plaintiff was diagnosed with deep vein thrombosis by Dr. Rami Tadros, MD, a vascular surgeon at Mount Sinai Beth Israel Hospital (*Id.* at ¶ 19). On June 5, 2018, plaintiff presented to Dr. Catalano "with continued complaints and/or worsening of right foot pain, discoloration along the right 4th and 5th digits, [and] swelling in the joint and plantar foot" (*Id.* at ¶ 21; Defendant's Statement of Undisputed Material Facts ¶ 21). Dr. Catalano ordered an MRI, which was performed at "Lenox Hill Radiology on June 16, 2018" (Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶ 21). The radiologist who interpreted the MRI noted that there was "intense bone marrow edema throughout the proximal phalanx of the fourth toe associated with marked soft tissue thickening and edema" (*Id.* at ¶

21; Dr. Catalano's Records at 113). He also wrote that "[d]ifferential consideration includes osteomyelitis" (*Id.* at 114; Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶ 21). Plaintiff returned to Dr. Catalano on June 26, 2018 "with continued right foot pain and concern over discoloring and sensitivity in the right foot" (*Id.*). Dr. Catalano ordered "a non-contrast CT scan of the right forefoot to evaluate the fracture healing of the right 4th toe" (*Id.*). On June 29, 2018, the "CT scan was performed," and the images revealed a "healed fracture of the proximal phalanx of the fourth toe associated with mature callus and soft tissue thickening" (*Id.*; Dr. Catalano's Records at 101). The radiologist noted that "bone marrow edema within the proximal phalanx of the fourth toe seen on the recent MRI likely represents residual reactive marrow edema related to treated osteomyelitis" (*Id.*). The radiologist advised that "[s]uperimposed acute or chronic osteomyelitis is unlikely given the absence of clinical infection, although difficult to entirely exclude" (*Id.*). After he read the MRI and CT reports, "Dr. Catalano diagnosed [plaintiff] with acute osteomyelitis of the right foot and ankle and fracture of the proximal phalanx of the right 4th toe" (Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ¶ 21). Ms. Crooks visited Dr. Catalano on February 1, 2019 with complaints of right foot pain (*Id.* at ¶ 22). Dr. Catalano ordered another MRI of the "right forefoot, without contrast," which was performed on February 11, 2019 (*Id.*). The MRI was "negative for residual osteomyelitis, but confirmed mild bone marrow edema within the medial hallux sesamoid, compatible with stress reaction, [and] moderate intermuscular edema within the midfoot centered along the plantar aspect of the second metatarsal in a perivascular distribution, nonspecific" (*Id;* Dr. Catalano's Records at 99).

In support of his motion for summary judgment, defendant submits an expert affidavit from Dr. Michael Trepal, D.P.M., a duly licensed podiatrist, and an expert affirmation from Dr. Mark Schweitzer, M.D., a physician board certified in radiology, contending that Dr. Rock did not deviate from acceptable podiatric practice in his treatment of the plaintiff, and that no act or omission of his

proximately caused her injuries (Trepal Expert Affidavit ¶¶ 2, 6; Schweitzer Expert Affirmation ¶¶ 2, 5, annexed as Exhibit B to defendant's motion papers). Their opinions are based on review of the pleadings, bill of particulars, medical/podiatric records, photographs, deposition transcripts, imaging studies, as well as their education, training, and experience (*Id.* at ¶¶ 3, 5; Trepal Expert Affidavit ¶ 3). Dr. Trepal maintains that Dr. Rock "did not fail to diagnose an infection of plaintiff's fifth toe" (*Id.* at ¶ 32). This conclusion is based on the records from Dr. Rock, the records from the urgent care facility where plaintiff was seen on September 24, 2017, and photographs taken by the plaintiff (*Id.*). Dr. Trepal claims that the "records and photographs depict a partially open surgical wound which [was] not infected" (*Id.* at ¶ 33). He alleges that plaintiff disregarded Dr. Rock's postoperative instructions not to wear regular shoes, resulting in a "dehiscence of the surgical wound on the right fifth toe" (*Id.* at ¶ 32). Further, Dr. Trepal suggests that there was no infection while plaintiff was being treated by Dr. Rock, because there was no "purulent discharge" mentioned in his records, and it was not depicted in the photographs (*Id.* at ¶ 33). He opines that Dr. Trepal did not deviate from the standard of care by failing to prescribe antibiotics, and/or taking a culture, since there were no signs of infection (*Id.*). He alleges that "[t]he first charted sign of an infection was on October 9, 2017, when Dr. Catalano's assessment included cellulitis," and that plaintiff's fifth toe healed after finishing the Bactrim prescribed by Dr. Catalano (*Id.* at ¶ 35). Dr. Trepal disagrees with Dr. Catalano's diagnosis of osteomyelitis, since no bone biopsy was ever performed in this case (*Id.* at ¶ 34). He states that the "MRI and CT studies performed in June 2018 suggested the possibility of osteomyelitis only if there were signs of a clinical infection," and there were no signs of a clinical infection noted in Dr. Catalano's records at that time (*Id.*). Dr. Trepal also points out that the second MRI taken in February 2019 showed "no evidence of osteomyelitis" (*Id.*). Dr. Trepal disputes plaintiff's contention that the surgery caused a fracture of plaintiff's fourth toe, and that Dr. Rock failed to diagnose that condition (*Id.* at ¶ 36). He contends that the surgery was performed at the "head/tip of the fourth proximal

phalanx, which is a different location than the proximal shaft of the phalanx," which is where the fracture was located (*Id.*). Based on the location of the fracture, Dr. Trepal suggests that it is very unlikely that the fracture occurred as a result of the surgery (*Id.*). However, even if the fracture was caused by the surgery, Dr. Trepal maintains that a fracture was a "known" "risk" of the procedure (*Id.*). Further, he states that Dr. Rock properly took a post-operative x-ray on September 7, 2017, which did not reveal a fracture (*Id.*). Dr. Trepal affirms that plaintiff's deep vein thrombosis was not caused by the surgery, as plaintiff was diagnosed with this condition more than two months after she stopped seeing Dr. Rock, and he never "issue[d] any orders for immobilization or other modalities that could have caused that condition" (*Id.* at ¶ 42).

Dr. Trepal contends that Dr. Rock properly obtained plaintiff's informed consent to perform an exostectomy on plaintiff's fourth and fifth toes (*Id.* at ¶ 39). He notes that Dr. Rock gave plaintiff a choice between two different surgical procedures to "address her condition": an exostectomy and an arthroplasty (*Id.* at ¶ 38). Dr. Trepal states that Dr. Rock appropriately discussed the foreseeable risks of an exostectomy with the plaintiff, including delayed wound healing, "swelling, pain, numbness, tingling, keloid scarring, soft tissue or bone infection," and the possibility of additional surgery (*Id.* at ¶ 39). He attests that a "a reasonable person in the setting of this plaintiff, with her condition and complaints, would undergo" the exostectomy (*Id.*). Dr. Trepal disputes plaintiff's contention that she was unaware that the surgery would be performed on her fifth toe based on Dr. Rock's records indicating that he had discussed that surgery would be on both toes with the plaintiff, the medical clearance records, and plaintiff's signed consent form stating that she was going to have surgery on both the fourth and fifth toes (*Id.* at ¶ 41).

Dr. Schweitzer opines that plaintiff "did not have a fracture of her right fourth toe" or osteomyelitis "as a result of the treatment" provided by Dr. Rock (Schweitzer Affirmation ¶ 28). Dr. Schweitzer contends that the radiologist at New York Radiology incorrectly interpreted the x-rays

taken on October 9, 2017 (*Id.* at ¶¶ 23-24). Dr. Schweitzer states that there is an "abnormality of the fourth proximal phalanx located on the proximal portion towards the base of the fourth proximal phalange, away from the head of that phalange, that can only be seen on the oblique view x-ray" (*Id.* at ¶ 22). However, he explains that "the characteristics of that abnormality are inconsistent with a fracture, and are consistent with a nutrient vessel" (*Id.* at ¶ 24). Further, he affirms that the "lack of deformity of the bone or callous formation on this x-ray are inconsistent with an acute fracture, and are hallmark signs of a nutrient vessel, which are" "commonly misread as fractures" (*Id.*). Dr. Schweitzer claims that the abnormality "was a chronic condition that existed prior to the surgery by Dr. Rock" based on the subsequent x-rays taken on November 10, 2017 and December 4, 2019, showing that the abnormality remained the same over time (*Id.* at ¶ 26). He asserts that plaintiff did not have osteomyelitis based on the CT scan from June 29, 2018, and the MRI results from June 16, 2018 and February 11, 2019 (*Id.* at ¶ 27). He indicates that the "studies lack the finding of bone destruction and/or fat loss that would be expected with osteomyelitis" (*Id.*).

In opposition to defendant's motion for summary judgment, plaintiff submits a redacted expert affidavit from a podiatrist duly licensed to practice in Pennsylvania, who opines that Dr. Rock departed from the standard of care in his treatment of the plaintiff, and that his departures proximately caused her injuries (Plaintiff's Redacted Expert Affidavit ¶¶ 1, 61-62). His/her opinion is based on review of the pleadings, medical/podiatric records, photographs, diagnostic films and reports, deposition transcripts, and billing records, as well as his/her education, training, and experience (*Id.* at ¶¶ 2-3). Plaintiff's expert maintains that Dr. Rock deviated from the standard of care by failing to diagnose plaintiff's infection, as "a diligent physician and/or podiatrist" would "promptly order cultures" "and/or blood work" to determine if there was an infection when a patient presents with complaints of "pain and obvious oozing, redness, and puss" (*Id.* at ¶ 44). He/she further alleges that Dr. Rock departed from acceptable podiatric practice by advising the patient not to take the antibiotics

prescribed by Dr. Verdirame, as he did not perform any tests to rule out an infection (*Id.*). Plaintiff's expert also takes issue with the fact that some of Dr. Rock's records are inaccurate, in that he wrote that the plaintiff appeared for an office visit on a day she did not, and wrote that she did not appear on a day she did (*Id.*). He/she claims that the way defendant performed the surgery deviated from the standard of care, and that defendant should have used local anesthesia to make a "minimal incision" (*Id.* at ¶ 45). He/she explains that performing the surgery with a "minimal incision" "generally causes significantly less pain and discomfort than an open incision and substantially minimizes the risk of any post-operative infection and/or other complications" (*Id.*). Plaintiff's expert disputes Dr. Trepal's contention that the "wound dehiscence was caused by the [p]laintiff's use of improper footgear;" he refers to plaintiff's examination before trial, wherein she testified that "she wore the surgical boot throughout her entire post-operative treatment with Dr. Rock" (*Id.* at ¶ 48). Further, he disagrees with Dr. Trepal's description of plaintiff's photographs, and claims that the photographs "show a purulent, yellow discharge oozing from the surgical site, together with redness and swelling," indicating that plaintiff had an infection (*Id.* at ¶ 49). He/she also believes that Dr. Trepal's opinion that a bone biopsy is necessary to diagnose osteomyelitis, is incorrect (*Id.* at ¶ 50). Plaintiff's expert contends that "[o]steomyelitis is routinely diagnosed using x-rays, MRI or CT imaging," and "[t]he fact that the MRI performed in February 2019 found no evidence of osteomyelitis does not mean that the patient did not have osteomyelitis in 2017 or 2018" (*Id.*). Plaintiff's expert also disagrees with Dr. Trepal's conclusion that Dr. Rock properly obtained plaintiff's informed consent to perform surgery on her fourth and fifth toes (*Id.* at ¶¶ 53-54). He/she affirms that the medical clearance report does not state that "the patient was aware that the prospective surgery involved both the 4th and 5th toes of the right foot" (*Id.* at ¶ 53). Further, there is no evidence that plaintiff was advised of the specific risks of the surgery, as the surgical consent form fails to disclose "any specific details about the risks of the subject surgery" (*Id.* at ¶ 54). Plaintiff's expert also alleges that her deep vein thrombosis was proximately caused by Dr.

Rock's "negligent post-surgical care and treatment," which "required extensive periods of inactivity" (*Id.* at ¶ 55).

Plaintiff's expert also disagrees with Dr. Schweitzer's conclusion that plaintiff did not have a fracture of her right fourth toe, and that the surgery did not cause a fracture (*Id.* at ¶¶ 57-59). He points out that Dr. Schweitzer admitted that the alleged fracture was not present on the pre-operative x-rays (*Id.* at ¶ 57). Further, the post-operative x-ray from September 7, 2017 was taken from a different angle, which may be "the reason" Dr. Rock did not see the fracture (*Id.*). Plaintiff's expert disputes that the location of the fracture indicates that it was not caused by the surgery; he affirms that although "the fracture is located at a different joint of the 4th toe," "it is well within the operative field and in the general vicinity of where the surgery took place" (*Id.* at ¶ 58). Further, plaintiff's expert opines that Dr. Schweitzer's theory that the "abnormality" represents a nutrient vessel that "existed prior to the surgery," and not a fracture, is "not credible," and is "contradicted by Dr. Rock's own records," which never mention a "nutrient vessel" (*Id.* at ¶ 59). He/she claims that Dr. Schweitzer's opinion that plaintiff did not have osteomyelitis based on the "CT scan performed on June 29, 2018, and the MRI studies performed on June 16, 2018 and February 11, 2019" is "refuted by the reports of the treating radiologists" (*Id.* at ¶ 60). Plaintiff's expert concludes that Dr. Rock's negligent treatment proximately caused plaintiff's injuries, including but not limited to "infection, osteomyelitis, wound dehiscence, fracture of the right 4th proximal phalanx, cellulitis, and abscess of the right foot" (*Id.* at ¶ 62).

In reply, defendant reiterates that Dr. Rock did not depart from acceptable podiatric practice in his treatment of the plaintiff, and that he did not proximately cause her injuries (Reply Affirmation ¶ 4). Defendant maintains that plaintiff's expert is unqualified to render an opinion, because he/she is licensed in Pennsylvania, and "fails to set forth what specific qualifications establish his/her familiarity with the New York podiatric medicine standard of care, [or] the radiological issues in this case" (*Id.* at

¶ 5). Further, defendant alleges that plaintiff's expert opinion is not entitled to consideration, as it is speculative, and not based on facts in the record (*Id.* at ¶¶ 5, 17).

To prevail on a cause of action for medical [or podiatric] malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]; *Paone v. Lattarulo*, 123 AD3d 683, 683 [2d. Dept. 2014]). On a motion for summary judgment, defendant must "make a prima facie showing that there was no departure from good and accepted medical [or podiatric] practice or that the plaintiff was not injured thereby" (*Iulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]; *Paone*, 123 AD3d at 684; *Parrilla v. Saphire*, 149 AD3d 856, 857 [2d. Dept. 2017]). Once the defendant meets its burden, the burden then shifts to the plaintiff to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas*, 83 AD3d at 24). If the defendant "makes only a prima facie showing that he or she did not deviate or depart from accepted medical [or podiatric] practice, the plaintiff, in order to defeat summary judgment, need only raise a triable issue of fact as to the alleged deviation or departure, and need not address the issue of proximate cause" (*Hayden v. Gordon*, 91 AD3d 819, 821 [2d. Dept. 2012]). Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical [or podiatric] malpractice are insufficient to defeat defendant physician's summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; "[s]uch credibility issues can only be resolved by a jury" (*Id.*).

To prevail on a cause of action alleging lack of informed consent in a podiatric malpractice case, a plaintiff must prove that (1) "the podiatric practitioner providing the professional treatment" failed "to disclose to the patient the alternatives thereto and the reasonably foreseeable risks and

benefits involved that a reasonable podiatric practitioner under similar circumstances would have disclosed," "(2) that a reasonably prudent person in the patient's 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 or condition for which recovery is sought" (*Parrilla*, 149 AD3d at 858; *see also* Public Health Law § 2805-d). On a motion for summary judgment, a patient's signature on "a generic consent form" that does "not disclose the risks specific to the surgical procedure performed," does not "establish the [defendant's] prima facie entitlement to judgment as a matter of law" (*Parrilla*, 149 AD3d at 858; *Xiao Yan Ye v. Din Lam*, 191 AD3d 827, 829 [2d. Dept. 2021]; *Schussheim v. Barazani*, 136 AD3d 787, 789-90 [2d. Dept. 2016]; *Walker v. Saint Vincent Catholic Medical Centers*, 114 AD3d 669, 671 [2d. Dept. 2014]). Where defendant fails to establish his/her "prima facie entitlement to judgment as a matter of law," the motion must be denied "regardless of the sufficiency of plaintiff's opposing papers" (*Id.* at 671; *Parrilla*, 149 AD3d at 858).

Here, defendant demonstrated his prima facie entitlement to summary judgment on the podiatric malpractice cause of action. Defendant's experts, Dr. Trepal and Dr. Schweitzer, affirmed that the practice and procedures by the treating podiatrist, were within acceptable standards of podiatric practice, and that no act or omission of his proximately caused any injury to the plaintiff. Dr. Trepal maintains that Dr. Rock adhered to the standard of care by performing the exostectomy, and that he did not fail to diagnose an infection, or cause a fracture of plaintiff's fourth toe. Dr. Schweitzer concludes that Dr. Rock's treatment did not cause a fracture of plaintiff's fourth toe or osteomyelitis. Their opinions constitute competent evidence, in that they are based on the pleadings, bill of particulars, medical/podiatric records, photographs, imaging studies, and deposition transcripts.

In opposition, plaintiff produced an affidavit of merit from a podiatrist licensed to practice in Pennsylvania attesting to departures from accepted standards of podiatric practice, and that these departures were a competent producing cause of the plaintiff's injuries. Plaintiff's expert "posess[es]"

"the requisite skill, training, education, knowledge or experience" "to render [a reliable] opinion as to diagnosis and treatment with respect to the symptoms presented by the [plaintiff]" despite the fact that he/she is not licensed to practice in New York (*See Behar v. Coren*, 21 AD3d 1045, 1047 [2d. Dept. 2005]; *Ocasio-Gary v. Lawrence Hosp.*, 69 AD3d 403, 405 [1st Dept. 2010]; *Nelson v. Lighter*, 179 AD3d 933, 936 [2d. Dept. 2020] (stating that "an otherwise qualified expert" "who is not licensed in this state, may submit a statement in support of or in opposition to a party's position in a case" if the "statement" is "in the form of a sworn affidavit")). Plaintiff's expert opinion, based on review of the pleadings, medical/podiatric records, photographs, diagnostic films and reports, deposition transcripts, and billing records, raises triable issues of fact. Due to the conflicting expert reports, defendant's motion for summary judgment is denied as to the podiatric malpractice cause of action (*See Deutsch*, 71 AD3d at 719).

Defendant's motion for summary judgment on the second cause of action alleging lack of informed consent is denied, as defendant has failed to establish his prima facie entitlement to summary judgment on this cause of action. The surgical consent form does not disclose any specific risks of the surgery, and defendant's experts "failed to aver that the consent form complied with the prevailing standard for such disclosures applicable to reasonable podiatrists performing the same kind of surgery" (Fifth Avenue Surgery Center Records at 13, annexed as Exhibit H to defendant's motion papers; *Parrilla*, 149 AD3d at 858; *Walker*, 114 AD3d at 670-71). Further, plaintiff testified at her deposition that Dr. Rock did not inform her of the risks of infection and scarring prior to the surgery, indicating that there are issues of fact as to whether Dr. Rock properly obtained plaintiff's informed consent to the exostectomy procedure (Plaintiff's EBT tr. 52, lines 4-12, annexed as Exhibit I to defendant's motion papers; *Parrilla*, 149 AD3d at 858). Accordingly, defendant's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER:

Hon. Pamela L. Fisher, J.S.C.