Santoeimma v Kyrou
2024 NY Slip Op 35103(U)
December 13, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2022-50858
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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ANTONINO SANTOEIMMA,

Plaintiff,

-against-

CHRISTOS KYROU, DPM, NORTHERN MEDICAL GROUP and DUTCHESS AMBULATORY SURGICAL CENTER, LLC,

Defendants.

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DECISION & ORDER

Index No.: 2022-50858
Sequence Nos.: 1&2

ACKER, J.S.C.

By motion sequence number 1, Defendant Dutchess Ambulatory Surgical Center, LLC, ("Dutchess Ambulatory") moves for summary judgment seeking dismissal of Plaintiff's complaint. Defendants Christos Kyrou, DPM and Northern Medical Group ("Northern Med")[1] also move for an order, pursuant to CPLR 3212, for summary judgment on motion sequence number 2.

The Court read and considered NYSCEF documents numbered 24-38, 40-56 and 58-64.

The instant podiatric malpractice action was commenced on March 23, 2022, by the filing of a summons and complaint. The complaint also contains a cause of action for lack of informed consent. Plaintiff alleges Defendant Dr. Kyrou departed from the standard of care when he performed surgery to correct a bunion and four hammertoes on the Plaintiff's right foot. Plaintiff further contends that Dr. Kyrou failed to inform him that the

[1] The claims against Northern Med are vicarious and arise from alleged actions or omissions by Dr. Kyrou. These Defendants are sometimes referred to collectively as "Kyrou Defendants".

surgery involved cutting ligaments and tendons of the toes and did not tell him that he might have pain, difficulty walking and recurrent deformity of the third toe after surgery. The surgery was performed at Dutchess Ambulatory.

Facts[2]

Prior to his first visit with Dr. Kyrou, Plaintiff Antonio Santoiemma ("Santoiemma" or "patient") was under the care of Dr. Reade. The patient first presented to Dr. Reade on January 4, 2016, who documented the following: "the patient had left sided foot pain for greater than a year which had been treated with multiple cortisone injections, with temporary relief. He had a more recent onset of right foot pain for a few weeks, localized to the dorsal aspect of the right forefoot and aggravated with weightbearing and alleviated with rest. On exam, there was pain on palpation of the central second and third metatarsal shafts. X-rays of the right foot and left foot showed diffuse osteoarthritis. An MRI was recommended for the left foot if the pain persisted, and he was prescribed Naproxen (an anti-inflammatory)."

The patient returned to Dr. Reade on January 25, 2016. Dr. Reade documented the patient had some mild improvement, but continued to have pain in the foot, localized to the second and third metatarsal phalangeal ("MTP") joints aggravated with weightbearing and alleviated with rest. He also had pain in the left foot. Dr. Reade noted hallux valgus (i.e. a bunion of the great toe) on the right with contracted MTP joint of the second toe. There was pain on palpation of the plantar aspect of the second MTP joint. Dr. Reade observed that at the last visit the pain seemed a little bit more diffuse along the central metatarsal area; however, at this point his pain on palpation on exam seemed to be localized to the second MTP joint. Dr. Reade's impression was osteoarthritis and pain of both feet. Dr. Reade noted the patient was wearing old worn-out shoes, so he recommended better-fitting shoes. He also noted that the patient needed to discontinue Naproxen, because he was scheduled for total left knee replacement in two weeks. Dr. Reade administered a cortisone injection to the second MTP joint of the right foot.

The patient returned to Dr. Reade on July 24, 2017, with a chief complaint of 6-7/10 aching and throbbing pain in the bottom and top of his right second toe. The top of the toe was aggravated by wearing shoes, and the bottom by weight bearing. He had other complaints referable to his knee joint replacement, incision and drainage of a possible

2 Plaintiff did not submit a counterstatement of material facts. As a result, these facts are based on the Court's review of the defense statements of facts and the referenced records.

hematoma or seroma, and shingles. Dr. Reade documented hallux valgus of the right side, with pain on the plantar (sole) aspect of the right second MTP joint, and semirigid flexion contracture of the right second toe. X-rays revealed increase in the intermetatarsal angle between the first and second metatarsals, as well as lateral deviation of the hallux (toward the lesser toes) and contractures of the second toe at the MTP joint and proximal interphalangeal ("PIP") joint. Dr. Reade administered a cortisone injection for capsulitis of the second MTP joint.

The Plaintiff last saw Dr. Reade on March 6, 2018. Dr. Reade noted, "Patient has had some right foot pain now for approximately [one] month. Patient states over the past couple weeks the intensity is increased to the point where he cannot wear a shoe and is painful with any type of … pressure or weightbearing. Patient describes intensity of the pain as a 9 out of 10. Sharp in nature. Aggravated with applied pressure and weightbearing and only alleviated when he is not wearing shoe gear and when he is at rest." On exam, Dr. Reade noted a large hallux valgus deformity with contracted second and third toes of the right foot. The hallux valgus deformity was track bound. X-rays taken on this visit confirmed hallux valgus deformity with degenerative joint changes, as well as hammertoe contractures of the lesser toes with degenerative changes. Dr. Reade removed a painful lesion from the right second toe. Surgery was discussed, but the patient did not return to Dr. Reade.

On September 6, 2019, Plaintiff presented to Dr. Kyrou, with a bunion of the right foot, hammertoes on digits 2-5, and complaining of a great deal of pain on the right fifth digit causing him to have trouble walking. The Plaintiff described his pain as moderate, aching, burning, cramping, and shooting. Plaintiff reported that the pain started years before. The pain was aggravated by ambulation, direct pressure, wearing shoes and walking. Plaintiff stated his pain was relieved by going barefoot. Plaintiff had undergone surgery in the past, specifically bilateral hip replacement, removal of a cyst from his face, left knee replacement and back surgery.

Dr. Kyrou examined the patient and found 2/4 dorsalis pedis pulse and posterior tibial pulse, bilaterally. Dr. Kyrou noted a bunion with redness at the medial aspect on the first met head of the great toe on the right foot. He noted callus formation over the proximal interphalangeal joints of toes 2-5 on the right, with the second digit overlapping the hallux. X-rays were taken and confirmed four hammertoes, hallux valgus formation, and second digit overlapping the hallux. X-rays also revealed abductovarus rotation of the fifth toe with prominent lateral aspect of the fifth digit.

According to Dr. Kyrou, he discussed hammertoe deformity with the patient including etiology, pathology, and treatment options, with the patient. Dr. Kyrou discussed options of appropriate shoes with a high toe box, padding, and paring of associated lesions. He reviewed surgical intervention with its benefits, potential complications and expected post-operative course and restrictions with the patient. Dr. Kyrou discussed in detail surgical intervention in correction of the patient's symptoms and deformitiesHe told the patient that he could have surgery on his five toes. Dr. Kyrou alleges he reviewed the possibility of application of internal surgical hardware, complications, and postoperative restrictions with the Plaintiff.

The Plaintiff testified that Dr. Kyrou told him that he would have to extend the toe and cut the bone on the side. Plaintiff testified that he asked Dr. Kyrou what he intended to do. He admitted that he did not remember what Dr. Kyrou told him. Plaintiff then admitted that Dr. Kyrou said he would open all the toes. Plaintiff first testified that he was told that there was a risk of infection. The patient was medically cleared for surgery on September 24, 2019.

A visit was held for surgical consent where pre and post operative instructions were given to the patient. Plaintiff signed a Consent to Operation and Local Anesthesia ("Consent") dated September 26, 2019. The Consent stated that the proposed operation was a minimally invasive right foot Akin of the Hallux First Metatarsal Osteotomy and second, third, fourth and fifth hammertoe corrections, with soft tissue mass removal of the right third digit. Plaintiff initialed the description of the procedure on the Consent.

The Consent states that the "nature and purpose of the operation, possible alternate methods of diagnosis or treatment, the risk involved, and the possibility of complications have been explained" to Plaintiff by Dr. Christos Kyrou. The Consent stated that Plaintiff "acknowledged that medicine and surgery are not an exact science and that no guarantee or assurance has been made as to the results of the operation or procedure."

Plaintiff testified that he cannot read English, but that he brought a relative with him when he was presented with paperwork, and that he did not tell anyone at the practice that he could not read English. Plaintiff signed a consent regarding anesthesia.

On October 2, 2019, Plaintiff presented to Dutchess Ambulatory for surgery. Dr. Kyrou performed a First Metatarsal Osteotomy, Reverdin-Isham osteotomy, and a lateral

release of the right foot bunion. The patient was discharged with detailed post-operative instructions, including the instruction to keep the area elevated for 24 hours and to call with any signs of infection, circulation impairment, excessive bleeding, or any questions or concerns. He was dispensed a Percocet to take at home. The Plaintiff signed the discharge instructions.

Plaintiff appeared for a post-operative visit on October 10, 2019. Dr. Kyrou undressed the foot and examined it, and performed x-rays. The patient reported he had been taking Tylenol for pain, and had two days left on his post-operative antibiotics. Dr. Kyrou inspected the right foot, and noted there was some maceration on the third digit medial side, and between the hallux and second toe. Dr. Kyrou also noted that there was still good correction of the bunion of the hallux, which was in a rectus position, with some swelling, but without erythema or signs of infection or dehiscence. His inspection revealed that toes 2-5 were in good correction, without abnormalities seen. Dr. Kyrou reviewed the x-rays, which showed good correction of the hallux and hammertoes, with all osteotomies doing well.

The patient returned for a second post-operative visit on October 17, 2019. Dr. Kyrou took x-rays at the second postoperative visit. Dr. Kyrou inspected the right foot, and found good correction of the hallux and toes 2-5. He reviewed the x-rays and found the correction of the hallux and toes 2-5 was in good position.

The patient appeared for a third post-operative visit on October 24, 2019. Dr. Kyrou took x-rays at the third postoperative visit. Dr. Kyrou reviewed the x-rays and found the hallux and toes 2-5 were in good correction.

The patient returned for a fourth post-operative appointment on November 1, 2019. The patient presented in a post-operative shoe and he continued to wear toe spacers. He had some maceration on the third digit, medial side, and in between the hallux and second toe. He had been having little pain, rating 4/10 and had minor swelling and bruising. X-rays were taken and demonstrated good correction of all toes. On inspection, the toes all appeared in good position.

The patient returned for a fifth post-operative appointment on November 8, 2019. The patient presented in a post-operative shoe. He continued to tape the toes and wear toe spacers. He had been having little pain, mostly in the fifth toe, and had minor swelling

and bruising. X-rays were taken and demonstrated good correction of all toes. On inspection, the toes all appeared in good position.

The patient returned for a sixth post-operative appointment on November 22, 2019. The patient presented in a regular shoe. He continued to tape the toes and wear toe spacers. He had been having a little pain, level 3/10, and had minor swelling and bruising. X-rays were taken and demonstrated good correction of all toes. On inspection, the toes all appeared in good position.

The patient returned for a seventh post-operative appointment on January 24, 2020. The patient presented in regular shoes. He continued to tape the toes and wear toe spacers. He had been minor pain but was feeling "very well". X-rays were taken and demonstrated good correction of all toes. On inspection, the toes all appeared in good position. Dr. Kyrou released restrictions on the patient's activities.

The patient next presented to Patrick J. Grippo, D.P.M., on September 11, 2021, complaining of pain in the fourth toe on the right foot. He reported the surgery by Dr. Kyrou 2-3 years prior, in which he had hammertoes and bunion on the right foot corrected. The patient underwent an x-ray of the right foot, interpreted by Dr. Grippo as showing a normal right foot x-ray status post McBride bunionectomy, with good healing seen. Dr. Grippo's assessment was pain, hammertoe and osteoarthritis of the right foot and the plan was for pain injection.

On October 1, 2021, Plaintiff saw Dr. Kyrou at his new practice, Community Primary Care. and complained of pain to the right fourth toe. Dr. Kyrou examined the feet, noting that pulses were 2/4 bilaterally and warm. The patient had tenderness on palpation and range of motion on the fourth digit, around the area of the proximal phalanx. Good correction was seen to toes 2-5. Some crepitus was seen, along with decreased range of motion, secondary to arthritis.

On October 15, 2021, the patient returned to Community Primary Care to see Dr. Kyrou, who explained he did not yet have his x-ray machine in the new location. Dr. Kyrou recommended that Plaintiff go for a follow up x-ray, but the patient preferred to wait until the x-ray machine was delivered to the new location. Dr. Kyrou noted the right fourth toe was tender to palpation and range of motion at the proximal phalanx. Dr. Kyrou noted there was good correction of the hammertoes, but some crepitus secondary to arthritis. Dr.

Kyrou explained that the pain was most likely secondary to arthritis or scar tissue and prescribed Medrol dosepak with follow up in one week.

On December 21, 2021, the patient returned in follow up from an x-ray of the right fourth digit. The patient complained of painful, long thick nails with difficulty wearing shoes or even socks and requested nail debridement. Dr. Kyrou confirmed the patient had thick, dystrophic, mycotic nails with fungal debris and inflamed nailbed, with tenderness on palpation on onychocryptosis and onycholysis of toes on both feet. Dr. Kyrou reviewed the x-rays brought with the patient and noted arthritic changes to the mid-foot, and normal forefoot with healed osteotomies and no deformities. Dr. Kyrou debrided the nails of both feet and recommended shoe inserts to help with his arthritis and the ball of his foot. He further recommended oral antifungals and topical medications to treat the toenail fungal infections. Dr. Kyrou also recommended the patient wear synthetic socks and porous shoes, not wear the same shoes day after day and to put antifungal powder or spray in the shoes.

On March 3, 2022, the patient saw non-party James Delorenzo, DPM ("Dr. Delorenzo") who documented the following: The patient was present for elongated toenails that he was unable to tend to himself; he was wearing shoes with the laces not in all the eyelets. Dr. Delorenzo's neurological examination of the foot was normal. The patient's pedal pulses were now absent and he had moderate varicose veins and edema of both legs. There was no pedal or leg hair. He had some contracted digits at with varus rotation and underlapping of the 5th digits beneath the 4th digits, on both feet. The nails were thickened, dystrophic, elongated, brittle and mycotic with subungual debris, discoloration, and mild discomfort with palpation due to thickness and length. There was a possible plantar plate tear, with moderate pain elicited at the plantar aspect of the 1st, 2nd, and 4th MPJ on the right, mild edema and soft tissue swelling. There was mild pain on dorsiflexion. There was a swan neck deformity of the third digit of the right foot. Dr. Delorenzo filed and cut the toenails on both feet. He discussed with the patient that there was a neuroma of the right foot and explained that typically this problem can begin when wearing too-narrow shoes. He recommended that the patient purchase wider and deeper shoes, remove the insert, and relace the shoes skipping the first set of eyelets to give more room to the toes. Various options including an MRI of the right foot to rule out a plantar plate tear were discussed.

The patient returned to Dr. Delorenzo on April 19, 2022 in follow up to an MRI of his right foot. Dr. Delorenzo documented that the patient was wearing tight, narrow, pointed

dress shoes with laces, that the sole of the right shoe was worn in the area of the 3rd and 4th toes, and there was a full-length Dr. Scholl's gel insert in the shoe causing tightening of the forefoot. The shoe was worn down in the same area that he complained of pain. Dr. Delorenzo documented he reviewed the MRI of the foot taken on April 12, 2022, which showed no evidence of fracture or dislocation, but showed diffuse forefoot degenerative joint disease with erosive changes of the hallux, suggestive of gout, subcutaneous edema, calcaneocuboid degenerative changes, and an anterior calcaneal 0.5 cm subchondral cyst. Dr. Delorenzo injected cortisone into the third interspace of the right foot to infiltrate the suspected neuroma.

On June 13, 2022 and November 15, 2022, Plaintiff underwent treatment by Dr. Delorenzo for long, thickened, mycotic nails.

Discussion

"In order to establish liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice and that such departure was a proximate cause of the plaintiff's injuries." *M.C. v. Huntington Hosp.,* 175 AD3d, 578, 579 [2d Dept. 2019] (citations omitted).

On a motion for summary judgment seeking dismissal of the complaint in a medical malpractice action, the defendant has the initial burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. *Duvidovich v. George,* 122 AD3d 666 [2d Dept. 2014]; *Burns v. Goyal*, 145 AD3d 952, 954 [2d Dept. 2016]. Where such a showing is made, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to rebut the prima facie showing and establish the existence of material issues of fact. *Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *Stukas v. Streiter*, 83 AD3d 18, 23-24 [2d Dept. 2011].

A plaintiff must demonstrate the existence of a triable issue of fact as to the elements on which the defendant has met his or her initial burden. *Swanson v Raju*, 95 AD3d 1105, 1106 [2d Dept 2012]. A plaintiff must produce expert testimony regarding specific acts of malpractice and not just testimony that alleges "[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 320, 325 (1986); *DiLorenzo v. Zaso*, 148 AD3d 1111, 1112 [2d Dept 2017]; *Burns v. Goyal, supra*.

Claims of lack of informed consent are statutorily defined. *See* Pub. Health Law § 2805-d. A practitioner providing treatment or diagnosis must disclose to the patient alternatives and reasonably foreseeable risks and benefits involved as a reasonable physician under similar circumstances would have provided. Pub. Health Law § 2805-d(1). "[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence...[citations omitted]...To establish a cause of action to recover damages based on lack of informed consent, a plaintiff must prove (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 [citations omitted]." *Pirri-Logan v. Pearl*, 192 AD3d 1149 [2d Dept. 2021]; *Many v. Lossef*, 190 AD3d 721 [2d Dept. 2021].

In order to prevail in a summary judgment motion on a lack of informed consent claim, the movant must establish as a *prima facie* case that proper disclosure was done and a reasonably prudent person in the patient's position would have undergone the treatment had the patient been fully informed of the alternatives to treatment and its reasonably foreseeable risks and benefits. *Dyckes v. Stabile*, 153 AD3d 783 [2d Dept. 2017]; *see also* Pub. Health Law § 2805-d(3). "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 [citations omitted]." *Godel v. Goldstein*, 155 AD3d 939, 942 [2d Dept. 2017].

Dutchess Ambulatory

In support of its motion, Duchess Ambulatory provides the pleadings, Examination Before Trial transcripts, Plaintiff's medical records and an affidavit from nursing expert Stephanie Vogl Rosenthal RN, BBA, CNOR, NE-BC. Dutchess Ambulatory contends that the complaint should be dismissed as it does not have a Certificate of Merit. Additionally, Duchess Ambulatory was only involved in Plaintiff's care when he presented for surgery on October 2, 2019 and that surgery was performed by Dr. Kyrou. Dr. Kyrou is not an

employee of Duchess Ambulatory and Plaintiff retained Dr. Kyrou at his private office. Nurse Rosenthal avers Dutchess Ambulatory could only be liable for the conduct of the nurses it employed. The nurses were not responsible for the performance of the surgery. The expert opines that the nurses did not deviate from acceptable standards of nursing care in the care they provided to Plaintiff and no act or omission of a nurse caused injury to the patient. The nurses also appropriately conducted a follow up call with the Plaintiff on October 3, 2019. Dutchess Ambulatory further argues that there cannot be a lack of informed consent claim against it as it is the duty of Plaintiff's private physician to obtain a patient's informed consent.

Plaintiff opposes the motion with an attorney affirmation and photographs arguing Defendant did not meet its burden because "[t]his is a *res ipsa loquitur* case." Counsel references medical records from Plaintiff's treatment with Dr. DeLorenzo in 2022, two to three years after the surgery, as well as excerpts from Plaintiff's deposition.

Dutchess Ambulatory has met its *prima facie* burden. It has established that it is not vicariously liable for the acts of Dr. Kryou, a non-employee. *See Smolian v. Port Auth. of N.Y. & N.J.,* 128 AD3d 796 [2d Dept. 2015]. To the extent that its employees, the nurses, did have involvement in the patient's care, the defense provides expert opinion that there was no departure from the standard of care and no act or omission of a Duchess Ambulatory employee was the proximate cause of any injury. *Schmitt v. Medford Kidney Ctr.,* 121 AD3d 1088 [2d Dept. 2014]. Finally, Defendant's argument that it is the surgeon's responsibility to obtain a patient's informed consent for a surgery, as opposed to a nurse is sufficient to meet its burden as to lack of informed consent claim. Thus, the burden shifts to Plaintiff. *Alvarez, supra.*

Plaintiff's failure to oppose the motion with any expert opinion is fatal to his case. *Wright v. Morning Star Ambulette Servs., Inc.,* 170 AD3d 1249 [2d Dept. 2019]. The opinions of Nurse Rosenthal are uncontested. Plaintiff has not established a material issue of fact as to any departure from the standard of care by a Dutchess Ambulatory employee. Notably, there is no evidence that the Dutchess Ambulatory nurses performed the procedure or did any act which Plaintiff claims is the cause of his injury. Plaintiff also does not show that Dutchess Ambulatory supervised or instructed Dr. Kyrou as to how the surgery should be done.

While Plaintiff apparently relies on the doctrine of *res ipsa loquitur*, the Court of Appeals has found that the doctrine is only available in "a narrow category of factually

simple medical malpractice cases." *States v. Lourdes Hosp.,* 100 NY2d 208, 210 [2003]. "The doctrine is generally available to establish a prima facie case when an unexplained injury in an area which is remote from the treatment site occurs while the patient is anesthetized." *DiGiacomo v. Cabrini Med. Ctr.*, 21 AD3d 1052, 1054 [2d Dept. 2005].[3] Plaintiff provides no legal or factual support for his conclusion that the doctrine is applicable to this case. Plaintiff does not provide any evidence that his case is "factually simple" or that his condition could only be caused by negligence. *Monzon v. Chiaramonte,* 140 AD3d 1126, 1129 [2d Dept. 2016]. Further, Plaintiff complains of injury to the area actually treated by Defendants - his complaints are not about a "remote" area.

Finally, Plaintiff does not oppose the allegation of Dutchess Ambulatory that it cannot be vicariously liable for the acts of Dr. Kyrou nor does Plaintiff oppose the defense argument as to lack of informed consent. *See Rebozo v. Wilen,* 41 AD3d 457 [2d Dept. 2007].

Accordingly, the motion for summary judgment of Defendant Dutchess Ambulatory Surgical Center, LLC is granted.

Kyrou/Northern Med

The Kyrou Defendants submit the pleadings, the Plaintiff's treatment records, an affirmation from Dr. Kyrou and an affirmation from Tzvi Bar-David, DPM. These Defendants maintain that Dr. Kyrou's treatment of Mr. Santoiemma was within the standard of appropriate podiatric care. Dr. Bar-David opines that the cutting of the tendons and ligaments was a necessary part of the surgery performed by Dr. Kyrou in order to alleviate or improve the patient's pre-existing and severe arthritic pain and deformities. There is no medical evidence that any nerves were improperly cut. The procedure corrected the patient's deformities; his continuing and progressive arthritis and deformities were not the result of the procedure Dr. Kyrou performed. Instead, Dr. Bar-David concludes Mr. Santoiemma's complaints are due to his medical comorbidities, including arthritis, PVD, gout and wearing poorly fitted shoes. Further, Dr. Kyrou appropriately treated the patient post-operatively, including through imaging. These x-rays indicated that the procedure was a successful one. Additionally, according to Dr. Bar-David, the patient's informed consent was obtained before the procedure and he was appropriately advised of the risks,

[3] This case does not involve a foreign object left inside the body. *See Kambat v. St Francis Hosp.*, 89 NY2d 489 [1997].

benefits and alternatives as evidenced by Dr. Kyrou's notes, the Plaintiff's deposition testimony and the written consent form. A reasonable person in patient's condition would not decline the procedure.

Dr. Kryou also submits his affirmation detailing his treatment of the patient as well as his discussions with the patient as to the surgery, including the risks, benefits and alternatives. They discussed the recovery process. Dr. Kryou explained there was no guarantee as to a successful procedure and answered Mr. Santoiemma's questions. The patient signed a detailed consent form, which is provided as an exhibit. Dr. Kryou avers that his treatment of the patient was consistent with the standard of podiatric care.

The Defendants establish their *prima facie* entitlement to judgment as a matter of law. *See Wright v. Morning Star Ambulette Servs., Inc, supra; Gilmore v. Mihail,* 174 AD3d 686 [2d Dept. 2019]. As for the malpractice case, the defense submits expert opinions that Dr. Kryou did not depart from the standard of care nor did his actions or omissions cause Plaintiff's injuries. *Mattocks v. Ellant,* -- AD3d -- [2d Dept. 2024]. As for the lack of informed consent claim, Defendants demonstrate that the Plaintiff signed a detailed consent form after being apprised of the alternatives and foreseeable risks and a reasonably prudent person in the Plaintiff's position would not have declined to undergo the surgery. *Pirri-Logan v. Pearl*, *supra.* Again, there is no causal connection between the Plaintiff's complained of injuries and the procedure performed by Dr. Kyrou. *Id*.

Thus the burden shifts to Plaintiff, who fails to set forth a triable issue of fact as to both the malpractice and lack of informed consent causes of action. Importantly, the Plaintiff only opposes the motion with his attorney affirmation; he does not provide any expert opinion. *Id; Malefakis v. Jazrawi*, 209 AD3d 727 [2d Dept. 2022]; *Mendoza v. Maimonides Med. Ctr.*, 203 AD3d 715, 717 [2d Dept. 2022]; *Roy v. Lent*, 219 AD3d 525 [2d Dept. 2023]. *Burns v. Goyal, supra*; *see e.g., Pirri-Logan v. Pearl*, *supra; Lowell v. Flom*, 195 AD3d 801 [2d Dept. 2021]; *Leigh v. Kyle*, 143 AD3d 779 [2d Dept. 2016]. "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat [a] defendant['s] . . . summary judgment motion." *Alvarez*, 68 NY2d at 325. The attorney affidavit alone is not sufficient to address the standard of care in the malpractice cause of action nor can it suffice to rebut the defense experts' opinions as to causation for both the malpractice and lack of informed consent claims. In fact, the affirmation does not even mention the Kyrou Defendants' expert opinions or attempt to

oppose those opinions. *Pirri-Logan v. Pearl*, 192 AD3d at 1150 ("To rebut the defendant's prima facie showing, a plaintiff must submit an expert opinion that specifically addresses the defense expert's allegations').

Further, while counsel for Plaintiff relies on the doctrine of *res ipsa loquitur*, as discussed above, this case does not fit into the narrow category of medical malpractice cases to which the doctrine applies. Based on the foregoing, the motion is granted.

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied.

NOW, therefore it is hereby

ORDERED that the Defendants' summary judgment motions are granted and the complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 13, 2024
Poughkeepsie, New York

Christi J. Acker

CHRISTI J. ACKER
JUSTICE OF THE SUPREME COURT

To: All Counsel via NYSCEF