Morse v Weill Cornell Medicine
2024 NY Slip Op 30668(U)
February 29, 2024
Supreme Court, New York County
Docket Number: Index No. 805425/2019
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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LEONARD MORSE,

Plaintiff,

- v -

WEILL CORNELL MEDICINE and GRACE SUN, M.D.,

Defendants.

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INDEX NO. 805425/2019

MOTION DATE 11/08/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

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, lack of informed consent, and negligent training and supervision, the defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted to the extent that the defendants are awarded summary judgment dismissing so much of the complaint as alleged that the defendant Grace Sun, M.D., negligently performed a cataract removal procedure on the plaintiff's right eye, negligently destroyed the patient's capsular bag in his right eye during the course of that procedure, negligently maintained the plaintiff's medical records, and, along with the defendant Weill Cornell Medical, negligently trained and supervised hospital staff. The motion is otherwise denied, inasmuch as there are triable issues of fact as to whether Sun performed a nonindicated procedure, whether she obtained the plaintiff's fully informed consent to the procedure, and whether the defendant Weill Cornell Medical is vicariously liable therefor.

II. FACTUAL BACKGROUND

The crux of the plaintiff's claims is that Sun performed a nonindicated procedure on his right eye, failed properly to account for his existing ophthalmic conditions, negligently performed that procedure in any event, negligently prescribed eye drops, failed properly to maintain his medical records, and failed to obtain his fully informed consent to the procedure by failing to inform him of the risks and benefits of cataract removal surgery and the alternatives thereto.

On October 24, 2016, the plaintiff, who is a dentist, first presented to Sun, an Assistant Professor of Ophthalmology at Cornell University, for an eye examination. As of that date, the plaintiff's uncorrected vision at the right eye was 20/40+1, and his best corrected vision was 20/25. Sun obtained the plaintiff's medical history and that of his family, noting that he was negative for glaucoma and age-related macular degeneration (ARMD), but she diagnosed him with pseudoexfoliation at the right lens, based upon her observation of white pigment around that lens. She also diagnosed the plaintiff with "glaucoma suspect," based on her conclusion that patients with pseudoexfoliation are at risk for glaucoma. Sun further diagnosed the plaintiff with a cataract in his right eye, which she asserted warranted monitoring at that juncture, but no surgical intervention, and a one-year follow-up examination unless the plaintiff developed new or worsening symptoms. The parties dispute whether Sun also diagnosed a cataract in the plaintiff's left eye, with Sun asserting that she did, and the plaintiff asserting that she did not.

On November 6, 2017, the plaintiff returned to Sun's office for an annual eye examination, at which the plaintiff complained of occasional burning, itching, and redness that nonetheless were not present at the visit itself. According to the defendants, the plaintiff reported that his vision was good with glasses. Sun performed vision tests, and measured the plaintiff's uncorrected visual acuity at the right eye as 20/50, noting that, with glasses, his vision improved to 20/20-1. Sun again diagnosed the plaintiff with pseudoexfoliation at the right lens, glaucoma suspect, cataracts of mild visual significance, and dry eye, and recommended that the plaintiff return to see her in one year.

On November 5, 2018, the plaintiff returned to Sun's office for another eye examination, after which Sun concluded that the vision in the plaintiff's right eye had significantly worsened compared to prior examinations, as his uncorrected visual acuity at the right eye was 20/80-1, with "effort," while his best corrected vision, with glasses, was only 20/40-2. She thus concluded that the plaintiff had a visually significant cataract at the right eye that was uncorrectable with refraction, and documented that the cataract could continue to be monitored. Upon noting that "the patient has noted significant difficulty with daily activities," however, she discussed cataract removal surgery with the plaintiff. The plaintiff, however, asserted that he did not make any complaints about his vision, and that the discussion about cataract surgery was limited to Sun's suggestion that, if he wanted to have adequate vision *without glasses*, "that was the only way forward."

Sun testified that she discussed the benefits of cataract surgery with the plaintiff at the 2018 visit. Specifically, she asserted that she had recommended that the plaintiff consider cataract surgery because his vision in the right eye could not be improved with glasses and that his vision was impaired because of his cataract, the plaintiff denied that she discussed all of the risks, benefits, and alternatives at that time. Moreover, although Sun's medical records stated that she discussed the risks and benefits of, and alternatives to, cataract surgery with the plaintiff on that day, including general risks, such as infection, bleeding, retinal detachment, blindness, and need for reoperation, the plaintiff contended that these risks were not discussed. The parties also presented differing accounts as to whether Sun specifically spoke to the plaintiff about the additional surgical risk posed by his pseudoexfoliation diagnosis. According to the plaintiff, "as far as the risks," Sun said only that "it's routine." The plaintiff also contended that, to the extent that pseudoexfoliation was discussed as a potential issue, Sun asserted only that, "for one of my residents that might be an issue, but in my hands it will be just fine." In addition, the plaintiff challenged the defendants' characterization of the relevant medical chart, asserting that there was "no mention in the medical record of any discussion informing [him] of

his increased risk of complication during cataract surgery in patients with the condition of pseudoexfoliation."

On February 11, 2019, the plaintiff returned to Sun's office for a pre-operative evaluation for cataract surgery, at which time he reported that he felt itchiness and irritation at his eyes. According to Sun, she documented that the plaintiff reported that his vision was blurry, but stable, although the plaintiff disputed that, asserting that he made no complaints concerning the sharpness of his vision. After completing a visual examination, including a gonioscopy exam to assess the plaintiff's future risk for glaucoma, Sun formed the impression that the plaintiff had a visually significant right cataract that could not be corrected or improved with refraction. There is a sharp dispute between the parties as to whether Sun, at the February 11, 2019 examination, discussed the relevant risks, benefits, and alternatives with the plaintiff. According to the defendants, Sun informed the plaintiff that he did not have good dilation and presented with pseudoexfoliation, conditions that could complicate cataract surgery, while the plaintiff contested this contention.

Nonetheless, the plaintiff signed an informed consent form on February 11, 2019, stating that he consented to undergo cataract extraction, intraocular lens implant, and possible vitrectomy of the right eye, and purportedly acknowledging that Sun had informed him of the nature and purpose of the surgery and the potential benefits, risks and side effects. He expressly contended that, notwithstanding the representations made in the form, Sun did not explain any of the risks, benefits, and alternatives to treatment. Although the plaintiff testified at his deposition that he had a limited discussion with Sun about the risk of pseudoexfoliation on the day before he signed the form, he also testified that he did not review the consent form closely when he signed it because it was "just boilerplate." In fact, this form set forth not his own birth date, but the date of birth date of his wife, also a patient of Sun's, as well as his wife's medical record number.

On March 25, 2019, an internist examined the plaintiff for the purpose of clearing him for the cataract surgery, which ultimately was scheduled as an elective procedure. The plaintiff thereafter called Sun's office with questions about his presurgical eyedrops, and spoke with Sun's assistant, Belinda Durano. According to the defendants, Durano documented that the presurgical medications were "straightened out" and that she had explained to the plaintiff "that the difference between the preoperative instruction sheet (specifically the color of the eye drops) does not always match what insurance will cover, which was the reason the doctor changed the medication to one his insurance would cover, resulting in different colored tops than those described on the instruction sheet."

On April 17, 2019, the plaintiff presented to New York Presbyterian Hospital (NYPH)-David H. Koch Ambulatory Surgery Center for cataract surgery. An anesthesiologist administered monitored anesthesia care, rather than general anesthesia. The plaintiff was under anesthesia for 3 hours and 21 minutes, while the surgery was performed within 2 hours and 53 minutes by Sun, who was assisted by NYPH ophthalmologists Charles Cole, M.D., and Monica Ertel, M.D. According to the operative report, Sun administered topical tetracaine, an anesthetic prior to surgery, as well as lidocaine gel. According to the plaintiff, however, the initial administration of anesthesia wore off approximately 15 to 20 minutes into the procedure, at which time repeated direct injections were administered into his eye, which he described as "beyond painful."

The operative report further asserted that, during the surgery, there was adequate dilation of the pupil, known as mydriasis. It also reported that, during the initial dissection to access the cataract, Sun observed zonular dehiscence, or separation of the wound edge, of 4 "clock hours," superiorly, and Sun testified at her deposition that this potential complication was "not unexpected." The report stated that she used capsular hooks to stabilize the capsular bag and complete the cataract removal, and "successfully" removed the dense core during the surgery. As explained in the operative report, due to the zonular dehiscence, fluid vitreous

material leaked from the posterior chamber of the eye to the anterior chamber, upon which Sun performed an anterior vitrectomy to remove some of this vitreous material. According to the defendants, Sun determined that, at that stage of the surgery, the plaintiff's capsular bag could not support the placement of an artificial intraocular lens in the bag, upon which she consulted with retinal surgeon Athanasios Papakostas, M.D., and requested that he perform a pars plana vitrectomy to remove residual vitreous material from the anterior chamber and remove the capsular bag.

In his own operative report, Dr. Papakostas wrote that he "successfully" performed a pars plana vitrectomy, and that he informed the plaintiff that he would not place an artificial intraocular lens that day during the surgery. Dr. Papakostas further reported that that he also told the plaintiff, on the day that he performed that surgery, that his capsular bag had been removed, a contention that the plaintiff categorially disputed. According to Sun, she advised the plaintiff postoperatively that the cataract procedure was "complex" due to his pseudoexfoliation, and that the surgical team was able to remove the lens, but did not place a new lens in his eye because it was in his best interest to place the lens on a later date. The plaintiff expressly disputed the contention that Sun informed him at that time that his lens had been removed.

Subsequent to the surgery, the plaintiff saw Sun at her office on April 18, 2019, and, according to the defendants, also on April 24, 2019 for surgical follow-up. After the April 24, 2019 appointment, Sun wrote a note describing that she had a "long discussion" with the plaintiff about having the surgery performed in stages, his risk for pseudoexfoliation at the left eye, and surgical plans to implant a new, artificial lens, including employment the "Yamane procedure," as opposed the implanting a sutured lens. According to Sun, the plaintiff planned to discuss these options further with Dr. Papakostas. The plaintiff, however, asserted that he had only one post-surgical follow-up visit with Sun on April 18, 2019, and did not see her on April 24, 2019. In any event, the plaintiff did not return to Sun's office for further treatment after April 24, 2019, instead communicating with her by telephone on May 9, 2019. Sun further made a note that,

during this call, she reviewed the treatment with the plaintiff, informed him that he had the potential for a very good visual outcome with secondary intraocular lens placement, and recommended that he consider obtaining the input from an anterior segment surgeon, inasmuch as secondary intraocular lens cases can be approached with a combined retinal and anterior segment surgeon to optimize outcome. The plaintiff described this telephone communication as involving Sun's attempt to "cajole" him into agreeing that she could perform any subsequent surgery.

On May 22, 2019, Dr. Papakostas performed an intraocular lens placement surgery in the plaintiff's right eye, specifically, a sutureless scleral fixation of the lens.

III. THE PLAINTIFF'S CONTENTIONS

In his complaint, the plaintiff alleged that, in April 2019, Sun recommended that he have cataract surgery to treat pseudoexfoliation in his right eye, despite the fact that it was "common knowledge that cataract surgery is contraindicated for patients" with that condition, and that cataract surgery is known as the treatment "of last resort" for such patients. He asserted that Sun nonetheless performed a cataract extraction with anterior vitrectomy upon him on or about April 17, 2019.

The plaintiff further alleged in his complaint that, in the course of attempting to obtain informed consent from him, Sun failed to disclose that cataract surgery was contraindicated for patients with pseudoexfoliation, and that, as a consequence, Sun foreseeably encountered severe complications, rupturing his capsular bag in the process and breaking apart the lens as she attempted to remove it, leaving fragments of the lens that were impossible to remove from the eye. The complaint asserted that Sun was unable to fix the rupture, and had to call in Dr. Papakostas to help mitigate the damage that she inflicted, but, despite the best efforts of Dr. Papakostas's, he was unable to repair the ruptured capsular bag and unable to remove the remaining lens fragments from the plaintiff's right eye. The plaintiff contended that, due to this complication, the surgery, which was supposed to last 20 minutes, lasted for several hours, and

that he was discharged from the surgical facility without a replacement lens in his right eye, leaving him essentially blind in his right eye following the procedure. He averred that this condition was not addressed for approximately one month, when Dr. Papakostas placed a replacement lens in the plaintiff's right eye. The plaintiff alleged in his complaint that, despite the implantation of the replacement lens, the eyesight in his right eye has never fully returned, that he suffered a permanent loss of depth perception in the right eye, and that his ability to discern color hues has been severely compromised. He thus complained that, as a consequence of Sun's malpractice, he was required to undergo multiple surgeries, and has significantly worse vision than before the surgery took place.

Moreover, the plaintiff alleged that the defendant Weill Cornell Medicine was vicariously liable for Sun's negligence, and that both of the defendants were negligent and careless in the provision of medical service, in ordering nonindicated or contraindicated eye surgery, in failing to order other necessary diagnostic tests, in failing to consider the consequences of a cataract surgery on a patient diagnosed with pseudoexfoliation, in failing to appreciate the significance of his complaints, in failing closely to monitor and/or follow his condition, in failing to refer him to an appropriate specialist, and in failing properly and timely to obtain consultations from such experts. He further asserted that they were negligent in failing to have an adequate, competent, or sufficient nursing staff and other personnel to meet his particular needs under the foreseeable circumstances, and failed to provide proper supervision and training to their staff and subordinates.

In his bills of particulars, the plaintiff reiterated many of the allegations set forth in his complaint, and also asserted that the defendants departed from good and accepted medical standards in negligently performing a cataract removal procedure on his right eye, in negligently destroying his capsular bag in his right eye during this procedure, and in performing an operation that was contraindicated, inasmuch as it was contraindicated for a patient such as the plaintiff, with a history of pseudoexfoliation syndrome.

The plaintiff also asserted that the defendants departed from good and accepted practice in negligently commingling his medical records with those of his wife, in negligently relying upon his wife's medical history that was contained in the commingled records, and thus in negligently relying upon an erroneous history of glaucoma. In addition, the plaintiff asserted that the defendants negligently failed to complete the operation, and failed to consult with other specialists prior to and during the operation, including a retinologist. He also alleged that the defendants negligently subjected him to an unduly long surgical procedure without sufficient anesthesia, negligently provided anesthesia that lasted for only 15 to 20 minutes, and negligently discharged him from the operating room with no lens in his right eye, thus subjecting him to a second operation to complete the first attempt at cataract removal.

With respect to the issue of lack of informed consent, the plaintiff averred that the defendants failed to inform him of the heightened risk of cataract surgery, based upon his history of pseudoexfoliation syndrome. In this regard, he asserted that, among other things, the defendants negligently identified the wrong patient and date of birth on the consent form, as well as the incorrect procedure, and identified the wrong procedure on the operating room request form, denominating it as a "routine cataract operation," when, in fact, it was a complex procedure in light of the pseudoexfoliation diagnoses. The plaintiff further faulted the defendants for negligently prescribing the wrong pre-operative eye drop medications and negligently providing him with preoperative instructions that differed from the instructions that were dispensed by the pharmacy.

In addition, the plaintiff alleged that the defendants were negligent in failing to prepare and maintain accurate medical records, in failing to document the actual procedures that were performed, in negligently writing the postoperative notes two hours prior to the completion of the operation, and in negligently and falsely asserting in the operative report that the surgery was successful and that a lens had been placed in the plaintiff's right eye.

As a consequence of these alleged departures and failure to obtain a fully informed consent, the plaintiff contended that he was caused to suffer intraoperative pain, the loss of eyesight in his right eye for one month until the second surgery was completed, severe diminution of the clarity, acuity, and depth and color perception in his right eye subsequent to the second surgery, and ongoing pain in his right eye.

IV. THE SUMMARY JUDGMENT MOTION

In support of their motion, the defendants submitted the pleadings, the bills of particulars, relevant medical and hospital records, the transcripts of the parties' deposition testimony, a statement of material facts, an attorney's affirmation, and the expert affidavit of ophthalmologist Brian Debroff, M.D.

Dr. Debroff opined that Sun met the standard of care in recommending cataract surgery, obtaining the plaintiff's informed consent to that procedure, and in performing the cataract surgery. He further concluded that the plaintiff's alleged injuries were not proximately caused by the defendants' treatment.

According to Dr. Debroff, pseudoexfoliation is a chronic and age-related condition that results in the deposit of abnormal fibrillary material on the anterior segment of the eye, and is most prevalent in patients over the age of 60. He averred that cataract surgery is "routinely performed" on patients with pseudoexfoliation, and is neither a surgery of "last resort" nor a contraindication to cataract surgery. As he explained it, if cataract surgery is not performed to remove a visually significant cataract in a patient with pseudoexfoliation, that patient eventually could become blind from the cataract. Hence, Dr. Debroff concluded that Sun met the standard of care in offering to perform cataract surgery despite the plaintiff's pseudoexfoliation. In fact, Dr. Debroff asserted that cataract surgery was "absolutely indicated" for the plaintiff as of November 5, 2018, when Sun made her recommendation, as testing had revealed that the plaintiff had a significant decline in vision between visits, with his vision at the right eye "much worse" than the prior year that could not be improved with corrective refraction. He opined that

there were "no other ophthalmologic explanations for Mr. Morse's uncorrected vision of 20/80-1 . . . except for his visually significant cataract."

As Dr. Debroff explained it,

> "[t]here is no bright line rule as to the specific visual acuity deficit that requires a surgeon to offer to perform cataract removal surgery. Some cataract surgeons may delay performing cataract surgery in patients until the patient's vision has declined to 20/50 because that is when some of the medical insurance companies will reimburse the cost of the surgery. However, the standard of care for when to recommend and perform cataract surgery is not dictated by billing reimbursement guidelines set by insurance companies."

Rather, he averred that cataract surgery should be offered to patients who have a visually significant cataract with decreased visual acuity on examination, and when the patient expresses a desire to correct and improve vision. Dr. Debroff further asserted that pseudoexfoliation is a progressive condition, and that, in patients with that condition, the ligaments that hold the lens in suspension in the eye, known as zonules, naturally weaken. He explained that zonules are important anatomical structures, as they suspend the capsular bag in the eye, and the natural lens sits within the capsular bag. Dr. Debroff asserted that a significant delay in cataract surgery for a patient with pseudoexfoliation is not medically recommended because of the progressive nature of the disease and that, accordingly, it was prudent and consistent with the standard of care for Sun to offer to perform cataract surgery on the plaintiff when she first diagnosed the cataract on November 5, 2018.

Dr. Debroff further concluded that, in performing the cataract surgery, Sun employed an appropriate surgical technique that was consistent with the standard of care. He asserted that Sun employed "standard technique" at the commencement of the surgery to access the capsular bag. Moreover, since, when she began the surgery, Sun observed four "clock hours" of zonular dehiscence, or weakening, representing approximately one third of the capsular bag. Dr. Debroff concluded that the weakening was caused by the plaintiff's pseudoexfoliation, and not caused by anything Sun did or failed to do, and that this condition made the surgery a more complex procedure. He further concluded that Sun properly and correctly employed capsular

hooks to stabilize the capsular bag. Dr. Debroff averred that Sun "successfully" removed the dense core of the cataract as the first step of the surgery.

According to Dr. Debroff, the plaintiff's "weak zonules provided a pathway for vitreous (fluid) from the back of the eye to migrate forward to the front of the eye. This occurred during plaintiff's surgery as a result of the zonular dehiscence, and not from a deviation from good and accepted surgical technique." He further asserted that Sun satisfied the applicable standard of care by performing an anterior vitrectomy, which involved the removal of vitreous material from the anterior of the eye by using an anterior vitrector handpiece connected to a phaco-emulsification machine. In connection with the vitrectomy, Dr. Debroff alleged that the standard of care required Sun to complete the surgery by closing the eye, and leaving the remaining vitreous and epinuclear material in place for removal at a later date. As he described it, allowing cataract and vitreous material to remain in the anterior chamber of the eye does not create or constitute an ocular emergency, and such material is frequently removed at a later date. According to Dr. Debroff, although it would have been appropriate for Sun to refer the plaintiff to a retina specialist for a pars plana vitrectomy, it would have been equally appropriate to schedule the vitrectomy for later date. He concluded that Sun exceeded the standard of care by consulting with a retina specialist intraoperatively, thus avoiding the need not only for a second surgical procedure to complete the pars plana vitrectomy, but a potential third procedure involving the placement of a new lens.

Dr. Debroff opined that the complications that occurred the plaintiff's cataract surgery are known risks of such surgery in patients with pseudoexfoliation, and that these complications could also occur in patients who do not have pseudoexfoliation. Specifically, he asserted that the plaintiff's pseudoexfoliation and associated zonular weakness put him at risk for those complications, and that "there is no evidence that surgical maneuvers or actions by Dr. Sun deviated from the standard of care." Rather, he concluded that the surgical technique and surgical decisions that Sun employed and elected not only were sound and medically indicated,

"but in the best interests of the patient's outcome," optimizing conditions for a successful lens placement and positioning. Dr. Debroff thus explicitly rejected the plaintiff's contention that Sun "negligently destroyed" the capsular bag, concluding that it was factually untrue because the operative record reported that the capsular bag was present in the plaintiff's eye when the retina specialist took over, although he nonetheless concluded that the ultimate decision to remove his capsular bag constituted the standard of care because the capsular bag no longer served a function, as it could not safely support a new lens if a lens had been placed inside it. Thus, Dr. Debroff explained that leaving the capsular bag in place would have subjected the plaintiff to an increased risk of scarring and infection. As Dr. Debroff characterized it, the plaintiff's

> "capsular bag was suspended without adequate support in the eye because of zonular dehiscence, the ligaments meant to hold the capsular bag in place had dehisced significantly before the surgery began as documented by Dr. Sun,"

thus resulting in weakness of the zonules and the inability to place an implant within the capsular bag.

With respect to the delay in the placement of a new intraocular lens, Dr. Debroff asserted that it was a sound and standard surgical decision to leave the plaintiff aphakic, that is, without a lens, until an appropriate date subsequent to the subject surgery. He averred that lenses should be placed under the best conditions for an optimal result, and that, if the lens had been placed during the subject surgery, while there was inflammation of the cornea and adjacent structures with suboptimal visualization of the eye, there would have been an increased risk for complications regarding lens placement and increased possibility of inaccurate placement of the lens. Thus, allowing the plaintiff to remain aphakic for a few weeks to allow the eye to heal before placing an intraocular lens was good surgical judgment and ultimately, was in the plaintiff's "best interest."

In connection with the equipment employed during the surgery, Dr. Debroff was of the opinion that the standard of care did not require Sun to use a femto second laser, as the femto second laser "has not been established through peer reviewed medical literature to improve

patient outcomes and it is not used in most cataract removal surgeries." Moreover, inasmuch as Sun is a board-certified ophthalmologist and an experienced anterior segment surgeon, she was, according to Dr. Debroff, not required by the standard of care to consult with other specialists prior to the cataract surgery. As he explained it, retina specialists generally treat disease in the *posterior* segment of the eye, and do not typically perform cataract surgery. He stated that, in any event, Sun's decision to consult with Dr. Papakostas intraoperatively was an exercise of good medical judgment that ultimately benefitted the plaintiff. Moreover, Dr. Debroff opined that Dr. Papakostas utilized a state-of-the-art surgical technique, known as the Yamane technique for placing the lens, which involved the creation of incisions in the sclera of the eye, and an artificial lens is thereupon supported by haptic placement through tunnels created in the sclera. As he explained it, there are no specific FDA-approved artificial lenses for suture-less scleral fixation, thus requiring all surgeons who use this technique to fit a commercially available lens into a patient's eye. As such, Dr. Debroff stated that this does require the conclusion that a lens needed to be, or actually was, "distorted" to fit the plaintiff's eye due to his anatomy, as claimed by the plaintiff.

Dr. Debroff opined that the consent that Sun obtained was qualitatively sufficient, inasmuch as he concluded that Sun explained the relevant potential risks of the surgery in general, such as bleeding, risk of blindness, and potential need for additional surgery, and had informed the plaintiff that he was at an increased risk for complications due to psetidoexfoliation and poor dilation. According to Dr. Debroff, Sun also met the standard of care in informing the plaintiff of the alternative options for lens placement if he opted to continue to treat with an anterior segment surgeon, but that the plaintiff elected to follow the recommendations of Dr. Papakostas instead. He also rejected the plaintiff's contention that Sun commingled the plaintiff's medical records with those of the plaintiff's wife, and that the plaintiff incorrectly presumed that documentation of his increased risk for glaucoma was erroneous charting when, in fact, all patients with pseudoexfoliation are at increased risk for glaucoma, and the standard

of care requires close monitoring with respect to the development of glaucoma. Dr. Debroff also rejected the plaintiff's contention that the provision of a consent form in his wife's name was departure from the appliable standard of care, characterizing it as "a harmless charting error that the patient himself failed to detect when he reviewed and signed the consent form," and which played no role in the outcome of the surgery. Similarly, Dr. Debroff opined that Sun satisfied the applicable standard of care with respect to completing the surgical booking form and scheduling the surgery as a routine cataract case. As he explained it, the surgical booking form "is used to reserve time in the operating room and it is used for billing codes," but does not have an impact upon the surgical plan itself. Nor did Dr. Debroff find evidence of a significant documentation error in Sun's medical records, concluding that the operative report was well documented and met the standard of care in describing the surgery.

In connection with the administration of anesthesia, Dr. Debroff asserted that it was within the applicable standard of care for an ophthalmologist to provide anesthetic drugs topically and intracamerally, while the anesthesiologist is responsible for administering medication for pain control intravenously. As he explained it, the decision as to whether to convert a cataract surgery from monitored anesthesia care to general anesthesia falls under the auspices of the attending anesthesiologist, not the ophthalmologist. Hence, he concluded that Sun did not depart from the standard of care by providing insufficient anesthesia "because that was not her role." Rather, according to Dr. Debroff, Sun appropriately deferred the management of the anesthesia to the anesthesiologist. Moreover, he noted that the relevant hospital records indicated that the plaintiff was examined prior to surgery by an anesthesiologist, and that, prior to the surgery, the anesthesiologist and the plaintiff discussed the latter's surgical history and the plan to administer monitored anesthesia care. Dr. Debroff asserted that cataract surgery is typically performed using monitored anesthesia care, and that it was not a standard of care to administer general anesthesia for cataract surgery because the risks of general anesthesia outweighed the benefits.

Ultimately, Dr. Debroff opined that the plaintiff had a "good visual outcome" after the intraocular lens was placed by Dr. Papakostas, with "good vision" of the right eye. Upon noting that the plaintiff has a significant cataract in his left eye, Dr. Debroff suggested that the plaintiff's vision currently is impaired because of that cataract, which can distort color perception and impair his ability to see. Dr. Debroff thus concluded that nothing that Sun did or did not do proximately caused any of the injuries claimed by the plaintiff.

In opposition to the motion, the plaintiff relied on the same documentation that the defendants submitted. He also submitted copies of discovery orders, an attorney's affirmation, a response to the defendants' statement of material facts, a memorandum of law, and the expert affirmation of board-certified ophthalmologist and cataract surgeon Neil Katz, M.D., who examined the plaintiff on January 21, 2021, and January 12, 2022.

Dr. Katz opined that cataract surgery was not indicated for the plaintiff, as the plaintiff was not experiencing "significant visual problems" at the time of the surgery, which Dr. Katz asserted was underscored by the fact that he was continuing to work as a dental surgeon. Dr. Katz further noted that, in the plaintiff's last visual acuity examination prior to the surgery, his best corrected vision was 20/40, which, by itself, was not an indication to undergo elective cataract surgery. As Dr. Katz phrased it, in the absence of significant complaints about his vision, which the plaintiff testified that he did not have, there was no reason to proceed with cataract surgery in April 2019. Hence, Dr. Katz concluded that the decision to proceed with cataract extraction surgery was a departure from good and accepted medical practice.

In addition, Dr. Katz found fault with the qualitative sufficiency of the consent that Sun obtained from the plaintiff. According to Dr. Katz, "there is no indication in the records that Dr. Sun ever explained to Dr. Morse the increased risks posed by cataract surgery" for patients who present with pseudoexfoliation syndrome, and he further asserted that these anticipated complications did, in fact, occur, including the destruction of the capsular bag and the need to call in a retinal surgeon. He further noted that the plaintiff was being treated with rapaflo, a

urinary retention medication that is administered to treat the effects of an enlarged prostate, which, according to Dr. Katz, leads to intraoperative floppy iris syndrome (IFIS) in patients with pseudoexfoliation syndrome and, thus, increased the risk of complication for cataract surgery. Based on the plaintiff's deposition testimony, Dr. Katz asserted that Sun did not explain this risk to plaintiff, the failure of which was a departure from proper attainment of informed consent. Dr. Katz asserted that It was incumbent upon Sun to explain to the plaintiff that pseudoexfoliation syndrome posed heightened risks of complications during the surgery and that, as set forth in the plaintiff's deposition testimony, instead of engaging in a detailed conversation with the plaintiff informing the plaintiff of the risks associated with this procedure, she delegated this task to her secretary, who presented the plaintiff with a generic consent form that did not contain any details about the increased risks posed of undergoing cataract surgery for a patient with pseudoexfoliation syndrome. Moreover, based on the plaintiff's deposition testimony that Sun made assurances to him that, while other doctors might consider this surgery challenging, in her hands everything would be fine, Dr. Katz concluded that the information that Sun provided in connection with increased risks of pseudoexfoliation syndrome was insufficient.

Dr. Katz further opined that Sun's decision to recommend and proceed with elective cataract extraction surgery, despite the lack of an indication for doing so, caused injury to the plaintiff. In this regard, Dr. Katz noted that the plaintiff had testified that, prior to the surgery, he was not experiencing significant visual problems and was continuing to perform his work as a dental surgeon without any restrictions or limitations, while, after the surgery, he presented to Dr. Katz with multiple and significant complaints regarding his vision in his right eye, including, but not limited to, glare, blurry vision, loss of depth perception, and halo effect, which he experienced on a daily basis. Dr. Katz concluded that these symptoms were most likely due to the position of the lens implant that was necessitated by the cataract extraction surgery, which Dr. Katz reported was slightly decentered from the visual axis in the plaintiff's eye. He further asserted that the edge of the implanted intraocular lens was close to the edge of the pupil and

that, although it was suggested to the plaintiff that he have a toric intraocular lens implanted to correct for astigmatism, such a lens could not be inserted because of certain unspecified "complications" that occurred at the time of the surgery. Thus, Dr. Katz opined that the plaintiff would not have been experiencing any of these problems had Sun not proceeded with a surgery that was not indicated and, more particularly, would still have had his natural lens in his right eye and no reason to undergo a second surgery with Dr. Papakostas. Dr. Katz further concluded that Sun's failure to advise the plaintiff of the increased risks of undergoing a cataract surgery, due to his pseudoexfoliation condition, was also a competent producing cause of the plaintiff's injuries. In this respect, Dr. Katz concluded that, based on the plaintiff's deposition testimony, had Sun properly advised the plaintiff of these increased risks, the plaintiff would not have undergone elective cataract surgery.

Dr. Katz did not render an opinion with respect to the quality of the surgical techniques that Sun employed and, although he asserted, contrary to Dr. Debroff, that a femto second laser could have been employed, he did not conclude that the failure to employ it constituted a departure from good practice. He gave no opinion with respect to the propriety of the preoperative administration of eye drops, nor did he opine that Sun was in any way responsible for the quality of Dr. Papakostas's surgery, other than to state that the surgery should not have been necessary in the first instance. In addition, Dr. Katz did not provide the court with an opinion as to whether it was a departure from the standard of care to permit the plaintiff to be discharged from the hospital in the absence of a lens or to compel him to wait several weeks after the cataract extraction surgery before the implantation of an artificial intraocular lens.

In reply, the defendants submitted an attorney's affirmation, in which counsel noted Dr. Katz's silence with respect to many of the departures that the plaintiff initially had identified, and argued that his affirmation was otherwise conclusory and insufficient to raise a triable issue of fact as to any disputed issue in the 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 (*see 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 (*see 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]).

Moreover, where a party's submission itself reveals the existence of a triable issue of fact, that party has failed to establish its prima facie entitlement to judgment as a matter of law (*see Reading v Fabiano,* 137 AD3d 1686, 1687 [4th Dept 2016]; *Kimber Mfg., Inc. v Hanzus*, 56 AD3d 615, 617 [2d Dept 2008]).

A. MEDICAL MALPRACTICE BASED ON ALLEGED DEPARTURES FROM GOOD PRACTICE

"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]).

To make a prima facie showing of entitlement to judgment as a matter of law, a defendant physician moving for summary judgment must establish 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 establish 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]). Moreover, as noted, 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]).

Once satisfied by the defendant, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting an expert's affidavit or affirmation attesting to a departure from accepted medical practice and/or opining that the defendant's acts or omissions were a competent producing cause of the plaintiff's injuries (*see Roques v Noble*, 73 AD3d at 207; *Landry v Jakubowitz*, 68 AD3d 728 [2d Dept 2009]; *Luu v Paskowski*, 57 AD3d 856 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.,* 68 NY2d at 325; *see Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). 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 preclude an award of summary judgment in a defendant's favor (*see Murphy v Conner*, 84 NY2d 969, 972 [1994]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24).

The defendants made a prima facie showing, through both Sun's testimony and Dr. Debroff's affidavit, that cataract extraction surgery was indicated, despite the plaintiff's condition of pseudoexfoliation syndrome and associated zonular weakness, and that Sun did not depart from good and accepted medical practice in recommending and performing the cataract extraction surgery. In addition, the defendants established, prima facie, that Sun did not depart

from good practice with respect to the quality of the surgical techniques that she employed, in declining to employ a femto second laser, or in prescribing certain eyedrops to the plaintiff. The defendants also made a prima facie showing that the discharge of the plaintiff from the hospital after the surgery, but prior to the intraocular lens implantation, did not constitute a departure from good practice, that she timely called for a consultation with a retina specialist, and that she was not responsible for the quality of Dr. Papakostas's implantation surgery in any event. Moreover, Sun established that she had no responsibility for the administration of anesthesia.

In opposition to that showing, the plaintiff failed to raise a triable issue of fact as to any alleged departure from good practice other than the determination to perform the surgery in the first instance, since the plaintiff's expert did not expressly address any other alleged departures. Rather, Dr. Katz explicitly opined only that elective cataract extraction surgery was not indicated for someone with the plaintiff's presenting conditions and was, due to increased risk of complications, not indicated for a patient who presented pseudoexfoliation and associated zonular weakness. Dr. Katz also suggested that those complications actually occurred in the plaintiff's case, thus causing intraoperative anatomical problems which, in turn, prolonged the subject surgery and necessitated additional surgeries, and led to an adverse visual outcome in the plaintiff's right eye, all of which was proximately caused by the mere determination to perform the surgery. Hence, that branch of the defendants' motion seeking summary judgment dismissing the medical malpractice claim against Sun is granted, except to the extent that it is denied with respect to so much of that claim as seeks to recover for the performance of allegedly nonindicated or contraindicated surgery.

B. LACK OF INFORMED CONSENT

The elements of a cause of action for lack of informed consent are:

> "(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the

> treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury"

(*Spano v Bertocci*, 299 AD2d 335, 337-338 [2d Dept 2002]; *see Zapata v Buitriago*, 107 AD3d 977, 979 [2d Dept 2013]; *Balzola v Giese*, 107 AD3d 587, 588 [1st Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst*., 211 AD2d 347, 350 [1st Dept 1995]). For a statutory claim of lack of informed consent to be actionable, a defendant must have engaged in a "non-emergency treatment, procedure or surgery" or "a diagnostic procedure which involved invasion or disruption of the integrity of the body" (Public Health Law § 2805-d[2]). "'[T]his showing of qualitative insufficiency of the consent [is] required to be supported by expert medical testimony'" (*King v Jordan*, 265 AD2d at 260, quoting *Hylick v Halweil*, 112 AD2d 400, 401 [2d Dept 1985]; *see* CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [1st Dept 2006]).

"'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'" (*Huichun Feng v Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]; *see Godel v Goldstein*, 155 AD3d 939, 942 [2d Dept 2017]). Nonetheless, a defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a claim where a patient signs a detailed consent form, and there is also evidence that the necessity and benefits of the procedure, along with known risks and dangers, were discussed prior to the procedure (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

The defendants made a prima facie showing of Sun's entitlement to judgment as a matter of law in connection with the lack of informed consent claim with their submissions, in which they made a showing that Sun fully discussed the relevant risks, benefits, and alternatives, in addition to securing the plaintiff's signature on a consent form. The plaintiff, however, through his own submissions, including a transcript of his deposition testimony and his expert's affirmation, raised a triable issue of fact as to whether the consent that the defendants

obtained from him was fully informed and qualitatively sufficient (*see Miller v Mount Sinai Hosp.,* 197 AD3d 1069, 1069 [1st Dept 2021]; *Many v Lossef*, 190 AD3d 721, 724 [2d Dept 2021]; *Gray v Williams,* 108 AD3d 1085, 1085 [4th Dept 2013]; *see also Beckwith v Bowen*, 158 AD3d 1153, 1155 [4th Dept 2018]; *Sarwan v Portnoy*, 51 AD3d 655, 656 [2d Dept 2008]). Specifically, he raised a triable issue of fact as to whether Sun did, in fact, clearly and meaningfully discuss with him the risks and benefits of, or the alternatives to, the right-eye cataract extraction surgery in light of his moderate visual impairment and his pseudoexfoliation, and whether, under the circumstances presented here, his mere execution of what he characterized as a "boilerplate" consent form, which admittedly included several incorrect entries, constituted a fully informed consent (*see Friedberg v Rodeo*, 193 AD3d 825, 827 [2d Dept 2021] ["The deposition testimony of the parties and the generic consent forms signed by the plaintiff revealed a factual dispute as to whether (the defendant) failed to disclose reasonably foreseeable risks associated with the treatment that a reasonable medical practitioner would have disclosed in the same circumstances."]). The plaintiff's own testimony raised a triable issue of fact as to whether a reasonable patient would have elected to proceed with the surgery had he been fully informed of the risks, benefits, and alternatives (*see Hugh v Ofodile,* 87 AD3d 508, 509 [1st Dept 2011] ["This Court has held that expert testimony concerning what a reasonable person would have done is not necessary to prosecute a lack of informed consent claim."]; *Andersen v Delaney*, 269 AD2d 193, 193 [1st Dept 2000] [expert testimony is not necessary on the issue whether a reasonably prudent person, fully informed, would not have consented to the treatment]; *Hardt v LaTrenta*, 251 AD2d 174, 174 [1st Dept 1998] [same]; *Osorio v Brauner*, 242 AD2d 511, 512 [1st Dept 1997] [same]; *cf. Orphan v Pilnik*, 66 AD3d 543, 547 [1st Dept 2009] [suggesting otherwise in dicta]). The plaintiff also raised a triable issue of fact as to whether the failure of Sun to provide a full explanation of the of benefits of the surgery, the risks thereof, and the alternatives thereto proximately caused him to undergo unnecessary surgery that left him in a worse position than if he had never undergone the procedure.

C. NEGLIGENT TRAINING AND SUPERVISION

The defendants demonstrated that they neither "knew, [n]or should have known," of their employees' "propensity for the sort of conduct which caused the injury" (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]; *see Kuhfeldt v. New York Presbyt./Weill Cornell Med. Ctr.*, 205 AD3d 480, 481-482 [1st Dept 2022]). Inasmuch as the plaintiff did not address this issue in his opposition papers, he failed to raise a triable issue of fact in opposition to the defendants' prima facie showing in this regard. Hence, that branch of the defendants' motion seeking summary judgment dismissing the negligent training and supervision claim must be granted.

D. VICARIOUS LIABILITY

"'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, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself'" (*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]). Since Sun was employed by Weill Cornell Medicine, and the court has concluded that there are triable issues of fact both as to whether Sun committed malpractice and whether she failed to obtain the plaintiff's fully informed consent, thus causing or contributing to the plaintiff's injuries, that branch of the motion seeking summary judgment dismissing the complaint against Weill Cornell Medical also must be denied to the extent that its liability is premised upon Sun's malpractice or failure to obtain the plaintiff's fully informed consent.

VI. CONCLUSION

In light of the foregoing, it is,

ORDERED that the defendants' motion for summary judgment is granted to the extent that they are awarded summary judgment (a) dismissing the negligent hiring and supervision

claim and (b) dismissing so much of the medical malpractice claim as alleged departures from good and accepted medical practice other than the claim that they performed cataract surgery that was not indicated or contraindicated, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for an initial pretrial settlement conference before the court, in Room 204 of 71 Thomas Street, New York, New York 10013, on April 9, 2024, at 10:00 a.m., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

2/29/2024
DATE

JOHN J. KELLEY, J.S.C.

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