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 18th day of January 2022.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

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DEBORAH MARK-JAMES,

Plaintiff,

DECISION/ORDER

- against -

Index No: 507334/2019

MICHAEL E. JONES, M.D., and
MICHAEL E. JONES, M.D., P.C. d/b/a
LEXINGTON PLASTIC SURGEONS,

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

Upon the foregoing papers in this medical malpractice action, defendants move, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff's complaint in its entirety with prejudice. Defendants also move for permission to enter judgment with the Clerk of the Court dismissing plaintiff's complaint.

Plaintiff commenced this action by filing a summons and complaint on or about April 3, 2019 (Statement of Undisputed Material Facts Pursuant to 22 NYCRR 202.8-G ¶ 1; Summons & Complaint, annexed as Exhibit B to defendants' motion papers). Issue was joined by defendants on June 3, 2019, and plaintiff served a verified bill of particulars upon defendants on July 9, 2019 (Statement of Undisputed Material Facts Pursuant to 22 NYCRR 202.8-G ¶¶ 3, 4; Answer annexed as Exhibit C to defendants' motion papers; Plaintiff's Verified Bill of Particulars annexed as Exhibit E to defendants'

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motion papers). Plaintiff served an amended bill of particulars on or about October 11, 2019 (Statement of Undisputed Material Facts Pursuant to 22 NYCRR 202.8-G ¶ 6; Plaintiff's Amended Verified Bill of Particulars, annexed as Exhibit G to defendants' motion papers). In her complaint and bills of particulars, plaintiff alleges that defendants departed from good and acceptable medical practice in their treatment of the plaintiff "on or about January 10, 2018, and on various dates prior to and/or thereafter" by negligently "performing a liposuction surgical procedure upon the plaintiff," failing to obtain plaintiff's informed consent prior to the surgery, "neglect[ing] to consult with physicians and/or surgeons who were well-qualified in the medical specialty(ies) involved herein before, during and/or after the performance of the subject liposuction surgical procedure," and failing to "maintain records which truly and accurately reflected the condition, evaluation and/or treatment of the plaintiff" (Complaint ¶¶ 12, 16-18; Plaintiff's Amended Verified Bill of Particulars ¶ 1). As a result of defendants' alleged malpractice, plaintiff is claiming to have sustained the following injuries: "formation of large bullae on the medial aspects of both knees with erythema and edema," "permanent scarring and/or discoloration on the lower extremities, bilaterally," "peeling away of skin on the lower extremities, bilaterally," "formation of necrotic tissue on the lower extremities, bilaterally," "tenderness in the lower extremities, bilaterally," "formation of keloid scarring, bilaterally, on the lower extremities," "severe hyperpigmentation of the lower extremities, bilaterally," "depression," "anxiety," "embarrassment and/or social stigma," "loss and/or diminution of the pleasures and pursuits of daily living," and "conscious pain, suffering, and agony" (*Id.*; Plaintiff's Verified Bill of Particulars ¶ 6).

The following facts are not in dispute. Plaintiff, a 58-year-old woman presented to Dr. Jones' office on October 19, 2017, complaining of a "friction rub between her thighs and inner knee areas when she walked" (Plaintiff's Expert Affirmation ¶ 4, annexed as Exhibit B to plaintiff's opposition papers). At this visit, "Dr. Jones recommended tumescent liposuction of [plaintiff's] inner thigh and

knee areas of both legs," and the "surgery was scheduled for January 10, 2018" (*Id.*; Defendants' Expert Affirmation ¶ 7, annexed as Exhibit A to defendants' motion papers). In his chart, Dr. Jones documented that he asked whether the plaintiff's "skin appear[s] fragile, [or] burns easily," and she answered "no" (*Id.* at ¶ 9). He also noted that he asked her whether her skin "form[ed] thick or raised scarring from a cut or burn," to which she answered, "no" (*Id.*). Dr. Jones' notes state that he discussed the risks of the procedure with the patient, including "hemorrhage, infection, coma, stroke myocardial infarction, death, scarring, prolonged ecchymosis, prolonged edema, wound dehiscence, keloid scarring, hypertrophic scarring," "hypo/hyper pigmented scarring, skin irregularity, skin dimpling, skin necrosis," "asymmetry," and "skin blistering" (*Id.* at ¶ 11; Lexington Plastic Surgery Chart at 18, annexed as Exhibit M to defendants' motion papers). Consent forms executed by the plaintiff are included in the medical records from Dr. Jones' office (Lexington Plastic Surgery Chart at 47-63).

Plaintiff arrived at Dr. Jones' office on January 10, 2018 for her scheduled liposuction procedure, which was performed under general anesthesia (Defendants' Expert Affirmation ¶ 14; Plaintiff's Expert Affirmation ¶ 4). The operative report documents that the areas where the "incisions were" to be made, were "infiltrated with 1 cc of 1% lidocaine with one to 100,000 epinephrine" (Defendants' Expert Affirmation ¶ 18; Lexington Plastic Surgery Chart at 19). Next, "[a]fter sufficient time to assume maximum vasoconstrictive effects of the agents, the procedure commenced with 3 mm incisions with an 11 blade" (*Id.*; Defendant's Expert Affirmation ¶ 18). The operative report indicates that the "incisions were made and carried down to the level of the subcutaneous tissue" (*Id.* at ¶ 19; Lexington Plastic Surgery Chart at 19). Next, "[t]umescent fluid was instilled into the addressed areas with adequate time to maximize the vasoconstrictive effects of the agents" (*Id.*; Defendants' Expert Affirmation at ¶ 19). Then, the "regions were" "liposuctioned with care taken to liposuction in both the deep and superficial subcutaneous fat compartments" (*Id.* at ¶ 20; Lexington Plastic Surgery Chart at

19). The operative report states that "[c]are was taken to remove the fat in an even and symmetric fashion throughout allowing for preservation of enough subdermal fat so as not to produce dimpling and skin irregularities" (*Id.*). At the conclusion of the procedure, plaintiff was put "into a surgical compression garment," and taken to the recovery room (*Id.*). The plaintiff was discharged around midnight, about seven hours after the surgery concluded (Plaintiff's Expert Affirmation ¶ 9).

Plaintiff woke up at 2:00 a.m. to use the bathroom, and felt pain in her legs (Defendants' Expert Affirmation ¶ 22). On January 11, 2018, plaintiff presented to Dr. Jones' office for her first post-operative appointment (Lexington Plastic Surgery Chart at 16; Defendants' Expert Affirmation ¶ 23). At this visit, plaintiff was seen by Ms. Leventhal, a Nurse Practitioner, who "removed the compression suit and documented" that the plaintiff had "[t]wo large bullae on the medial aspects of both of her knees" (*Id.*; Lexington Plastic Surgery Chart at 16). She was also seen by Dr. Jones, who noted that "he cleaned the area with betadine, lanced and drained both of the bullae" (*Id.*; Defendants' Expert Affirmation ¶ 24). Dr. Jones also put Xeroform gauze over the bullae, and put the plaintiff back in the compression garment (*Id.*; Lexington Plastic Surgery Chart at 16). Over "the next 10 months," plaintiff "returned [to Dr. Jones' office] approximately a dozen times" "for treatment of the blisters" (Defendants' Expert Affirmation ¶ 26).

On January 16, 2018, plaintiff was seen by Irene Saviolis, a nurse practitioner, who "lanced the bullae with a sterile No. 11 blade and drained serous fluid" (*Id.* at ¶ 27). The chart indicates that the fluid did not have a "foul odor," and there were no "signs and symptoms of infection" (*Id.*; Lexington Plastic Surgery Chart at 14). Ms. Saviolis "reapplied" the "Xeroform dressing" to plaintiff's "bilateral knee," and the plaintiff was "instructed to apply Silvadene cream" (*Id.*; Defendants' Expert Affirmation ¶ 27). On February 8, 2018, the plaintiff was seen by nurse practitioner Lauren Demino, who examined the plaintiff, and "consulted [Dr. Jones] via text" (*Id.* at ¶ 29; Lexington Plastic Surgery Chart at 11). She wrote the following note in plaintiff's chart: "Skin in inner knees with pink tissue

around edges, and necrotic tissue at center. No pus drainage, odor, but tender to palpitation" (*Id.*). Based on Dr. Jones' recommendation, she prescribed Collagenase, to be applied four times a day, and 500 mg of Levaquin, to be taken for seven days (*Id.*; Defendants' Expert Affirmation ¶ 29). The notes indicate that plaintiff was "instructed to apply Collagenase only to the necrotic tissue and then switch to Neosporin or Silvadene once the necrotic tissue was gone" (*Id.*). Further, she was directed to "continue wearing the compression garment" (*Id.*).

On February 22, 2018, plaintiff was seen again by Ms. Demino, who documented that "[t]here was no pus, drainage, or odor, but the inner knees were tender to palpitation" (*Id.* at ¶ 30). Dr. Jones was also in the room during this examination, and "he offered to manually debride the area, but the patient refused" (*Id.*; Lexington Plastic Surgery Chart at 9). Plaintiff was instructed to "continue to apply Collagenase to the necrotic tissue," "[a]pply warm soaks to [the] area 3-4 times a day," and to "continue to wear a compression garment" (*Id.*; Defendants' Expert Affirmation ¶ 30). Plaintiff returned to Dr. Jones' office on April 5, 2018, and the notes document that she was "compliant with applying the Collagenase" (*Id.* at ¶ 31). The physical examination revealed that the "skin on the inner knees" was "pink, healthy tissue that [was] healing up well" (*Id.*). Dr. Jones directed the plaintiff to use "keloid care two times a day to the healed areas, [and] provid[ed] her with a complimentary product" (*Id.*). On November 1, 2018, the chart indicates that the skin in the inner knees had healed, but "remain[ed] pink," and that there was "[h]yperpigmentation around the pink area" (*Id.* at ¶ 32; Lexington Plastic Surgery Chart at 5). The plaintiff was examined by Dr. Jones, who told the patient that he was not sure whether the pink area would darken, and wanted to monitor her progress over the course of a year (*Id.*). He directed her to return in two months to see if the area had darkened, and to continue to use keloid care (*Id.*; Defendants' Expert Affirmation ¶ 33).

On December 11, 2018, plaintiff presented to Dr. Kevin Tehrani, a plastic surgeon, "who she had previously treated with for other unrelated procedures" (*Id.* at ¶ 36). His notes state that plaintiff

"burned her inner thighs with a heating pad [in] January 2018," "and now had some hypopigmentation and hyperpigmentation" (*Id.* at ¶ 37; Kevin Tehrani MD chart at 61, annexed as Exhibit O to defendants' motion papers). Dr. Tehrani "suggested" "Cellutome micro-graphing," and she was given "signature cream to use 3 times a week" (*Id.*; Defendant's Expert Affirmation ¶ 37). On December 18, 2018, plaintiff returned to Dr. Tehrani, who "performed an excision of burn scar and Split Thickness Skin Graft (STSG) using Cellutome epidermal graft" (*Id.* at ¶ 39). She "cancelled her February 12, 2019 appointment with Dr. Tehrani, and cream was shipped to her" (*Id.* at ¶ 40).

In support of their motion for summary judgment, defendants submit an expert affirmation from Thomas Davenport, M.D., a physician board certified in plastic surgery, contending that defendants did not deviate from acceptable medical practice in their treatment of the plaintiff, and that no act or omission of theirs proximately caused the plaintiff's injuries (Defendants' Expert Affirmation ¶¶ 1, 6). Dr. Davenport's opinion is based on review of the bills of particulars, medical records, deposition transcripts, and "photographs of plaintiff's alleged injuries," as well as his education, training, and experience (*Id.* at ¶¶ 4, 5). Dr. Davenport opines that Dr. Jones did not depart from acceptable medical practice when performing the liposuction procedure on plaintiff on January 10, 2018 (*Id.* at ¶ 49). He explains that the operative report does not need to "say exactly where the incision, or incisions, would be made," and that the "pre-operative markings on the patient's body" "direct the surgeon when performing the actual procedure" (*Id.* at ¶ 51). Further, he indicates that "the surgeon ultimately determines the location, or locations, of the insertion of the device to perform the liposuction procedure" (*Id.*). Dr. Davenport maintains that based "[u]pon [his] review of the operative report and the post-operative photographs, there is no evidence that Dr. Jones was working too close to the skin nor that he took out too much fat in the thigh and/or knee region" (*Id.* at ¶ 56). He also suggests that Dr. Jones appropriately performed the procedure in a "conservative" manner by

"manually palpat[ing] the area and suction[ing] to confirm that the device was at proper depth" (*Id.* at ¶ 57).

Dr. Davenport affirms that Dr. Jones rendered appropriate post-operative care to the plaintiff (*Id.* at ¶ 67). He claims that Dr. Jones adhered to the standard of care by "immediately plac[ing] plaintiff" in the compression garment after the surgery (*Id.* at ¶ 68). He explains that the garment is supposed to "be extremely tight, so as to prevent subcutaneous seroma from pooling and becoming infected," and that "[a]ny necrosis and/or blisters should be seen just at the very distal end of the garment" (*Id.* at ¶ 69). Further, Dr. Davenport confirms that Dr. Jones appropriately treated plaintiff's post-operative blisters by prescribing Collagenase, Neosporin and Silvadene (*Id.* at ¶ 71). He states that the Collagenase "break[s] up the dense parts of the blistering," and Neosporin and Silvadene have "antibiotic properties," which "kept the blisters from becoming infected" (*Id.*). Dr. Davenport concurs with "Dr. Jones' characterization of the plaintiff's alleged skin injuries as blisters and/or bullae," not "keloid scarring" (*Id.* at ¶ 70). Further, Dr. Davenport alleges that Dr. Jones met the standard of care by continuing to treat plaintiff's blisters with Collagenase, warm soaks, and advising plaintiff to continue to wear a compression garment, when plaintiff "returned [to his office]" "with little improvement" to her blisters (*Id.* at ¶ 72). He maintains that "there were no other remedies Dr. Jones or his staff should have implemented that would have made any difference to the overall outcome of plaintiff's alleged injuries" (*Id.* at ¶ 76).

Dr. Davenport concludes that plaintiff's injuries were not proximately caused by the liposuction procedure, or the post-operative treatment (*Id.* at ¶¶ 59, 67). He alleges that the "surgery was performed conservatively, and there is no evidence that Dr. Jones was working too close to the skin or removed too much fat to cause divots in the flesh" (*Id.* at ¶ 60). Further, he opines that the location of the injury "which runs the entire length of the liposuction procedure," suggests that it did not "occur as a result of wearing the compression suit post-operatively" (*Id.* at ¶ 61). Based on the

medical records from Dr. Tehrani, stating that plaintiff reported that she "burned her inner thighs with a heating pad in January 2018," and his review of the photographs, Dr. Davenport contends that plaintiff's injury was "more likely to have been caused" by "leaving a heating pad between her knees and thighs" (*Id.* at ¶¶ 62-63). Dr. Davenport affirms that he has "seen and treated patients during [his] career who have caused the same injury as alleged by the plaintiff with a heating pad" (*Id.* at ¶ 64). Further, he explains that the anesthesia "used on the entirety of the bilateral medial thighs" during the liposuction, would result in the "plaintiff [being] unable to feel the heat" "until she had already sustained the significant burns" (*Id.* at ¶ 65).

Dr. Davenport maintains that plaintiff's "informed consent claim is without merit," as the evidence demonstrates that plaintiff was "aware of the risks prior to surgery" (*Id.* at ¶¶ 80, 86). He points out that the chart lists the risks of the procedure, and documents that they were discussed with the patient (*Id.* at ¶¶ 81, 84). Further, Dr. Jones' deposition testimony confirms that the risks of the procedure were discussed with the patient prior to the procedure, and the plaintiff signed a consent form prior to the procedure (*Id.* at ¶ 85).

In opposition to defendants' motion for summary judgment, plaintiff submits a redacted expert affirmation from a physician board certified in plastic surgery, who concludes that defendants departed from acceptable medical practice in their treatment of the plaintiff, and that these departures proximately caused the plaintiff's injuries (Plaintiff's Expert Affirmation ¶¶ 1, 17). Plaintiff's expert opinion is based on review of the pleadings, medical records, deposition transcripts, pre- and post-operative photographs, Dr. Davenport's expert affirmation, as well as his/her own education, training, and experience (*Id.* at ¶¶ 2, 3). Plaintiff's expert contends that Dr. Jones deviated from the standard of care during the liposuction procedure on January 10, 2018, resulting in "severe and permanent scarring and disfigurement" (*Id.* at ¶ 17). Plaintiff's expert disagrees with Dr. Davenport's contention that the procedure was "completed without complication," based on the fact that plaintiff was in severe pain

after the procedure "requir[ing] [her] to remain at Dr. Jones' office with intravenous administration of Toradol" for "nearly 8 hours" after the surgery (*Id.* at ¶ 19). Plaintiff's expert points out that Dr. Jones' deposition testimony confirms that "the prolonged post-surgical stay is not a normal occurrence, and [that] patients undergoing this procedure are typically discharged home" within 20 minutes to 1 hour after surgery (*Id.*). He/she alleges that Dr. Jones' operative report "is self-serving, and may not accurately reflect the manner in which the procedure was actually performed" (*Id.* at ¶ 20). He/she affirms that Dr. Jones "acknowledge[d]" that this type of injury may "occur if the procedure is performed too closely to the dermis or epidermis layers of the skin" (*Id.* at ¶ 20). Further, plaintiff's expert claims that the "area of the bullae directly correlates to the location of the liposuction," and "the fact that the patient sustained this type of injury to both extremities is further evidence that the procedure was negligently performed" (*Id.* at ¶ 21). He/she contends that Dr. Jones "utilized a poor and/or overly aggressive technique during the surgery," "improperly and negligently inserted the cannula too close to the upper skin layers," "used defective instrumentation and/or devices during the procedure and/or" "excessively suctioned fat tissue during the procedure" (*Id.*). Plaintiff's expert opines that "[a]ny one, or a combination of [the above] deviations could result in the type of injury sustained by [the plaintiff]" (*Id.*).

Plaintiff's expert disputes defendants' contention that plaintiff's injuries were caused by a heating pad (*Id.* at ¶ 22). He/she points out that plaintiff denies using a heating pad, or that she even owned a heating pad in January 2018 (*Id.*). Further plaintiff explained in her deposition testimony "why she provided an inaccurate history to Dr. Tewari," as she was afraid that he would have been insulted that she did not come to him for the liposuction procedure (*Id.* at ¶¶ 16, 22). Dr. Jones' records do not state that plaintiff used a heating pad, even though he is now claiming that "an unknown employee told him at the first post-operative visit that" plaintiff had used a heating pad "the night before" (*Id.* at ¶ 22). Plaintiff's expert maintains that plaintiff's injury did not occur as a result of using

a heating pad, as "heating pad injuries are generally more commonly seen in the elderly population, whose skin tends to be thinner and more frail" (*Id.*). He/she also suggests that the injury is unlikely to have been caused by a heating pad, based on the fact that plaintiff was wearing a compression garment after the surgery, which "would serve as an effective heat barrier to any skin damage that could have been caused by a heating pad" (*Id.*).

Plaintiff's expert disagrees with Dr. Davenport's opinion that Dr. Jones properly obtained plaintiff's informed consent prior to the liposuction procedure (*Id.* at ¶ 26). He/she states that the "informed consent form provided for the January 10, 2018 procedure was a boilerplate document with no specific reference to the liposuction procedure which Ms. Mark-James was to undergo" (*Id.*). Further, the "document" did not list the "risks and potential complications of the specific procedure," and Ms. Mark-James "testified that she has no recollection of any discussion of the risks of the procedure" (*Id.*). Plaintiff's expert also indicates that consent form was "witnessed by an unknown employee of Dr. Jones, whose signature is not decipherable, and his/her affidavit was not submitted for consideration" (*Id.*). Therefore, he/she opines that Dr. Jones "failed and neglected to fully inform his patient of the risks of the subject procedure, including permanent skin damage, creation of lesions, bullae and scarring" (*Id.*).

In reply, defendants contend that plaintiff's expert opinion is speculative, conclusory, and not supported by facts in the record (Reply Affirmation ¶¶ 12-17). Defendants claim that Dr. Jones properly obtained plaintiff's informed consent prior to the liposuction procedure based on his notes documenting that he discussed the risks of the procedure with the patient, and the signed consent forms (*Id.* at ¶ 23). Defendants maintain that plaintiff has failed to raise a triable issue of fact as to the informed consent claim, and that "there is no requirement that the informed consent form specifically list out every potential risk of the procedure" (*Id.* at ¶¶ 23-24).

To prevail on a cause of action for medical 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]). On a motion for summary judgment, defendant must "make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Iulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]). 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 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 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, "a plaintiff must prove (1) that the person providing the professional treatment failed to inform the patient of the reasonably foreseeable risks and benefits associated with the treatment, and the alternatives thereto, that a reasonable medical practitioner would have disclosed under similar 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 (*Xiao Yan Ye v. Lam*, 191 AD3d 827, 829 [2d. Dept. 2021]; *Schussheim v. Barazani*, 136 AD3d 787,

789 [2d. Dept. 2016]; Public Health Law § 2805-d). A cause of action for "lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body" (*Id.*). 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 v. Saphire*, 149 AD3d 856, 858 [2d. Dept. 2017]; *Xiao Yan Ye*, 191 AD3d at 829; *Schussheim*, 136 AD3d at 789-90; *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).

Here, defendants met their prima facie burden on the medical malpractice cause of action. Defendants' expert, Dr. Davenport, affirmed that the practice and procedures by Dr. Jones and his staff were within acceptable standards of medical practice, and that no act or omission of theirs proximately caused any injury to the plaintiff. Dr. Davenport maintains that Dr. Jones properly performed the surgery based on the operative report, and that he properly treated the plaintiff's injuries. Further, he alleges that plaintiff's injuries were caused by using a heating pad hours after the surgery. His opinion constitutes competent evidence, in that it is based on the bills of particulars, deposition transcripts, medical records, photographs, and his own training and experience.

In opposition, plaintiff produced an affidavit of merit from a plastic surgeon, attesting to departures from accepted standards of medical practice, and that these departures were a competent producing cause of the plaintiff's injuries. Plaintiff's expert opinion, based on review of pleadings, bills of particulars, medical records, deposition transcripts, photographs, and defendants' expert affirmation, raises triable issues of fact. Due to the conflicting expert reports, defendants' motion for

summary judgment is denied as to the cause of action for medical malpractice (*See Deutsch*, 71 AD3d at 719).

Defendants' motion for summary judgment is denied as to the second cause of action alleging lack of informed consent, as defendants have failed to establish their 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 defendants' expert "failed to aver that the consent form complied with the prevailing standard for such disclosures applicable to reasonable practitioners performing the same kind of surgery" (Lexington Plastic Surgery Chart at 61-62; *Parrilla*, 149 AD3d at 858; *Walker*, 114 AD3d at 670-71). Further, defendants submitted plaintiff's deposition testimony in support of their motion, wherein she testified that she did not "recall" Dr. Jones informing her of the risks, benefits, and alternatives prior to the surgery, indicating that there are issues of fact as to whether Dr. Jones properly obtained plaintiff's informed consent to the liposuction procedure (Plaintiff's EBT tr. Day 1 123, lines 16-19, annexed as Exhibit H to defendants' motion papers; *Parrilla*, 149 AD3d at 858; *Xiao Yan Ye*, 191 AD3d at 829). Defendants' expert also failed to demonstrate that "a reasonably prudent person in the plaintiff's position would not have declined to undergo the procedure if he or she had been fully informed" (*See Walker*, 114 AD3d at 671; *Muniz v. Katlowitz*, 49 AD3d 511, 513 [2d. Dept. 2008]). Accordingly, defendants' 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.

HON. PAMELA L. FISHER