SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDITH MCMAHON** **PART** **30M**

Justice

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VIRA CAREY,

Plaintiff,

- v -

ETTORE VULCANO MD, MOUNT SINAI HEALTH SYSTEM, INC.,THE ST. LUKE'S-ROOSEVELT HOSPITAL CENTER

Defendant.

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INDEX NO. 805137/2020

MOTION DATE 07/19/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ordered that the motion of defendants Ettore Vulcano, M.D. and The St. Luke's-Roosevelt Hospital Center (hereinafter the "defendants"[1]), for summary judgment pursuant to CPLR §3212 is granted, and plaintiff's complaint is dismissed.

This matter arises out of alleged medical malpractice surrounding a minimally invasive surgical procedure performed by orthopedic surgeon, Dr. Ettore Vulcano, to correct a bunion on plaintiff's right foot. Plaintiff underwent a percutaneous Chevron and Akin osteotomy ("MICA") with percutaneous abductor tendon release on April 2, 2019. Dr. Vulcano is one of only a few surgeons who performs the MICA surgery[2]. Plaintiff maintains that as a result of defendants' (1) negligence, (2) medical malpractice, and (3) the vicarious liability of St. Luke's-Roosevelt

[1], A Stipulation of Discontinuance in favor of defendant Mount Sinai Health Systems Inc., was executed and filed on December 9, 2020 (*see* NYSCEF Doc. No. 18).

[2] According to defendants' expert, Anne H. Johnson, M.D., "only a handful of orthopedic surgeons in the United States performs the MIS bunion correction procedure, also known as the "MICA" procedure (*see* NYSCEF Doc. No. 38, para 3).

Hospital for the training, oversight and credentialing of Dr. Vulcano (*see* Plaintiff's three count Amended Verified Complaint; NYSCEF Doc. No. 5), she is left with hallux varus, a deformity of the great toe joint in which the great toe deviates away from the other toes.[3]

In her January 26, 2021 Verified Bill of Particulars, and March 16, 2022 Supplemental Verified Bill of Particulars[4] (*see* NYSCEF Doc. No. 43, para. 3) plaintiff defines the acts or omissions constituting negligence and/or malpractice of Dr. Vulcano as: "fail[ing] to properly plan for and perform the surgery on April 2, 2019, and thereafter fail[ing] in his follow up care and treatment of plaintiff; in failing to properly perform the Chevron and Akin osteotomies with percutaneous abductor tendon release; causing or contributing to the development of a hallux varus deformity and valgus deviation of the second toe; overcorrected the hallux leading to development of hallux varus; improperly performed a chevron procedure; overcorrected the plaintiff's bunion procedure; improperly performed an aggressive procedure leading to an inappropriate inter-metatarsal angle; failing to timely recognize the errors post-surgery and thereby failing to treat same in a manner that could have assisted healing." The stated negligent acts and/or omissions of St. Luke's-Roosevelt Hospital Center are for vicarious liability for the acts of its employee, agent or servant, Dr. Vulcano.

Neither the Amended Verified Complaint nor the Bills of Particulars articulate a cause of action for lack of informed consent.

BACKGROUND FACTS

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[3] Hallux **valgus** (as opposed to hallux varus) is a condition where the big toe is bent toward and overlaps the second toe. Hallux valgus may be accompanied by a bunion.

[4] The only difference between the Verified Bill of Particulars and Supplemental Verified Bill of Particulars is at paragraph 3, where the Supplemental Bill adds, at the first sentence, that Dr. Vulcano "**his agents or employees**" failed to properly plan for and perform surgery….and the last sentence, where the Supplemental Bill adds that the doctor "**failed to timely recognize the errors post-surgery and thereby failed to treat same in a manner that could have assisted healing**"

On October 31, 2018, the fifty-five-year-old plaintiff, Vira Carey, came under the care of nonparty podiatrist, Dr. Douglas Livingston, for complaints related to bunions on both feet for at least ten years. In January of 2019, plaintiff returned to Dr. Livingston for "preoperative discussions" regarding her painful bunion deformity and indicated that she wished to pursue surgical management. Plaintiff testified that she "freaked out" when she learned of a six-inch scar likely to be left by the type of open procedure to be performed by Dr. Livingston (*see* Plaintiff's deposition; NYSCEF Doc. No. 44, p. 40) and decided to seek a second opinion. Through online research, plaintiff learned of a minimally invasive procedure with less scarring, performed by defendant Dr. Vulcano.

Plaintiff had her first visit with Dr. Vulcano on February 11, 2019. After the exam, Dr. Vulcano and the plaintiff discussed non-operative and operative treatment, specifically the Minimally Invasive Chevron and Atkin ("MICA") procedure. On April 2, 2019, plaintiff underwent elective hallux valgus correction of the right foot for a chief complaint of right foot pain.

According to the Operative Report authored by Dr. Vulcano, he performed a percutaneous Chevron and Akin osteotomies and percutaneous abductor tendon release with placement of Wright Medical 3mm and 4mm headless screws and a 0.062-inch stainless steel K-wire. The operation began at 9:35 a.m. and plaintiff was transferred to PACU at 10:23 a.m. She was instructed to follow up with Dr. Vulcano in two weeks and to wear the post-operative sandal while weightbearing.

Plaintiff returned to work two weeks after surgery. Her job required her to be on her feet for half the day, but she wore "orthotic shoes" at work (*see* NYSCEF Doc. No. 44, p. 86-87).

On April 15, 2019, plaintiff returned to Dr. Vulcano's office for a post-operative follow-up. Weight bearing three view x-rays were obtained which revealed good alignment and hardware in place. Her sutures were removed, and plaintiff was instructed to wear the post-op sandal and toe spacer at all times, to "maintain toe in alignment." A four-week follow-up appointment was scheduled to remove the K wire.

Plaintiff returned to Dr. Vulcano on May 13, 2019, at which time the K wire was removed with pliers. Plaintiff was instructed to wear the toe spacer for an additional two weeks and to start physical therapy. A six-week follow-up appointment was scheduled for July 12, 2019, at which time plaintiff reported an excessive space between her first and second toes. Physical exam revealed splaying of the first and second toes, and weight bearing three view x-rays of the foot demonstrated hallux varus with further bone healing and valgus deviation of the second toe. Dr. Vulcano documented: "Unfortunately the patient developed hallux varus. I discussed reverse Akin and second hammertoe correction." Plaintiff was instructed to present for a follow up x-ray in four months.

On October 11, 2019 plaintiff had her final visit with Dr. Vulcano. It was noted that she was in discomfort. Weight bearing three view x-rays of the foot revealed hallux varus with further healing of the osteotomies. Dr. Vulcano again discussed surgical options to correct the hallux varus, including Reverdin with reverse Akin or the reverse Akin alone.

On February 6, 2020 plaintiff returned to her original podiatrist, Dr. Livingston, with complaints of pain in the first MTP joint of the right foot eleven months status post-surgery. X-rays obtained in the office were interpreted as revealing retained hardware consisting of one screw about the 1st metatarsal in addition to a screw about the proximal phalanx of the hallux with adducted position of the hallux at the level of the MTP joint (*see* NYSCEF Doc. Nos. 38,

50). Dr. Livingston formed an impression of hallux varus and documented a discussion of conservative versus surgical management.

On April 30, 2020 plaintiff returned to Dr. Livingston for further follow-up of her right hallux varus deformity. Also on April 30, 2020, Dr. Vulcano authored a telephone encounter note, indicating that plaintiff had called informing she had been seen by a podiatrist who told her that she had "irreparable nerve damage" and who "formulated a number of diagnoses that I am perplexed about including that the hardware is causing limited range of motion" (*see* NYSCEF Doc. No. 48). Dr. Vulcano additionally documented that plaintiff never complained of neuropathic pain, but rather discomfort associated with the hallux varus rubbing against her shoe toe box. He suggested that she see neurologist, Dr. Adam Bitterman, whose office was in proximity to plaintiff's home. Ultimately, Dr. Bitterman evaluated plaintiff for complaints of neuropathic pain, and "observed the same findings" as Dr. Vulcano (*see* NYSCEF Doc. No. 48, telephone record of May 28, 2020). Dr. Vulcano concluded that plaintiff's "best chance" to resolve her symptoms was with a fusion, and he suggested that she contact him if she decided to proceed with fusion surgery. The April 30, 2020 telephone call was plaintiff's final encounter with Dr. Vulcano.

To date plaintiff has not undergone corrective surgery.

MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment on the grounds, *inter alia*, that the care and treatment rendered throughout the entirety of plaintiff's care, including the post-operative period, was in accord with good and accepted practice, did not contribute to plaintiff's alleged injuries, was not a proximate cause of plaintiff's injuries, and that plaintiff's admitted noncompliance with postoperative instructions (*i.e.*, use of "orthopedic shoes" while ambulating and limping at

work for half the day two weeks post- surgery) may be a contributing catalytic factor in the development of her injuries.

In support of the motion, defendants submit the expert affirmation of foot and ankle orthopedic surgeon, Dr. Anne H. Johnson, M.D., (*see* NYSCEF Doc. No. 38) whose detailed affirmation supports her opinion, within a reasonable degree of medical certainty, that (1) it was entirely appropriate for Dr. Vulcano, an orthopedic surgeon trained in MICA bunion correction procedures, to recommend that Ms. Carey undergo the April 2, 2019 surgery, and that the surgery was clearly indicated in light of Ms. Carey's past medical history and presenting clinical complications; (2) Dr. Vulcano properly obtained informed consent from plaintiff for the elective surgery and held a detailed risk and benefits discussion with plaintiff, and she was aware of the risks including hallux varus; (3) Dr. Vulcano's performance of the MIS bunion correction procedure was at all times consistent with good and accepted practice and did not contribute to plaintiff's injures. In this regard, Dr. Johnson specifically opines that "it is good practice to confirm proper alignment of the osteotomies prior to completing the procedure, as Dr. Vulcano did here. Determining proper alignment of the hallux relies on clinical judgment of the surgeon, which is made upon the preoperative examination and imaging of the hallux, as well as the immediate postoperative fluoroscopy and gross visualization. *It is good and accepted practice to position the hallux in a slightly varus alignment in some patients with a severe deformity, such as Ms. Carey, and this is done with the expectation that the toe may naturally drift towards a more valgus alignment postoperatively...for this reason, it is common practice to bandage the toe in a slightly varus alignment postoperatively*....[t]he post operative gross visualization of the hallux is more useful in determining proper alignment, as fluoroscopic imaging alone may not accurately depict the true alignment of the hallux because the image is non-weight-bearing and may not

depict the alignment when the patient is weight-bearing" (*id.*, para 43; emphasis supplied)[5]; (4) Dr. Vulcano's post-operative management, care and treatment of plaintiff was in accord with good and accepted practice and did not contribute to plaintiff's injuries; (5) plaintiff's noncompliance with postoperative instructions could be a contributing catalytic factor in the development of her injuries and (6) plaintiff's claims against the hospital are without merit, as Dr. Vulcano's pre-operative intra-operative and post-operative care of was in accord with good and accepted practice.

In opposition to the motion, plaintiff submits the redacted affidavit of a podiatric foot and ankle surgeon (*see* NYSCEF Doc. No. 55), who attests to being "familiar" with the minimally invasive surgical procedure performed by Dr. Vulcano, as well as the standard of care with respect to the care and treatment provided by defendants (*id.*, para 2). Plaintiff's expert opines that Dr. Vulcano deviated from accepted standards of care in performing the Chevron and Akin osteotomies by "*overcorrecting the condition, leading to development of hallux varus; by failing to ensure that the hallux was not overcorrected* and remained in appropriate anatomical position with an appropriate intermetatarsal angle, which is difficult in MIS as the visibility is limited, and overcorrection can and does lead to development of post-surgical complications including development of hallux varus...overcorrection of the hallux during surgery was clear and visible on fluoroscopy and caused or contributed to the development of the hallux varus" (*id.*, paras. 6, 7; emphasis supplied). Plaintiff's podiatry expert continues, that "absent the overcorrection it is more likely than not that the plaintiff would not have developed a hallux varus, and it healed in a varus position as a result of the overcorrection." The expert concludes that "the surgery itself and the associated overcorrection of the hallux, caused or contributed to the development of the

[5]; Plaintiff's podiatric expert maintains that the surgery failed due to, *inter alia,* overcorrection of the hallux in the varus position.

hallux varus." Finally, in response to Dr. Johnson's affirmation, plaintiff's expert opines that plaintiff did not give her informed consent for MICA surgery.

INFORMED CONSENT

"It is well settled that lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" (*Jolly v. Russell,* 203 AD2d 527, 528 [2d Dept. 1994]). Here, although the complaint does not plead a separate cause of action for lack of informed consent, the court finds that even if a cause of action had been properly pled, lack of informed consent cannot be maintained, based upon plaintiff's own deposition testimony.

APPLICABLE LAW

The standards for summary judgment are well settled. The proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; [*internal citations omitted*]). The motion must be supported by evidence in admissible form (*see Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]), and the facts must be viewed in the light most favorable to the nonmoving party (*see Vega v. Restani Constr. Corp.,* 18 NY3d 499, 503 [2012]). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on the issues of credibility" (*Garcia v. J.D. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept. 1992]).

Once the movant has met his or her burden on the motion, the nonmoving party must establish the existence of a material issue of fact (*see Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A movant's failure to make a *prima facie* showing requires denial of the motion,

regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; [*internal citations omitted*]). It has been held that merely "pointing to gaps in an opponent's evidence is insufficient to demonstrate a movant's entitlement to summary judgment" (*Koulermos v. A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept. 2016]).

"The drastic remedy of summary judgment, which deprives a party of his day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*DeParis v. Women's Natl. Republican Club, Inc.*, 148 AD3d 401 [1st Dept. 2017]; [*internal citations omitted*]). "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v. American Lung Assn.*, 90 NY2d 623, 631 [1997]).

To sustain a cause of action for medical malpractice, the plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of the claimed injury. A medical provider moving for summary judgment, therefore, must make a *prima facie* showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his or her alleged departure from accepted standards of medical practice (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15 [1st Dept. 2009]; [*internal citations omitted*]), or by establishing that the plaintiff was not injured by such treatment (*see* generally *Stukas v. Streiter*, 83 AD3d 18 [2d Dept. 2011]).

To satisfy the burden on the motion, a defendant must present expert opinion testimony that is supported by the facts in the record, addresses the essential allegations in the complaint or the bill of particulars, and is detailed, specific, and factual in nature (*see Roques v. Noble*, 73 AD3d 204, 206 [1st Dept. 2010]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and the opinion should specify "in what way" the plaintiff's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v. Lawrence Hospital*, 69

AD3d 403, 404 [1st Dept. 2010]). Once a defendant has made such a showing, the burden shifts to the plaintiff to "submit evidentiary facts or materials to rebut the *prima facie* showing by the defendant" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]), but only as to those elements on which the defendant met the burden (*see Gillespie v. New York Hosp. Queens*, 96 AD3d 901 [2d Dept. 2012]). Accordingly, a plaintiff must produce expert testimony regarding the specific acts of malpractice, and not just testimony that alleges "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence" (*Alvarez v. Prospect Hosp.*, 68 NY2d at 325). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to defeat summary judgment (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 24). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v. New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The plaintiff's expert must address the specific assertions of the defendant's expert with respect to negligence and causation (*see Foster-Sturrup v. Long*, 95 AD3d 726, 728-729 [1st Dept. 2012]).

Where the parties' conflicting expert opinions are adequately supported by the record, summary judgment must be denied. "Resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury" (*Frye v. Montefiore Med. Ctr.*, 70 AD3d 15, 25; *see also Cruz v. St. Barnabas Hospital*, 50 AD3d 382 [1st Dept. 2008]).

"As a general rule, when the proposed opinion testimony of a witness who is not a medical doctor is against a defendant who is a medical doctor, the opinion of the witness as to the course of treatment defendant should have undertaken is beyond his professional and educational experience and cannot be considered competent medical opinion on the issue of defendant's

negligence," unless the two experts "are licensed to treat the type of injury sustained by plaintiff, *and they perform the same surgical procedure* at issue in the case" (*Parese v. Shankman*, 300 AD2d 1087 [4th Dept. 2002];[internal citations and quotations omitted; emphasis supplied]).

FINDINGS

The plaintiff's expert has not performed the surgical procedure at issue in this matter.

The Court finds that defendants have established entitlement to judgment as a matter of law by submitting, *inter alia*, the affirmation of orthopedic surgeon, Dr. Johnson, who opined that Dr. Vulcano made all appropriate and timely decisions during the April 2, 2019 surgery and post-surgical care, and that his conduct was not a proximate cause of the plaintiff's hallux varus deformity. In opposition, plaintiff has failed to raise a triable issue of fact, because plaintiff's expert never actually performed the MICA surgery.

In *Escobar v. Allen,* 5 AD3d 242 [1st Dept. 2004]) the First Department discussed this very issue when it allowed the testimony of plaintiff's expert podiatrist, because the podiatrist and the defendant orthopedic surgeon were "licensed to treat the type of injury sustained by plaintiff, and to *perform the same type of surgery at issue" (id.* at 243; emphasis supplied*).* Here, while plaintiff's expert concludes that "Dr. Vulcano deviated from accepted standards of care in performing the Chevron and Akin osteotomies by overcorrecting the condition, leading to the development of the hallux varus" (*see* NYSCEF Doc. No. 55, para.7), the expert never performed the MICA, never defined the extent of the overcorrection, and as a result was not competent to render an opinion as to (1) the standard of care, (2) which acts constituted a departure from those standards, and (3) whether such a departure caused or contributed to the particular injuries claimed here.

While a medical expert need not be a specialist in a particular field in order to testify regarding accepted practice in that field (*Lopez v. Gramuglia*, 133 AD3d 424 [1st Dept. 2015]), the expert must provide a foundation that he or she possesses the "requisite personal knowledge" necessary to make a determination on the issues presented (*Limmer v. Rosenfeld,* 92 AD3d 609 [1st Dept. 2012]; *see Steinberg v. Lenox Hill Hosp.*, 148 AD3d 612 at 613 [1st Dept. 2017]; internal citations omitted*; see also Villani v. Kings Harbor Multicare Center,* 190 AD3d 534 [1st Dept. 2021]). Here, plaintiff's expert never performed the same surgical procedure attempted by Dr. Vulcano and consequently lacks the requisite personal knowledge required to opine that overcorrection of the hallux was a departure from the standard of care and a proximate cause of plaintiff's injuries.

Both experts have set forth their opinions on whether plaintiff furnished her informed consent to the MICA surgery. Based upon the record before it, particularly plaintiff's deposition testimony, the Court finds that plaintiff provided defendants with her informed consent.

Accordingly, it is

ORDERED that the motion of defendants Ettore Vulcano, M.D. and St. Luke's Roosevelt Hospital for summary judgment dismissing the complaint of plaintiff, Vira Carey, is granted in its entirety; and it is further

ORDERED that the Clerk enter judgment dismissing the plaintiff's complaint.

8/16/2022
DATE

HON. JUDITH McMAHON
Hon. Judith N. McMahon
J.S.C.