Kosinski v Wladis
2024 NY Slip Op 35421(U)
April 25, 2024
Supreme Court, Albany County
Docket Number: Index No. 905866-19
Judge: Christina L. Ryba
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SHIRLEY T. KOSINSKI and KEITH J. KOSINSKI,
Plaintiffs,
-against-

EDWARD J. WLADIS, M.D., OPHTHALMIC PLASTIC SURGERY, PLLC, COLONIE ASC, LLC,
Defendants.

DECISION/ORDER
Index No. 905866-19

APPEARANCES:

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RYBA J.,

On May 8, 2016, plaintiff Shirley T. Kosinski (hereinafter plaintiff) fell down a flight of stairs in her home and struck the left side of her face on the edge of an open door at the bottom of the stairs. As a result, plaintiff sustained a significantly displaced fracture of the left-sided zygomaticomaxillary complex ("ZMC") and orbital floor blowout fracture, causing multiple bone fragments from the sinus walls and the orbital floor to be displaced into the left maxillary sinus[1]. On May 12, 2016, plaintiff underwent her first surgery by Dr. Oluseyi Aliu MD, a plastic surgeon, who performed an open reduction and internal fixation of the ZMC fracture, repaired the orbital floor by securing a surgical implant known as a Medpor plate over the fracture, and performed a procedure

[1]The ZMC refers to the skeletal complex comprised of the cheekbone, jawbone and other facial bones that form the overall structure of the face and orbit/eyesocket. The orbital floor refers to one of the orbital bones that supports the eyeball.

to suspend the midface to the orbital rim to prevent it from descending. Following that surgery, plaintiff was reportedly unhappy with the indented appearance of her left cheek and the slight droop of her left eyelid, but otherwise reported having normal vision and eye function.

Approximately one year after the surgery, however, plaintiff presented to an ophthamologist with complaints of double vision, a distorted appearance to the left eye, and drooping of the left eyelid. Plaintiff was referred to defendant Dr. Edward Wladis MD, an ophthalmic plastic and reconstructive surgeon, for evaluation and treatment. Examination and testing performed by Dr. Wladis at plaintiff's first appointment on August 14, 2017 revealed that plaintiff's left eye had sunken four millimeters back and down into the orbital cavity, causing a hollowing of the upper eyelid known as a superior sulcus deformity. Dr. Wladis ordered a CT scan which showed that the Medpor plate used by Dr. Aliu to cover the orbital floor fracture had descended into plaintiff's maxillary sinus, causing a depression in the left orbital floor. Concerned that a condition known as silent sinus syndrome may have caused the plate to shift, and that any attempt to repair the orbital floor would be doomed to fail if the condition was not addressed, Dr. Wladis referred plaintiff to Dr. Carlos Pinheiro-Neto, an ear nose and throat specialist, with the plan to conduct a joint surgery.

Dr. Wladis and Dr. Pinheiro-Neto performed the joint surgery on November 1, 2017, with Dr. Pinheiro-Neto first surgically opening and inflating plaintiff's left maxillary sinus and Dr. Wladis then surgically restoring the orbital floor by implanting a new Medpor plate. According to Dr. Wladis, he considered removing the original plate prior to placing the new implant, but was concerned that the manipulation required to extract the plate would jeopardize the integrity of plaintiff's already severely traumatized orbital bones. Accordingly, Dr. Wladis left the original plate intact and implanted a larger Medpor plate on top of it.

At her post-operative visit with Dr. Wladis on November 17, 2017, plaintiff presented with

post-surgical swelling and subtle retraction or drooping of the left lower eyelid, along with a condition know as scleral show wherein the sclera or white area of the eye is visible below the iris. Because Dr. Wladis considered scleral show to be a common condition following orbital fracture repair that would likely resolve as plaintiff's other swelling subsided, and because plaintiff's eyes otherwise appeared symmetrical and healthy, Dr. Wladis recommended that they simply continue to monitor plaintiff's condition. At her next post-operative visit on February 23, 2018, however, plaintiff complained of double vision and slight pain behind her left eye. Upon examination and testing, Dr. Wladis found that plaintiff's eyes were still symmetrically positioned with no upper eyelid hollowing suggestive of a sulcus deformity. Based upon this finding, Dr.Wladis concluded that the new Medpor plate remained well positioned and plaintiff's complaints were instead likely attributable to dry eye and surface irritation caused by the retraction of her left lower eyelid, which Dr. Wladis believed was due to scar tissue that formed in the lower eyelid incision made by Dr. Aliu during plaintiff's first surgery. To address the retraction of the left lower eyelid, Dr. Wladis performed a surgery known as a left lower eyelid retraction and flap repair with conjunctivoplasty on March 15, 2018. During the surgery, Dr. Wladis removed the scar tissue that formed due to plaintiff's first surgery, placed an Alloderm implant to bolster and elevate the lower eyelid, and elevated the cheek tissue to a higher position to better support the lower eyelid. Dr. Wladis concluded the surgery by performing a temporary tarsorrhaphy wherein he sutured the left upper and lower eyelids together to promote the healing process.

Plaintiff's medical records reveal that when she returned to Dr. Wladis for her post-operative visit on March 23, 2018, her eyelid appeared to be healing normally and she had no reports of pain. However, one of the temporary tarsorrhaphy sutures at the corner of plaintiff's lower eyelid had broken, and Dr. Wladis offered to either replace the suture or secure the area with a bandage.

Plaintiff opted for the bandage and was instructed to return in one week, or sooner if she experienced problems. When plaintiff returned to Dr. Wladis a week later on March 30, 2018, she had already removed the bandage and was experiencing discharge from her left eye. Based upon the opaque appearance of the cornea, Dr. Wladis concluded that plaintiff had suffered a corneal abrasion, for which he prescribed antibiotic ointment and eye drops. Over the ensuing days, plaintiff began to experience swelling of her left eyelid and cheek, prompting Dr. Wladis to prescribe different eye drops and an oral antibiotic for potential sinusitis. Although Dr. Wladis directed plaintiff to return for a follow-up appointment the next day, plaintiff canceled the appointment because she believed that her condition had improved with the new medications. At plaintiff's next appointment on April 6, 2018, Dr. Wladis noted that plaintiff's vision had improved, the corneal abrasion was healed, the lower eyelid was in a good position, and plaintiff reported that she was doing well. Plaintiff again presented to Dr. Wladis on April 27, 2018 complaining that her left lower eyelid was swollen. However, plaintiff denied any associated pain or discharge, and Dr. Wladis noted that the eyelid remained in good position with good tone and contour. Dr. Wladis directed plaintiff to follow up as planned on June 11, 2018.

At the June 11, 2018 visit, Dr. Wladis observed that plaintiff's left lower eyelid appeared a bit tight and short horizontally. To address the issue, Dr. Wladis performed a surgery to elongate the eyelid and associated tendon to improve tone and contour of the eyelid on July 3, 2018. Several days later, plaintiff reported to Dr. Wladis that her eye "looks fantastic" and she was "ecstatic " with the results. At a follow-up visit on July 13, 2018, Dr. Wladis documented that plaintiff's eyelids were healing well and appeared symmetrical, that her vision had improved, and that she had no complaints of pain. However, on September 18, 2018, plaintiff texted Dr. Wladis to advise him that her double vision had returned and her sinus walls seemed to be collapsing. Dr. Wladis referred

plaintiff to an ear nose and throat specialist and an optoplastic surgeon, but plaintiff decided to seek treatment elsewhere.

Plaintiff next treated with Dr. Michael Grant, MD, an ophthamologist and plastic surgeon located in the State of Maryland, who noted that plaintiff was experiencing double vision, retraction of the left lower eyelid, and sinking of her left eye into the socket. During a surgery performed on December 28, 2018, Dr. Grant discovered that the original plate implanted by Dr. Aliu and the second plate implanted by Dr. Wladis were both displaced into the maxillary sinus. Dr. Grant removed both implants, performed an open reduction and internal fixation of the orbital floor, and implanted a new orbital plate that he created using computer-assisted technology to generate a 3-D printed implant from a mirror image overlay. Dr. Grant performed another surgery on April 2, 2019 to address plaintiff's left lower eyelid retraction and a condition known as trichiasis in which the eyelashes grow inwards toward the eye. During that surgery, Dr. Grant reversed plaintiff's lower left eyelid using rotating sutures and used a skin graft from plaintiff's right eyelid to increase the height of the left lower eyelid. Despite these surgeries, plaintiff was still experiencing retraction of the left lower eyelid along with scleral show at her follow-up appointment on April 19, 2019. When plaintiff returned for her next appointment on July 11, 2019, Dr. Grant documented that the left eye was sunken back and the left lower eyelid was turned outward. Plaintiff also complained of recurring double vision, excessive scleral show, an asymmetrical smile and loss of left cheek volume. Dr. Grant recommended another lower eyelid reconstruction surgery with mucosal and upper eyelid grafts, but plaintiff did not feel confident about his recommendation and therefore did not return for her follow up appointments.

Plaintiff next sought treatment from Dr. Guy Massry, MD, an ophthalmic plastic and reconstructive surgeon located in Beverly Hills, California, for complaints of left lower lid retraction,

scleral show, and an asymmetry in the appearance of her left cheek. On December 19, 2020, Dr. Massry performed surgery that included a cantoplasty to change the shape of the left eye, a hard palate graft transferring tissue from plaintiff's mouth into the corner of her eyelid, and a mid-cheek facelift. Despite this surgery, plaintiff reported that she was still dissatisfied with the appearance of her cheek when she smiles, that she continues to experience double vision, and that she deals with discomfort such as excessive tearing and tingling on the left side of her face.

Plaintiff, and her husband derivatively, commenced this action against Dr. Wladis, his employer Ophthalmic Plastic Surgery, PLLC, and his ambulatory surgery center Colonie ASC, LLC (hereinafter collectively referred to as defendants) seeking to recover damages under two causes of action sounding in medical malpractice and loss of consortium. As amplified by the amended bill of particulars, plaintiffs allege that Dr. Wladis committed medical malpractice by improperly performing the surgeries on November 1, 2017, March 15, 2018, and July 3, 2018, by misdiagnosing plaintiff with silent sinus syndrome, by failing to correct plaintiff's double vision, and by failing to perform a mirror image overlay, a hard palate graft and a mid-face lift. Plaintiffs allege that Dr. Wladis' deviations from the standard of care proximately caused plaintiff to require the subsequent treatment and surgeries performed by Dr. Grant and Dr. Massry, caused abnormal eyelash growth and permanent loss of three-quarters of the eyelashes on her left eye requiring regular chemotherapy injections in her eyelids, and resulted in a variety of other issues including gingivitis and tooth infections, the inability to work and engage in extracurricular activities, cognitive disturbances, and double vision. Plaintiffs further allege that defendants Ophthalmic Plastic Surgery and Colonie ASC are vicariously liable for Dr. Wladis' claimed medical malpractice. Issue has been joined, discovery is now complete, and a jury trial is scheduled to commence on July 15, 2024. Defendants now move

for summary judgment dismissing the complaint in its entirety. Plaintiffs oppose the motion.

The requisite elements of proof in a medical malpractice action are: 1) a deviation or departure from standards of accepted medical practice; and 2) proof that such departure was a proximate cause of injury or damage (see, Holland v Cayuga Med. Ctr. at Ithaca, Inc., 195 AD3d 1292 [2021]). In a medical malpractice action, competent medical expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause (see, Giambona v Stein, 265 AD2d 775 [1999]). Therefore, a defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, prima facie, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries (see, Bardaglio v Edward G. Bryant, IV, OD, PLLC, 217 AD3d 1195, 1197 [2023]; Schwenzfeier v St. Peter's Health Partners, 213 AD3d 1077, 1078 [2023]). This initial burden is satisfied through expert evidence, supported by factual proof such as deposition testimony and medical records, to rebut the claim of malpractice by establishing that the treatment rendered was within the accepted standard of care or did not cause the plaintiff's injuries (see, Tkacheff v Roberts, 147 AD3d 1271, 1272 [2017]; Cole v Champlain Val. Physicians' Hosp. Med. Ctr., 116 AD3d 1283, 1285 [2014]).

Once the moving defendant's initial burden is satisfied, the burden shifts to the plaintiff to raise a genuine issue of fact through competent expert medical opinion evidence establishing that the defendant breached the standard for good and acceptable care that existed in the locality at the time of treatment, and that such breach was a proximate cause of the injuries alleged (see, Butler v Cayuga Med. Ctr., 158 AD3d 868, 874 [2018]; Longtemps v Oliva, 110 AD3d 1316, 1318 [2013]; Helfer v Chapin, 96 AD3d 1270, 1272 [2012]; Torns v Samaritan Hosp., 305 AD2d at 966 [2003];

Yamin v Baghel, 284 AD2d at 779 [2001]). Generalized or conclusory allegations of medical malpractice which are unsupported by competent proof are insufficient to raise a question of fact to defeat summary judgment (see, Butler v Cayuga Med. Ctr., 158 AD3d 868, 875 [2018]; Humphrey v Riley, 163 AD3d 1313, 1315 [2018]; Longtemps v Oliva, 110 AD3d at 1319 [2013]). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on 'specifically cited evidence in the record' " (Tsitrin v New York Community Hosp., 154 AD3d 994, 996 [2017], quoting Roca v Perel, 51 AD3d 757, 759 [2008]; see, Jacob v Franklin Hosp. Med. Ctr., 188 AD3d 838, 840 [2020], aff'd 36 NY3d 1102 [2021]).

In support of their motion for summary judgment, defendants submit the deposition testimony of plaintiff, Dr. Wladis and Dr. Pinheiro-Neto; plaintiff's medical records from her treatment and surgeries with Dr. Aliu, Dr. Wladis, Dr. Pinheiro-Neto, Dr. Grant, and Dr. Massry; and the expert affidavit of Richard Dean Lisman, M.D, a specialist in ophthalmic plastic and reconstructive surgery. Based upon his more than 40 years of practice as an ophthalmic plastic and reconstructive surgery specialist, as well as his experience as Director of Ophthalmic Plastic Surgery Services at NYU Medical Center; Institute of Reconstructive Plastic Surgery and NYU School of Medicine, Lisman attests that he is fully familiar with the standard of care for Ophthalmic Plastic and Reconstructive Surgery applicable at the time of Wladis' surgery and treatment of plaintiff. Upon reviewing plaintiff's medical records and other relevant material in this litigation, Dr. Lisman opines with a reasonable degree of medical certainty that Dr. Wladis' treatment of plaintiff complied with the applicable standard of medical care in all respects, and that there was no causal nexus between any deviations alleged and the injuries claimed by plaintiffs.

Dr. Lisman first addresses the allegation that Dr. Wladis departed from accepted standards of care by incorrectly diagnosing plaintiff with silent sinus syndrome. Dr. Lisman opines that, upon receiving the CT scan results showing that the original Medpor plate implanted by Dr. Aliu had descended into the maxillary sinus and caused a partial blockage, Dr. Wladis appropriately and consistent with the standard of care considered a differential diagnosis of silent sinus syndrome. Dr. Lisman explains that silent sinus syndrome is a condition in which the sinuses collapse due to a blockage, and that the syndrome causes symptoms similar to those that plaintiff was experiencing including sunken eyes, droopy eyelids, and double vision. Dr. Lisman also concurs with the opinion expressed by Dr. Pinheiro-Neto in his deposition testimony that plaintiff was at high risk to develop silent sinus syndrome because the displaced Medpor plate was creating a blockage in her maxillary sinus. Dr. Lisman opines that, because the condition can weaken the orbital bone over time and cause it to shift, reconstruction of plaintiff's orbital floor would likely fail in the event that plaintiff had silent sinus syndrome that went untreated. Accordingly, Dr. Lisman opines that Dr. Wladis appropriately referred plaintiff to Dr. Pinheiro-Neto for the concern of silent sinus syndrome, and with a plan to conduct a joint surgery wherein Dr. Pinheiro-Neto would open, aerate and clean the sinus prior to placement of the new Medpor plate. Dr. Lisman avers that this surgical approach was good medical practice, and would have been the same treatment for addressing the displaced Medpor plate regardless of whether plaintiff actually had silent sinus syndrome. Dr. Lisman further agrees with the opinion expressed by Dr. Pinheiro-Neto in his deposition testimony that plaintiff may have indeed had maxillary silent sinus syndrome at the outset, but once the sinus was opened and the surgery was performed, the syndrome was resolved. This evidence is sufficient to satisfy defendants' initial burden to demonstrate that Dr. Wladis did not deviate from accepted standards of medical care

in formulating a differential diagnosis of silent sinus syndrome. Moreover, inasmuch as the proof demonstrates that plaintiff's surgery and treatment would have been the same even without a silent sinus syndrome diagnosis, defendants have sufficiently demonstrated that Dr. Wladis' diagnosis of silent sinus syndrome did not proximately cause any injury to plaintiff.

Dr. Lisman next addresses the allegation that Dr. Wladis deviated from accepted standards of medical care when performing the November 1, 2017 surgery by failing to remove the original Medpor plate and instead "stacking" a new plate on top of it, by implanting an orbital plate that was not the proper size, and by failing to use mirror image overlay and 3-D printing technology to customize a properly sized implant to repair the orbital floor and address plaintiff's complaints of double vision. Dr. Lisman initially avers that mirror image overlay and 3-D printing technology were not available at most hospitals at the time of plaintiff's surgery, and that therefore the surgical standard of care for repairing an orbital fracture in Albany, New York in 2017 did not require the use of such advanced technology. According to Dr. Lisman, while the mirror image overlay and 3D printed implant "may have been exalted as the 'Ferrari' of implants" at the time, the Medpor plate implant used by Wladis "was a sound and reasonable 'Mercedes' orbital floor implant" that was a medically acceptable choice for plaintiff's surgery and well within the applicable standard of care. In any event, Dr. Lisman explains that the use of mirror image 3D models to create customized orbital implants does not necessarily have any advantage over traditional implants such as the Medpor plate, because such traditional implants are also customized to the patient through intraoperative trimming and can adequately restore orbital volume and projection without resort to mirror image and 3-D printing technology. Inasmuch as this competent medical proof establishes that the standard of care did not require the use of a mirror image overlay and 3D printed implant,

the Court concludes that defendants have sufficiently demonstrated that Dr. Wladis did not depart from accepted standards of care in failing to employ that technology to create plaintiff's orbital implant.

With regard to the manner in which Dr. Wladis performed the November 1, 2017 surgery itself, Dr. Lisman opines that Dr. Wladis properly and within the standard of care performed a left anterior orbitotomy with an inferior transconjunctival approach to the orbital floor, with reconstruction and placement of a Medpor plate implant, in conjunction with left endoscopic sinus surgery by Dr. Pinheiro-Neto. Dr. Lisman first opines that prior to the surgery Dr. Wladis appropriately explained the associated risks to plaintiff, including the possibility of pain, infection, persistent double vision, scarring, and the need for additional surgeries, and obtained plaintiff's informed consent to the procedure.[2] Dr. Lisman next provides a step-by-step description of the surgery, along with a detailed factual explanation for his opinion that Dr. Wladis complied with the applicable standard of surgical care throughout the procedure. Specifically, Dr. Lisman opines that in placing the orbital implant, Dr. Wladis used proper surgical technique, appropriately checked the implant position to ensure that the plate was resting on bone on all sides, checked the projection of the eye to verify that it was no longer sunken back into the socket, and performed a forced duction test by manipulating the eyeball with forceps to ensure that the implant was stable. Dr. Lisman also opines that the manner in which Dr. Wladis performed the surgery did not cause the lower eyelid retraction (pulling down) and ectropion (turning out) that plaintiff ultimately developed months later. Rather, Dr. Lisman explains, those conditions were most likely an unfortunate consequence of Dr.

[2] Although the parties' submissions contain passing discussion of whether plaintiff gave informed consent to certain treatments, the complaint does not assert an informed consent cause of action. Accordingly, the Court therefore will not pass on the issue of whether informed consent was indeed obtained.

Aliu's initial surgery in 2016, wherein he utilized an external incision approach to the lower eyelid which carries the known risk of causing the lower eyelid to droop and turn out, leaving the eyelid surface exposed and prone to irritation.

Dr. Lisman next opines that the surgery concluded with the implant in a stable and proper position, as evidenced by the normal projection of plaintiff's eye and the fact that the implant did not wobble or sink during the forced duction test. Dr. Lisman explains that if the Medpor plate was not large enough or was not properly positioned to cover the fracture as plaintiffs contend, it would have shifted during the forced duction test. Moreover, Dr. Lisman points out that if the implant was too small or improperly placed, it would not have provided sufficient internal support to plaintiff's eye and it would have remained sunken. As Dr. Lisman explains, "[c]overing a fracture is like putting a lid on a bucket; if the lid is too small, it will fall right into the bucket (i.e., the sinus). This would result in the eye sinking back, as the volume of the orbit would not have been reduced". Based upon these findings, Dr. Lisman concludes that the implant used by Dr. Wladis was sufficiently large and properly secured to cover plaintiff's fractured orbital floor at the time surgery concluded. Although Dr. Lisman acknowledges that the implant later descended into plaintiff's sinus, as discovered by Dr. Grant during his December 28, 2018 surgery, he opines that this occurred as the probable result of post-surgical orbital fat atrophy - - a known complication of traumatic injuries and surgical repairs - - which enlarged the orbital space. Under these circumstances, Dr. Lisman explains, an implant that was appropriately sized at the time of surgery could later appear to be too small when observed in the context of an enlarged orbital space.

Dr. Lisman also opines that Dr. Wladis's decision not to remove the original Medpor plate during the surgery, and to instead "stack" the new implant above it, was not a deviation from the

standard of care but was a reasoned and cautious medical decision considering plaintiff's medical history.

Dr. Lisman asserts that because plaintiff's orbit was so severely traumatized from her original injury and her first surgery, and because the displacement of the original implant indicated that her orbital bones were potentially unstable, Dr. Wladis risked further jeopardizing the health and stability of plaintiff's orbital bones socket if he attempted to manipulate and remove the original implant. Accordingly, Dr. Lisman opines that Dr. Wladis properly deliberated on the various risks and benefits of removing the original implant and exercised sound medical judgment in arriving at the reasonable decision to leave it intact and stack the second plate above it. Dr. Lisman asserts that the surgical method of "stacking" a second plate on top of a previous plate has been commonly used for decades, including in the surgeries he has performed himself, and is well within the standard of surgical care. Dr. Lisman avers that Dr. Wladis's decision to "stack" the plates represented a judgment call between two medically acceptable courses of action. The Court notes that "a doctor is not liable in negligence merely because a treatment, which the doctor as a matter of professional judgment elected to pursue, proves ineffective" (Nestorowich v Ricotta, 97 NY2d 393, 398 [2002]), and that liability will not be imposed for an error in professional judgment if "it is a judgment that a reasonably prudent doctor could have made under the circumstances" (Dumas v Adirondack Med. Ctr., 89 AD3d 1184, 1186 [2011]). In view of the foregoing, and considering that Dr. Lisman's medical opinion and analysis is explained in specific detail and is based upon factual proof in the record, the Court finds that defendants have demonstrated that Dr. Wladis did not deviate from the applicable standard of care in performing the November 1, 2017 surgery (see, Young v Sethi, 188 AD3d 1339, 1341 [2020]; Martino v Miller, 97 AD3d 1009, 1010 [2012]).

The Court will next turn to plaintiffs' claims that Dr. Wladis committed medical malpractice

when performing the March 15, 2018 surgery to correct the retraction of plaintiff's left lower eyelid. In this regard, plaintiffs contend that Dr. Wladis deviated from accepted standards of care in failing to adequately reconstruct the orbital floor prior to performing the eyelid retraction surgery, by removing skin and thereby shortening the eyelid during the course of the surgery, and in failing to correct plaintiff's double vision and eyelid retraction through alternate procedures such as a hard palate graft or mid-face cheek lift. In support of their motion for summary judgment dismissing these claims, defendants again rely on their expert Dr. Lisman, who offers his detailed medical opinion that Dr. Wladis complied with the standard of care in all respects in performing the March 15, 2018 eyelid retraction surgery.

First, Dr. Lisman opines that Dr. Wladis's decision to address plaintiff's double vision and other complaints through eyelid surgery, as opposed to a different surgery and without first attempting to again reconstruct the orbital floor, conformed to the applicable standard of care. In support of his opinion, Dr. Lisman explains that double vision is common after eye surgery, particularly given the severe orbital injury that plaintiff suffered, and the testing performed by Dr. Wladis prior to the surgery revealed nothing to indicate that plaintiff's double vision was being caused by a shift in the orbital implant or a defect in the orbital floor. To the contrary, Dr. Wladis examined plaintiff prior to the surgery and determined that the projection of plaintiffs' eyes was symmetrical and she no longer had any discernable hollowing of the upper eyelid. Given these findings, Dr. Lisman opines that the orbital implant was well-placed and functioning at that time because a displaced or poorly positioned implant would have caused the eye to sink backwards. Dr. Lisman therefore opines that Dr. Wladis complied with the standard of care by treating plaintiff's double vision and eyelid complaints through the March 15, 2018 eyelid retraction surgery, as opposed to another surgery to reconstruct the orbital floor.

Next, Dr. Lisman offers his medical opinion that the applicable standard did not necessitate either a hard palate graft or a mid-face lift to address plaintiff's double vision and lower eyelid retraction. Dr. Lisman explains that a hard palate graft is a spacer for elevating displaced lower eyelids, much like the Alloderm spacer used by Wladis in the March 15, 2018 surgery, although the hard palate graft is obtained by the more invasive process of harvesting tissue from the roof of the mouth. Dr. Lisman opines that both Alloderm and hard palate grafts are successful grafting materials for patients needing lower eyelid elevation and retraction, and that by opting to use the medically accepted Alloderm spacer, Dr. Wladis did not deviate from the standard of care. As for the mid-face lift, which Dr. Lisman describes as a purely cosmetic procedure that can give the face a more youthful-looking appearance, Dr. Lisman notes that Dr. Wladis did indeed offer plaintiff the option of a mid-face lift procedure on February 28, 2019, which she declined. Dr. Lisman opines that Dr. Wladis obtained an effective symmetry of the eye and nice appearance through the surgery that he performed, and although plaintiff was not satisfied with her looks, a mid-face cheek lift was not medically necessary and was not required by the applicable standard of care. Additionally, in Dr. Lisman's opinion, Plaintiff's decision to later undergo a hard palate graft and mid-face cheek lift with Dr. Massry were cosmetic choices and not medical necessities.

Finally, Dr. Lisman opines that the March 15, 2018 surgery itself was performed properly in accordance with the applicable standard of surgical care. Contrary to plaintiffs' assertion that Dr. Wladis removed excessive skin during the surgery, Dr. Lisman notes that Dr. Wladis' operative report contains no mention of skin trimming or cutting. Dr. Lisman opines that Dr. Wladis never destroyed or removed any viable skin needed for later reconstruction, that he properly overcorrected the eyelid to combat any potential regression and recurring scar tissue, that he appropriately used the Alloderm implant to bolster the lower eyelid to address the concern of scleral show, and that he

ultimately achieved good symmetry of the eyelids. As for the July 3, 2018 elongated eyelid flap surgery that Dr. Wladis performed, Dr. Lisman notes that plaintiff was informed of and understood the potential risks of surgery including decreased vision, infection, scarring, and the need for additional surgeries. After explaining the procedure used by Dr. Wladis to perform the surgery, Dr. Lisman opines that he employed good surgical technique in compliance with the applicable standard of practice used for elongating shortened tendons in patients such as plaintiff. The foregoing proof is sufficient to satisfy defendants' prima facie burden to demonstrate that Dr. Wladis did not deviate from accepted standards of medical practice in performing both the March 15, 2018 eyelid retraction surgery and the July 3,2018 elongated eyelid flap surgery.

Dr. Lisman also offers his expert medical opinion on the issue of proximate cause. First addressing the allegation that Dr. Wladis' negligence proximately caused plaintiff to suffer from abnormal eyelash growth and the need for corrective injection treatments, Dr. Lisman explains that abnormal eyelash growth is a known complication of eye surgeries, especially eyelid reversal surgery such as the one performed by performed by Dr. Grant on April 2, 2019. It is further Dr. Lisman's opinion that plaintiff requires eyelid injection treatments as the result of her traumatic injury and extensive cosmetic surgeries, rather than any negligence on the part of Dr. Wladis. With regard to claim that the Medpor implant placed by Dr. Wladis caused plaintiff to develop gingivitis and tooth infections, Dr. Lisman notes that none of plaintiff's medical records contain any such diagnoses. Dr. Lisman also explains that gingivitis resulting from infection may be caused by a variety of sources, and given the brief period of time that Dr. Wladis' implant was in place, it is highly unlikely that it would have caused infection or gingivitis. Dr. Lisman opines that the removal of skin from the roof of plaintiff's mouth during the hard palate graft performed by Dr. Massry could have been a potential source an infection; however, it would be impossible to pinpoint the precise cause without any

medical records documenting such an infection. Finally, Dr. Lisman states to a reasonable degree of medical certainty that Dr. Wladis did not cause plaintiff's problems with poor drainage of the left eye or her claimed inability to move the left comer of her eye. Rather, Dr. Lisman asserts that these conditions are the cumulative result of the risks that plaintiff assumed by continuing to undergo repeated surgeries to correct minor flaws in her appearance.

Dr. Lisman's medical opinions, which are abundantly detailed and supported by reference to and discussion of the relevant medical records and deposition testimony, satisfy defendants' initial burden to demonstrate that the treatment and care rendered by Dr. Wladis was in all respects appropriate and consistent with the standard of care, and that such treatment did not proximately cause any of the injuries alleged by plaintiff. Inasmuch as defendants have demonstrated their entitlement to summary judgment on their medical malpractice against Dr. Wladis, they have also established that no vicarious liability can attach to defendants Ophthalmic Plastic Surgery, PLLC and Colonie ASC (see, Dumas v Adirondack Med. Ctr., 89 AD3d 1184, 1187 [2011], lv denied 18 NY3d 807 [2012]). Likewise, defendants' showing that summary judgment dismissing the medical malpractice cause of action is warranted also entitles them to dismissal of the derivative loss of consortium claim asserted by plaintiff's husband (see, Wittrock v Maimonides Med. Ctr.-Maimonides Hosp., 119 AD2d 748 [1986]).

The burden thus shifts to plaintiffs to present competent proof from a medical expert to establish both that Dr. Wladis deviated from the accepted standard of care in the community at the time of his treatment, and that such deviation proximately caused the injuries alleged (see, Martino v Miller, 97 AD3d at 1010 [2012]; Derusha v Sellig, 92 AD3d 1193 [2012]; Snyder v Simon, 49 AD3d 954, 956 [2008]; Passero v Puleo, 17 AD3d 953, 954 [2005]; Toomey v Adirondack Surgical Assoc., 280 AD2d 754, 755 [2001]). Notably, because defendants' expert proof addressed the

elements of both deviation and proximate cause, plaintiffs' opposing expert proof must be sufficient to create a genuine issue of fact as to both of these elements (see, Forrest v Tierney, 91 AD3d 707, 708 [2012]; Nichols v Stamer, 49 AD3d 832, 833 [2008]). In this regard, plaintiffs submit the affidavit of Dr. Michael Grant, MD, the Board Certified ophthalmologist and plastic surgeon who performed plaintiff's December 28, 2018 orbital reconstruction surgery with mirror image overlay and 3D printing technology, as well as her April 2, 2019 surgery to address the recurrence of her lower eyelid retraction. Dr. Grant opines that, based upon his review of the relevant testimony and medical evidence, as well as his education, training and experience in the fields of ophthalmology and plastic surgery, defendants deviated from accepted medical standards of practice throughout their treatment of plaintiff and that such deviations were substantial factors in causing all of the injuries alleged by plaintiff.

However, as a physician licensed by the State of Maryland with no apparent education, training or experience practicing in the State of New York, Dr. Grant is required to lay an appropriate foundation for his opinion by demonstrating a familiarity with the standard of care customarily practiced by ophthalmologist and oculoplastic surgeons in Albany, New York (see, Yamin v Baghel, 284 AD2d at 779 [2001]). To that end, Dr. Grant simply asserts in a conclusory fashion that "[t]he standard of care in Maryland is no different than the standard of care in New York [and]. . . . as such, I am fully familiar with the standards of care at issue in this litigation." Notably, neither the affidavit nor any evidence in the record indicate how Dr. Grant allegedly became familiar with what the applicable standard of care in New York State requires. Absent this necessary foundation, Dr. Grant has provided the Court with no basis to conclude that he has the requisite familiarity with the standard of care customarily practiced by ophthalmologist and oculoplastic surgeons in this State (see, Torns v Samaritan Hosp., 305 AD2d at 967 [2003]; Yamin v Baghel, 284 AD2d at 780 [2001]).

However, even assuming that Dr. Grant has laid a proper foundation for his opinions, the substance of his affidavit fails to create a material question of fact sufficient to defeat summary judgment. Dr. Grant first opines that Dr. Wladis deviated from accepted standards of medical practice in performing the November 1, 2017 orbital reconstruction surgery by using a Medpor implant that was too small to cover the orbital fracture and by placing the implant directly into the sinus. This assertion is belied by facts in evidence and completely ignores plaintiff's medical records documenting that Dr. Wladis placed the implant over the orbital fracture, not within the sinus, secured the implant to intact tissue on all sides, performed the forced duction test to ensure that the implant was stable, and determined that the implant was functioning and well-positioned after surgery. Dr. Grant also fails to acknowledge and address Dr. Lisman's opinion that Dr. Wladis' implant became displaced not because it was too small, but because the orbital space became larger as the result of orbital fat loss. As Dr. Grant's opinion in this regard is unsupported by facts in the record and fails to specifically address the opinion of defendants' expert, it fails to raise an issue of fact (see, Cassano v Hagstrom, 5 NY2d 643, 646[1959]; Humphrey v Riley, 163 AD3d 1313, 1315 [2018]; Brown v Bauman, 42 AD3d at 392 [2007]).

Dr. Grant also opines that Dr. Wladis improperly performed the November 1, 2017 orbital reconstruction surgery by failing to remove the original plate and instead "stacking" the new plate above it. He describes this surgical approach as "antiquated", "no longer acceptable" and "ineffective", and that Dr. Wladis "should have" removed the original plate and used another method such as mirror image overlay and 3-D printing technology to create a new implant. Although Dr. Grant does not dispute that such technology was not available in Albany, New York at the time of plaintiff's surgery, he opines that Dr. Wladis "could have" at least advised plaintiff that such technology might be available in another locality. These conclusory and speculative opinions are

likewise insufficient to defeat summary judgment.

First, Dr. Grant's opinion that Dr. Wladis "should have" or "could have" followed a different course of treatment "is not the equivalent of an opinion that it was a deviation from accepted medical standards"(Passero v Puleo, 17 AD3d 953, 954 [2005]; Buckner v St. Luke's Roosevelt Hosp. Ctr., 103 AD3d 535 [2013]). Moreover, Dr. Grant's opinion is unsupported by the appropriate foundation defining the applicable standard of care and explaining why it would have required Dr. Wladis to utilize or suggest a surgical method that was not available in the local medical community (see, Torns v Samaritan Hosp., 305 AD2d 965, 967 [2003]). In addition, Dr. Grant's opinion that Dr. Wladis should have removed the original plate before placing the new implant fails to address the specific assertion by defendants' expert that removing the plate posed the risk of further jeopardizing the integrity of plaintiff's eye socket. Indeed, Dr. Grant's conclusory theories are no more than an impermissible attempt to "reason back" from the fact that Dr. Wladis' implant ultimately became displaced as a basis to assume that some malpractice must have occurred (see, Park v Kovachevich, 116 AD3d 182, 192 [2014]; Fernandez v Moskowitz, 85 AD3d 566, 568 [2011]; Brown v Bauman, 42 AD3d 390, 392 [2007]). Not every undesirable outcome may be attributed to a doctor's failure to exercise due care, and the mere fact that a chosen treatment proves ineffective or unsuccessful does not support a claim for medical malpractice (see, Nestorowich v Ricotta, 97 NY2d 393, 398 [2002]; Schrempf v State of New York, 66 NY2d 289, 295 [1985]).

The remaining opinions offered by Dr. Grant do not require extended discussion as they are conclusory, speculative and lack the necessary factual and evidentiary support to create an issue of fact as to either a deviation from the standard of care or proximate cause. First, Dr. Grant's opinion that Dr. Wladis "should have" performed a mid-face lift or a hard pallet graft in lieu of the March 15, 2018 and July 3, 2018 surgeries suffers form the same fatal deficiencies as his previous opinions,

i.e., Dr. Grant fails to define the applicable standard of care or provide any factual explanation as to why it required these procedures. Moreover, Dr. Grant fails to acknowledge that, even after Dr. Massry performed these identical procedures on plaintiff, she remained dissatisfied with her appearance and continued to experience the same problems that she attempts to attribute to Dr. Wladis herein. And while Dr. Grant opines that "[t]here is no question that her need for additional surgery was due to the negligence of Dr. Wladis", he fails to offer any explanation or factual basis for this opinion whatsoever. Notably, while Dr. Grant appears to attribute plaintiff's need for skin graft surgery to Dr. Wladis' alleged negligence in removing excessive skin around plaintiff's eye, plaintiff's medical records are absolutely devoid of any notation that Dr. Wladis cut or removed any skin during his surgeries. Likewise, Dr. Grant's opinion that plaintiff's abnormal eyelash growth was caused by Dr. Wladis' surgical methods is perfunctorily stated without any supporting facts or detail to offer insight into what those methods were or how they contributed to plaintiff's condition.

As for Dr. Grant's opinion that Dr. Wladis improperly diagnosed plaintiff with silent sinus syndrome, the record demonstrates that the diagnosis did not change the course of plaintiff's treatment or otherwise adversely affected her physical condition (see, DeFilippo v New York Downtown Hosp., 10 AD3d 521, 523 [2004]; Bossio v Fiorillo, 210 AD2d 836, 838 [1994]). Moreover, Dr. Grant's opinion that plaintiffs' claimed injuries were cause by Dr. Wladis' negligence fails to acknowledge Dr. Lisman's opinion that many of the alleged injuries, including abnormal eyelash growth and the need for further surgeries, were not the result of any negligence but were instead the known and naturally occurring risks of the surgeries that plaintiff chose to undergo (see, Gage v Dutkewych, 3 AD3d 629, 631 [2004]). Dr. Grant's final sweeping statement that departures from accepted standards of care that"caused lasting injury to [plaintiff's] left side of her face, eye double vision and the damages listed in Plaintiffs' Bill of Particulars" is too conclusory and

overbroad to create a triable issue of fact sufficient to defeat defendants' motion.

In view of the foregoing, defendants' motion for summary judgment is granted, and the complaint is dismissed in its entirety. To the extent that the parties' arguments have not been explicitly addressed herein, the Court has reviewed them and found them to be lacking in merit or otherwise unnecessary to address.

For the foregoing reasons, it is

ORDERED the motion by defendants is granted, and the complaint is dismissed in its entirety.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, counsel for defendants shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: April 25, 2024

HON. CHRISTINA L. RYBA
Supreme Court Justice

04/26/2024