Rose v Antell
2023 NY Slip Op 33043(U)
September 1, 2023
Supreme Court, New York County
Docket Number: Index No. 805337/2019
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 805337/2019

LAUREN ROSE,

MOTION DATE 05/05/2023

Plaintiff,

MOTION SEQ. NO. 001

- v -

DARRICK E. ANTELL, M.D., NYC RECONSTRUCTIVE SURGERY, P.C., COLUMBIA EASTSIDE AMBULATORY SURGERY FACILITY, P.C., and LENOX HILL AMBULATORY SURGERY, P.C.,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

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

I. INTRODUCTION

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice under the theory of res ipsa loquitur, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is denied.

II. FACTUAL BACKGROUND

The crux of the plaintiff's claim is that, on August 2, 2017, in the course of abdominal liposuction and bilateral breast reduction procedures that were performed by the defendant plastic surgeon Darrick E. Antell, M.D., at the defendant ambulatory surgery facilities, she suffered a burn to the back of her left knee while she was under anesthesia, caused by the misplacement or improper use either of an electrocautery knife or an electrocautery pad that was supposed to be affixed to her right thigh. She averred that the burn, in turn, caused her skin to blister, which left permanent scarring.

According to the defendants, the plaintiff remained in a supine position during the procedures, while a Bovie pad for the electrocautery was applied to her right thigh. They further averred that no equipment or surgical tools intentionally were on her left leg or the back of her left knee during the procedure, that her legs were covered, and that no medications or substances were applied to her legs by Antell or his staff. The plaintiff challenges the defendants' characterization of these assertion as "undisputed," claiming that, inasmuch as she was under anesthesia during the entire procedure, she had no opportunity to determine whether these allegations are true. Similarly, the plaintiff disputes the defendants' allegation that, while electrocautery apparatus was applied to her breasts for purposes of performing the breast reduction operation, it was not utilized below that area.

The defendants alleged that the former defendant Joseph Sebeo, M.D., an anesthesiologist, employed a blood pressure monitor on one of the plaintiff's arms and an electrocardiogram monitor on her chest, with an intravenous line running into the other arm. They further averred that there were no interventions or monitors applied below the patient's waist. As the defendants recounted it, the liposuction procedure was performed first, after which the relevant wounds were cleaned, sterile dressings were applied, and the plaintiff was re-draped and prepared for the breast reduction portion of the surgery. They further asserted that, following the breast reduction procedure, the wounds caused thereby were cleaned, all wound edges, including the nipple-areola complex, were noted to be viable, sterile dressings were applied, and the plaintiff was transferred to recovery. As with the defendants' other allegations, the plaintiff argues that they cannot be deemed to be undisputed, because she was under anesthesia during the entire period when these tasks were undertaken and these observations were made.

The surgery lasted between three to four hours. The defendants claim that a post-operative skin examination was performed, and that although the examination "indicated the patient's skin was clear," they conceded that the plaintiff informed a nurse immediately after the

surgery of the presence of a blister behind her left knee. The plaintiff asserted that no such examination was undertaken, but she confirmed that she made such a complaint. Upon the plaintiff's complaint, the nurse informed the plaintiff that the blister might have been the result of her exposure to poison ivy during the plaintiff's recent gardening activities, and instructed her to apply the over-the-counter antibiotic ointment Bacitracin to the blister area. The plaintiff, however, has no recollection of such a discussion, except the recommendation to apply Bacitracin. The defendants discharged the plaintiff at 5:50 p.m. on August 2, 2017. On August 3, 2017, the plaintiff sent photographs of the blister to Antell's office, after which Antell spoke with the plaintiff and prescribed Silvadene ointment, which is used to treat burns. The blister turned into a significant ulceration, which ultimately resulted in permanent scarring.

III. THE PLAINTIFF'S CONTENTIONS

In her complaint, the plaintiff alleged that the defendants were negligent in failing to afford necessary, proper, prompt, and required care for her condition, as well as necessary, proper, prompt, and required treatment, diagnosis, examination, testing, and management thereof. She asserted that they were further negligent in in failing properly, adequately, correctly, and timely to diagnose her condition, and in causing, allowing, and failing to prevent her from being burned while under anesthesia. In addition, the plaintiff averred that the defendants failed properly, promptly, and adequately to treat her and, in essence, ignored her condition. She claimed that the defendants also failed to provide good and accepted operating room care. The plaintiff asserted that, as a consequence, she sustained a burn to the back of her left leg that developed into a blister which, in turn, left permanent scarring at the burn site.

In her bill of particulars, the plaintiff reiterated the allegations in her complaint, adding that the defendants departed from good and accepted care in the manner in which they undertook the surgical procedures, in failing timely to recognize the fact that she had been burned during those procedures, and in failing timely to treat the burn. She faulted them for failing properly to monitor her during the procedures, failing timely and properly to perform the

necessary post-operative examinations of her skin, and, as a consequence, failing timely and properly to treat her for the burn. The plaintiff asserted in her bill of particulars that, as a proximate result of the defendants' malpractice, she sustained a burn to the left knee, permanent scarring of to the left knee measuring 3.48 centimeters by 2.44 centimeters, and a deformity of her left leg.

IV. THE SUMMARY JUDGMENT MOTION

In support of their motion, the defendants submitted the pleadings, the bill of particulars, relevant medical records, the note of issue, a statement of undisputed facts, an attorney's affirmation, and the expert affirmation of dermatologist Mary Ruth Buchness, M.D.

In her affirmation, Dr. Buchness reiterated the defendants' version of the facts, relying upon deposition testimony and medical records. She opined that the plaintiff did not suffer from a thermal injury, that is, a burn, during the course of the liposuction and breast reduction procedures that Antell performed. According to Dr. Buchness, when skin is permanently scarred by burning via a thermal instrument in an operating room, "there is an odor associated with the thermal injury, and there is no mistake among the individuals in the operating room that a burn has occurred." Although the defendants did not submit the transcripts of the parties' deposition testimony in support of their motion, Dr. Buchness asserted that there was nothing in the medical records or deposition transcripts that she reviewed indicating that anyone smelled an odor suggesting that a burn occurred. She further asserted that there was "no evidence that an instrument capable of burning the patient was used below the patient's waist, or that such instrument was used under the drapes used to cover the patient's legs during surgery." She continued that

> "[w]hen a burn mark leaving a scar does occur on the skin, it is my experience and opinion that a burn mark or other char mark is left on the skin. Upon my review of the photographs supplied in this matter, it is clear that there is no burn mark or charring on the patient's skin. In most cases, the burn mark is in the shape of the instrument, another factor which is missing here."

Dr. Buchness further asserted that the employment of drapery over the plaintiff's legs made it impossible for a thermal injury to have occurred during the surgery, as the plaintiff's left knee was not exposed or accessible during the portions of the surgery when instruments capable of burning flesh were being employed. Accepting the defendants' contention that no medications or substances were employed during the procedure that could have caused a skin injury, Dr. Buchness concluded that the cause of blister was "unknown," and that there was no "instrumentality of a burn under the control of the defendant which could have caused the claimed injury." She thus speculated that the skin injury was "likely related to a superseding event such as poison ivy, a spider bite, or an infection."

In the affirmation of the defendants' attorney, the defendants argued that the plaintiff could not rely on the doctrine of res ipsa loquitur because there was no instrumentality under the defendants' control that could have caused or contributed to the blister.

In opposition to the defendants' motion, the plaintiff relied on the same documentation that the defendants had submitted, and she also submitted excerpts of the parties' deposition transcripts, photographs of her injury that were taken shortly after its onset, a counter statement of facts, an attorney's affirmation, and the expert affirmation of general and plastic surgeon Burt Greenberg, M.D.

In her deposition, the plaintiff averred that, prior to submitting to the surgical procedures on August 2, 2017, she had no pain, no marks, no ulcerations, no rashes, and no blistering on the back of her left knee. She testified that, after she awoke from the anesthesia, she noticed for the first time that she had a sharp pain at that location. The plaintiff asserted that she complained to a nurse, but had no recollection of discussing gardening or exposure to poison ivy with the nurse. One of the nurses who assisted in the procedure, nonparty Carmelita Estaris, explained that smoke and odors can arise during a cauterization process that involved the burning of tissue, and described the means for suctioning away such smoke and odors, but averred that she was unable to recognize the presence of smoke and odors in most situations

because she is always wearing a surgical mask. At his deposition, Antell asserted that the heat-generating grounding pad used for cauterization is very sticky, that it could not accidentally move from the location to which it was affixed, and that it would stop working if it became detached.

Dr. Greenberg opined that

> "[t]o a reasonable degree of medical certainty, plaintiff's injury was a burn. This opinion is based on my considerable experience treating burns. Dr. Buchness, does not mention that Dr. Antell treated the injury just as a burn would be treated. His office chart and Ms. Rose's deposition indicates that he prescribed Silvadene ointment, performed debridements (cutting away dead tissue), and even discussed hyperbaric treatment with plaintiff, all of which are standard treatments for burns. Dr. Antell's nurse stated that, to her knowledge, Silvadene is only used to treat burns, which are also treated with debridement"

(citations omitted). Dr. Greenberg challenged Dr. Buchness's conclusion that a burn was unlikely because it would have produced an unmistakable odor that would have been noticed by surgical staff. As he framed it, Dr. Buchness, "who is not a surgeon, never mentions having any personal experience with an intra-operative thermal injury." He further explained that her assertion presumed that Antell or his staff would have recorded or admitted to detecting any odor that might have indicated that the plaintiff had been burned. Dr. Greenberg additionally noted that Dr. Buchness offered no explanation for how Antell or his staff would be able to determine whether the "unmistakable odor" was the result of applying thermal energy, either intentionally or inadvertently.

Dr. Greenberg rejected, as mere speculation, Dr. Buchness's statement that the plaintiff's injury was more likely to have been caused by exposure to poison ivy, an insect bite, or an infection. According to Dr. Greenberg,

> "Dr. Buchness does not even assert that the injury looks like poison ivy or a spider bite or an infection. The injury was not treated as poison ivy or a spider bite or an infection. Dr. Antell admits he did not diagnose plaintiff as having poison ivy; did not know the cause of the injury; and did not treat this injury as an infection by culturing any fluid. To a reasonable degree of medical certainty, Ms. Rose;s injury is too focal, with discernible borders; too deep; and left too much residual scarring to be either a rash, an insect bite or infection"

(citation omitted). He further rejected, as completely contradicted by the medical records, Dr. Buchness's contention that the injury was "a subsequent development likely related to a superseding event," since the plaintiff made her complaints immediately after awaking from surgery and had no signs or symptoms prior to the surgery. Dr. Greenberg also rejected, as completely speculative, Antell's deposition testimony that the injury might have been caused by friction, freezing, chemical exposure, infection, poison ivy, or sunburn. He again concluded that none of these types of injuries would start as a blister and develop into injury as focal, circumscribed, and deep as the injury shown in the relevant photographs, and result in the plaintiff's permanent scarring.

In addition, Dr. Greenberg took issue with Dr. Buchness's conclusion that the plaintiff was not and could not have been exposed to any instrumentality that could cause a burn. He explained that two instrument that were the likely cause of the burn were a Bovie Knife and a Bovie grounding pad. As he explained it, a

> "'Bovie (Knife)' [ ] is a pencil-like instrument with a button that activates the emission of electrical energy to either cut through skin or cauterize blood vessels. Dr. Antell testified he used a 'Bovie.' The instrument is connected by wire to the 'Bovie' machine, which is an electrosurgical unit that supplies the electric power. If the Bovie was dropped or misplaced, it could have been activated by pressure on the button from plaintiff's leg while she was being repositioned or by inadvertent pressure by one of the surgical staff, perhaps through the surgical drapes. Since the Bovie was not supposed to be contact the patient outside the surgical field, any injury caused by the Bovie would constitute a departure from good and accepted medical practice"
>
> "Another instrument is the 'Bovie' grounding pad, which Dr. Antell described as a 3 x 4-inch adhesive pad with a 'wire in the middle,' which is placed 'outside the surgical field.' Generally, the wire runs from the pad to the Bovie machine. The purpose of any Bovie grounding pad is to allow the application of electrical energy thru [sic] the Bovie for cutting and cautery while protecting the patient from absorbing electrical current and perhaps suffering a heart arrhythmia. The principle is similar to wearing rubber footwear while working near electrical current. Good and accepted standards of medical practice require that the connection between the pad and the patient's skin be firm, dry and clean, and remain so during the entire surgery. The reason this is standard practice is that it has been known for decades that a loose connection, or a connection between the pad and skin that is hindered by hair, dirt or debris, can prevent the electrical energy from safely leaving the body and instead cause burns of varying degrees. This type of Bovie pad injury is rare and results from negligent placement and

> monitoring of the pad, which constitute[ ] departures of good and accepted practice by Dr. Antell and his staff. Dr. Antell or his staff should have checked that the connection was firm, dry and clean both at the beginning of surgery and after any repositioning of the patient"

(citations omitted).

Although the defendants claimed that the grounding pad was placed on the patient's right thigh, and was firmly affixed thereto, Dr. Greenberg opined that, inasmuch as the liposuction procedure was performed prior to the breast reduction procedure, it would be common for the Bovie pad to have been placed on the *calf* prior to the liposuction, so that it already was in place for the breast reduction procedure and located further from the liposuction surgical field than the thigh, which was its ultimate destination.

Dr. Greenberg additionally identified a tube-shaped cannula as a potential source of ultrasound energy that resembles thermal energy. He asserted that such a cannula frequently is employed during an ultrasound assisted liposuction. Dr Greenberg further noted that, although the medical records reported that the liposuction procedure that the plaintiff underwent was suction assisted, rather than ultrasound assisted, the plaintiff had signed a consent to an ultrasound assisted procedure. Nonetheless, he characterized the possibility of a cannula-caused injury as more remote than a Bovie knife or Bovie pad-caused injury.

Crucially, Dr. Greenberg asserted that

> "[s]ince the Bovie and liposuction cannula is not supposed to be used outside of the surgical field, only negligent use of either instrument could have caused the injury. Similarly, the Bovie pad, including the wire, will not generate injurious heat or electric energy if properly placed on well-prepared skin and checked after repositioning. So there is *no* non-negligent manner in which any of these instruments could have caused plaintiff's injury"

(emphasis in original).

Dr. Greenberg contradicted Dr. Buchness's conclusions as to the significance of the use of drapery and the absence of adverse repositioning, asserting that drapes wouldn't protect the plaintiff from a Bovie pad injury, the drapes had to be moved when she was repositioned in the interim between the liposuction and breast reduction procedures, and a Bovie device could be

dropped or misplaced in a manner where it goes through or under the surgical drapes. Dr. Greenberg also took issue with Dr. Buchness's conclusion that that plaintiff's injury was not an intra-operative burn because there was no "burn mark or charring on the skin" shown on the photographs of plaintiff's injury. In the first instant, Dr. Greenberg opined that the photographs "do a show a penetrating burn injury," and that the terms "burn mark" and "charring" are not standard medical terms for describing burns in any event. Rather, according to Dr. Greenberg, burns are "described in terms of the depth or thickness of the injury and generally classified as first, second or third degree injuries." He noted that, colloquially, charring refers to blackening of tissue and that, although not requisite to diagnosing a burn, the relevant photographs did in fact depict blackened tissue.

In addition, Dr. Greenberg averred that Dr. Buchness was not qualified to render an opinion as to whether the plaintiff's injuries were burn injuries, or whether any instrumentality employed in the course of the procedures was capable of producing those injuries. He noted in this regard that Dr. Buchness never stated that she had performed, or even attended, a breast reduction or liposuction surgery, and thus did not know what adverse consequences the Bovie knife, Bovie pad, or cannula were capable of causing.

In reply to the plaintiff's opposition papers, the defendants submitted an attorney's affirmation, in which she argued that the defendants established their prima facie entitlement to judgment as a matter of law, and that Dr. Greenberg's affirmation failed to raise a triable issue of fact because it sets forth only "general conclusions, misstatements of evidence, and unsupported assertions" and failed to rebut the defendants' showing as to lack of causation. She further argued that Dr. Buchness was indeed qualified to render an expert opinion as to causation in this action.

V. SUMMARY JUDGMENT STANDARDS

It is well settled that the movant on a summary judgment motion "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] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). In other words, "[i]n 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 issues of credibility" (*Garcia v J.C. Duggan, Inc*., 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp*., 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (s*ee id*.; *Medina v Fischer Mills Condo Assn.,* 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] 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'" (*De Paris v Women's Natl. Republican Club, Inc*., 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr*., 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (se*e Koulermos v A.O. Smith Water Prods*., 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

A. Qualifications of Defendants' Expert to Render Opinion

Contrary to the plaintiff's contention, Dr. Buchness, as a dermatologist, is qualified to render an opinion as to whether the injury depicted in the plaintiffs photographs was a burn injury, whether burning skin emits a distinct odor, and which of the instrumentalities employed

by the defendants could have caused a burn injury, even if she did not have experience or expertise in the use of cauterization apparatus in the course of plastic surgery procedures. This is because the specialty of dermatology involves knowledge concerning the nature, appearance, and reactivity of skin. Conversely, for this same reason, the court concludes that she does not have the requisite experience or training to opine on the propriety of the methods employed by the defendants in deploying and operating the Bovie knife and pad, and cannot opine as to whether the specifics of the deployment of those instruments in the plaintiff's case adhered to or departed from good and accepted surgical practice. Hence, at most, Dr. Buchness is qualified to provide limited expert opinion as to the issue of proximate cause.

The determination of whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court, the provident exercise of which will not be disturbed absent a serious mistake or an error of law (*see Guzman v 4030 Bronx Blvd. Assoc., LLC*, 54 AD3d 42, 49 [1st Dept 2008]). The courts of this State repeatedly have rejected the concept that only a specialist practicing in a defendant's particular specialty is competent to testify that another specialist departed from accepted practice in the specialty (*see Fuller v Preis*, 35 NY2d 425, 431 [1974]; *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [1st Dept 2017]; *Bickom v Bierwagen*, 48 AD3d 1247,1248 [4th Dept 2008]; *Julien v Physician's Hosp*., 231 AD2d 678, 680 [2d Dept 1996]; *Matter of Enu v Sobol*, 171 AD2d 302, 304 [3d Dept 1991]; *Joswick v Lenox Hill Hosp*., 161 AD2d 352, 355 [1st Dept 1990]). Nonetheless, a physician who is put forward by a party as an expert qualified to support a summary judgment motion must assert that he or she possesses the necessary knowledge and training in the relevant specialty, or explain how he or she came to it, and also must articulate the standard of care that allegedly was applicable (*see Colwin v Katz*, 122 AD3d 523, 524 [1st Dept 2014]).

> "To qualify as an expert, the witness should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable. Thus, if a physician possesses the requisite knowledge and expertise to make a determination on the issue presented, he need not be a specialist in the field. The question of whether a physician may

> testify regarding the standard of accepted medical practice outside the scope of his specialty can be a troublesome one, but appellate courts have rejected claims of error directed at a physician's qualifications to offer an opinion outside the scope of his specialty when the witness's specialty is closely related to the specialty at issue"

(*Matter of Enu v Sobol*, 171 AD2d at 304 [citations omitted]). Thus,

> *"the affidavit must be by a qualified expert who 'profess[es] personal knowledge of the standard of care in the field of . . . medicine [at issue], whether acquired through his practice or studies or in some other way'* (*Nguyen v Dorce*, 125 AD3d 571, 572 [1st Dept 2015] [pathologist not qualified to render opinion as to whether defendant deviated from the standard of care in the field of emergency medicine]; *see also Atkins v Beth Abraham Health Servs.*, 133 AD3d 491 [1st Dept 2015] [osteopath not qualified to render opinion on treatment of a geriatric patient with diabetes and other conditions]; *Udoye v Westchester-Bronx OB/GYN, P.C.,* 126 AD3d 653 [1st Dept 2015] [pathologist not qualified to render an opinion as to the standard of care in obstetrics or cardiology]; *Mustello v Berg,* 44 AD3d 1018 [2d Dept 2007] [general surgeon not qualified to render opinion as to gastroenterological treatment])"

(*Bartolacci-Meir v Sassoon*, 149 AD3d at 572-573 [emphasis added]).

Consequently, where, as here, the physician proffering an allegedly expert affirmation demonstrates no familiarity with certain aspects of the defendant's specialty, specifically, the surgical techniques that they employed, and the proper employment and intraoperative management of a Bovie knife and Bowie pad, the affiant will be deemed not to have the requisite experience, training, and knowledge necessary to render an opinion as to whether that defendant departed from standards of good practice (*see Vargas v Bhalodkar,* 204 AD3d 556, 557 [1st Dept 2022] ["(p)laintiff's expert, an internist and gastroenterologist with no apparent training or knowledge in cardiology, did not set forth sufficient qualifications to opine on whether [defendant] deviated from the relevant standard of care when she gave cardiac clearance for decedent to temporarily cease taking blood thinners and undergo a colonoscopy"]; *Newell v City of New York*., 204 AD3d 574, 574 [1st Dept 2022] ["an internist who demonstrated no familiarity with surgery in general or abdominal surgery in particular, was not qualified to render an opinion that [defendant] departed from accepted standards of medical care in performing plaintiff's appendectomy"]; *Samer v Desai*, 179 AD3d 860 [2d Dept 2020] [general and vascular surgeon

not qualified to render opinion as to orthopedics or family medicine]; *Bartolacci-Meir v Sassoon*, 149 AD3d at 572 [1st Dept 2017] [general surgeon lacked any experience in gastroenterology sufficient to qualify him as an expert]; *Steinberg v Lenox Hill Hosp*., 148 AD3d 612, 613 [1st Dept 2017] [plaintiffs' expert was "not qualified to offer an opinion as to causation[,as h]e specializes in cardiovascular surgery, not neurology or ophthalmology [and] failed to 'profess the requisite personal knowledge' necessary to make a determination on the issue of whether [an arterial] perforation was responsible for plaintiff's visual impairment"]; *cf. Fuller v Preis*, 35 NY2d at 431 [neurologist was permitted to give an opinion in the closely related specialty of psychiatry on the issue of whether an accident was the proximate cause of a subsequent suicide]; *Humphrey v Jewish Hosp. & Med. Ctr*., 172 AD2d 494 [2d Dept 1991] [general surgeon was deemed to be qualified to render an opinion in the specialty of obstetrics and gynecology]; *Matter of Sang Moon Kim v Ambach*, 68 AD2d 986, 987 [3d Dept 1979] [opinion testimony of qualified neurosurgeon at a professional misconduct hearing was sufficient to permit a finding of gross negligence or gross incompetence of an orthopedic surgeon committed during spinal surgery]).

B. Medical Malpractice and Res Ipsa Loquitur

"To sustain a cause of action for medical malpractice, a 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 plaintiff's injury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Elias v Bash*, 54 AD3d 354, 357 [2d Dept 2008]; *DeFilippo v New York Downtown Hosp*., 10 AD3d 521, 522 [1st Dept 2004]). A defendant physician moving for summary judgment 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 (*Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or by establishing that the plaintiff was not injured by such treatment (*see McGuigan v*

Centereach Mgt. Group, Inc., 94 AD3d 955 [2d Dept 2012]; *Sharp v Weber*, 77 AD3d 812 [2d Dept 2010]; *see generally Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

To satisfy the burden, 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 at 206; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]; *Koi Hou Chan v Yeung*, 66 AD3d 642 [2d Dept 2009]; *Jones v Ricciardelli*, 40 AD3d 935 [2d Dept 2007]). If the expert's opinion is not based on facts in the record, the facts must be personally known to the expert and, in any event, the opinion of a defendant's expert should specify "in what way" the patient's treatment was proper and "elucidate the standard of care" (*Ocasio-Gary v Lawrence Hospital*, 69 AD3d 403, 404 [1st Dept 2010]). Stated another way, the defendant's expert's opinion must "explain 'what defendant did and why'" (*id*., quoting *Wasserman v Carella*, 307 AD2d 225, 226, [1st Dept 2003]). Furthermore, to satisfy his or her burden on a motion for summary judgment, a defendant must address and rebut specific allegations of malpractice set forth in the plaintiff's bill of particulars (*see Wall v Flushing Hosp. Med. Ctr*., 78 AD3d 1043 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr*., 55 AD3d 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572 [2d Dept 2007]).

Although a plaintiff asserting a medical malpractice claim usually must demonstrate that the defendant physician deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury (*see Rivera v Kleinman*, 16 NY3d 757, 759, [2011]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24; *Terranova v Finklea*, 45 AD3d at 572; *Zellar v Tompkins Community Hosp.*, 124 AD2d 287, 288-289 [3d Dept 1986]), the theory of res ipsa loquitur may be applied to occurrences "[w]here the actual or specific cause of an accident is unknown" (*Kambat v St. Francis Hosp*., 89 NY2d 489, 494 [1997]). Under such circumstances, "a jury may . . . infer negligence merely from the happening of an event and the defendant's relation to it" (*id*.; *see States v Lourdes Hosp*., 100 NY2d 208, 211-212 [2003]; Restatement

[Second] of Torts § 328D). To establish a prima facie case of negligence in support of a res ipsa loquitur charge, 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 NY2d at 494; *see James v Wormuth*, 21 NY3d 540, 545-546 [2013]; *Ebanks v New York City Tr. Auth*., 70 NY2d 621, 623 [1987]; Prosser and Keeton, Torts § 39 at 244 [5th ed]). Res ipsa loquitur, a doctrine of ancient origin (*see Byrne v Boadle*, 2 H & C 722, 159 Eng Rep 299 [1863]), derives from the understanding that some events ordinarily do not occur in the absence of negligence (*see id.; see also Dermatossian v New York City Tr. Auth*., 67 NY2d 219, 226 [1986]). Once a plaintiff satisfies the burden of proof on these three elements, the res ipsa loquitur doctrine permits the jury to infer negligence from the mere fact of the occurrence (*see States v Lourdes Hosp.*, 100 NY2d at at 211-212; *Kambat v St. Francis Hosp.,* 89 NY2d at 495). Thus, for example, where "a foreign object is left in the body of the patient, or the patient, while anesthetized, experiences an unexplained injury in an area which is remote from the treatment site" (*McCarthy v Northern Westchester Hosp*., 139 AD3d 825, 827 [2d Dept 2016] [citation omitted]), the invocation of the doctrine of res ipsa loquitur may be warranted (*see id.; see also Mattison v OrthopedicsNY, LLP*, 189 AD3d 2025, 2027 [3d Dept 2020]*; Swoboda v Fontanetta*, 131 AD3d 1042, 1045 [2d Dept 2015]; *DiGiacomo v Cabrini Med. Ctr*., 21 AD3d 1052, 1054 [2d Dept 2005]; *Escobar v Allen*, 5 AD3d 242, 243 [1st Dept 2004]; *Leone v United Health Servs*., 282 AD2d 860, 860-861 [3d Dept 2001]; *Hill v Highland Hospital*, 142 AD2d 955, 956 [4th Dept 1988]).

The doctrine of res ipsa loquitur frequently has been found applicable to circumstances, such as those presented here, where an anesthetized patient sustained a burn injury during

surgery in an area remote from the surgical site, and the defendants provided no evidentiary proof as to what caused the injury (*see Rosales-Rosario v Brookdale Univ. Hosp. & Med. Ctr.,* 1 AD3d 496, 497 [2d Dept 2003] [infliction of burn on the inner portion of patient's right knee while she was hospitalized to give birth]; *Babits v Vassar Bros. Hosp*., 287 AD2d 670, 671 [2d Dept 2001] [infliction of a third-degree burn on the rear area of the plaintiff's right upper thigh during orthoscopic knee surgery]; *Mack v Lydia E. Hall Hosp*., 121 AD2d 431, 431-433 [2d Dept 1986] [infliction of third degree burns on the side of patient's left thigh during the course of a surgical procedure for the treatment of rectal cancer]).

Although the defendants established, through Antell's deposition testimony, that neither Antell nor his surgical staff departed from good and accepted medical and surgical practice in any of the particulars of their surgical technique or their employment of the Bovie cauterization equipment, the court concludes that they failed to make a prima facie showing that the doctrine of res ipsa loquitur is inapplicable. In this regard, they failed to establish that the plaintiff was not in fact burned during the surgery, they failed to establish that the only instrumentalities that could have burned her were not under their exclusive control, and they failed to establish that the injuries claimed by the plaintiff could have been caused in the absence of negligence.

The medical records that the defendants submitted, in an of themselves, reflect and reveal the existence of triable issues of fact as to whether the plaintiff sustained a burn injury to the back of her left knee while she was anesthetized, as they reflect that the plaintiff exhibited no pre-operative skin derangement, she first complained about the back of her knee immediately upon awakening from anesthesia, and, notwithstanding Buchness's opinion, Antell himself prescribed Silvadene burn cream and debridements to treat the injury one day after the surgery. Moreover, the defendants' contentions as to other potential causes of the injury were completely speculative, and had no support in the record, other than an allegation that the plaintiff discussed her interest in gardening with a nurse, which, at most, provided a purported basis for Dr. Buchness's speculation that the plaintiff may have been exposed to poison ivy in

the days leading up to the surgery, a surmise that itself was made in the absence of any evidence as to the nature and location of the plaintiff's alleged gardening activities.

Even if the defendants made the requisite prima facie showing by virtue of their deposition testimony that neither the Bovie knife nor the Bovie pad came into contact with the back of the plaintiff's left knee, and Dr. Buchness's opinion that the drapes allegedly covering the plaintiff's leg were sufficient to protect her from any heat generated by that equipment in any event, the plaintiff raised triable issues of fact as to the applicability of the doctrine of res ipsa loquitur with Dr. Greenberg's affirmation, additional deposition transcripts, and photographs. Dr. Greenberg explicitly identified the plaintiff's injury as a burn injury, he asserted that the Bovie knife and pad could indeed cause a burn through the leg drapes if they came into contact with the drapery, he opined that there was no non-negligent explanation for the injury, and he concluded that the only explanation for the injury involved contact with the heat-generating equipment that the defendants employed. Moreover, the photographs depicted a dark, circular ulceration that even a lay person could not confuse with a poison ivy rash, and Nurse Estaris's deposition testimony that she would be unable to smell the odor of burning flesh because she was wearing a mask undercut Dr. Buchness's opinion that the plaintiff could not have been burned because no one reported smelling such an odor.

Accordingly, that branch of the defendants' motion seeking summary judgment dismissing the complaint insofar as asserted against Antell must be denied.

C. Vicarious Liability

Where a physician working for a professional corporation renders medical care to a patient "within the scope of his or her employment" for that corporation, the corporation may be held vicariously liable for the negligence of the physician (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]). "'In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment'" (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 949 [2d

Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1213 [2d Dept 2018]). Inasmuch as this court has concluded that there are triable issues of fact as to whether Antell committed malpractice under the theory of res ipsa loquitur, Lenox Hill Ambulatory Surgery, P.C., also known as NYC Reconstructive Surgery, P.C., also known as Columbia Eastside Ambulatory Surgery Facility, P.C., as his joint employers, may be held vicariously liable for that malpractice. Hence, those branches of the defendants' motion seeking summary judgment dismissing the complaint insofar as asserted against the corporate defendants must be denied as well.

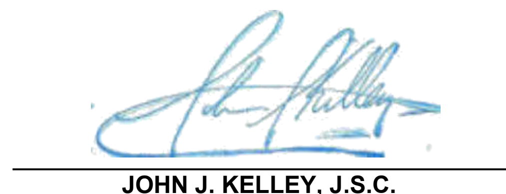
VI. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion is denied; and it is further,

ORDERED that the parties shall appear for a pretrial settlement conference on October 11, 2023 at 11:00 a.m.

This constitutes the Decision and Order of the court.



9/1/2023
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**