SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

GABRIELA ARNOLD and CHRISTIAN ARNOLD,

Plaintiffs,

- v -

NEAL BLITZ, D.P.M.,

Defendant.

----------X

INDEX NO. 805198/2016

MOTION DATE 01/27/2025

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 153, 155, 156, 157

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

In this action, inter alia, to recover damages for podiatric malpractice based on alleged departures from good and accepted practice and lack of informed consent, the defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. The plaintiffs oppose the motion. The motion is granted, and the complaint is dismissed.

The crux of the plaintiffs' claims is that, on August 21, 2013, the defendant podiatrist negligently performed surgery to repair a plantar plate rupture on the right foot of the plaintiff Gabriela Arnold (the patient), that, on November 20, 2013, the defendant negligently performed a hammertoe repair procedure on the patient's same foot, and that the defendant failed to obtain her fully informed consent to the procedures. In their bill of particulars, the plaintiffs focused exclusively on the hammertoe procedure, alleging that the defendant departed from good and accepted podiatric practice in that he failed to exercise appropriate surgical technique, specifically, that he misplaced a thin, flexible wire, known as Kirschner wire or k-wire, into the patient's bone, and thereafter negligently removed the k-wire. They further alleged that the defendant failed to utilize appropriate presurgical, intraoperative, and postsurgical imaging studies, failed to appreciate the significance of the patient's postsurgical complaints, and failed

timely to diagnose and appreciate postsurgical complications. The plaintiffs further asserted that, as a consequence of the defendant's malpractice and failure to obtain the patient's fully informed consent, the patient suffered from intense pain, nerve damage, bone damage, a deformed foot, leg and hip damage, inability to walk properly, and difficulty with balance.

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]).

"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 Foster-Sturrup v Long,* 95 AD3d 726, 727 [1st Dept 2012]; *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]). Such a cause of action may be premised upon a claim that those departures allowed a patient's condition to worsen, and thus deprived him or her of an opportunity for a cure or a better outcome (*see Mortensen v Memorial Hosp.*, 105 AD2d 151, 156, 159 [1st Dept 1984]; *Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 178 [1st Dept 1974], *affd no op.* 37 NY2d 719 [1975]). Moreover, where a physician fails properly to diagnose a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment, and the insufficiency of or delay in treatment proximately causes injury, he or she will be deemed to have departed from good and accepted medical practice (*see Perez v Fitzgerald,* 115 AD3d 177, 178 [1st Dept 2014]; *Perlin v King*, 36 AD3d 495, 495 [1st Dept 2007]; *see generally Zabary v North Shore Hosp. in Plainview,* 190 AD3d 790, 795 [2d Dept 2021]; *Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Med. Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

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]; *Barry v Lee*, 180 AD3d 103, 107 [1st Dept

2019]; *Frye v Montefiore Med. Ctr*., 70 AD3d at 24) or establish that the plaintiff was not injured by such treatment (*see Pullman v Silverman,* 28 NY3d 1060, 1063 [2016]; *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 this 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 [emphasis added]; *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).

In support of his motion, the defendant submitted the pleadings, the plaintiff's bill of particulars, a statement of allegedly undisputed material facts, the note of issue, relevant medical records, the transcripts of the parties' deposition testimony, an attorney's affirmation, and the expert affidavit of podiatrist Edwin Wolf, D.P.M., M.S. Dr. Wolf opined that the defendant did not depart from good and accepted practice and that nothing that he did or did not do caused or contributed to the patient's injuries.

Dr. Wolf explained that, upon first meeting with the defendant on August 2, 2013, the patient complained that, over the previous three years, she had experienced right foot pain and had been administered three cortisone injections that failed to relieve the pain. He asserted that the defendant immediately diagnosed the patient with a ruptured right plantar plate and hammertoe of the second toe of her right foot. Dr. Wolf concluded that surgery to repair the ruptured plantar plate was an indicated procedure in light of the failure of more conservative treatment, and that, on August 21, 2013, the defendant properly performed the plantar plate repair surgery within the applicable standard of care, "after which plaintiff had a smooth and uneventful recovery." He noted that, in fact, subsequent to filing the complaint, the patient made no allegations relative to the plantar plate surgery.

As Dr. Wolf described it after reviewing the defendant's chart, on November 8, 2013, the patient further complained to the defendant that the second toe of her right foot was hammered and buckled. Dr. Wolf opined that the defendant correctly diagnosed the patient with hammertoe, and concluded that this condition was present when the patient first presented to

the defendant on August 2, 2013. As he explained it, the second toe had become increasingly rigid as a natural consequence of the progression of the patient's "biomechanical abnormalities[,] which caused the hammertoe to occur initially." Dr. Wolf also opined that, in addition, scar tissue had formed below the second toe following the plantar plate repair procedure, causing the second toe to become even more rigid postoperatively.

As Dr. Wolf described the operative report, on November 20, 2013, the defendant performed a right second metatarsophalangeal joint release, and right second toe hammertoe repair, with proximal interphalangeal joint arthroplasty. He expressly opined that the surgery was properly performed. Specifically, Dr. Wolf noted that the intraoperative fluoroscopy images demonstrated that the k-wire was properly placed through the patient's right second toe, and secured the toe in an appropriate, stable position amenable to healing. As he explained it, there are no significant nerves in the "interspaces" between an individual's toes, and that while there are some nerves throughout the toe and these "interspaces," k-wire placement "through the toe and into an interspace is a commonly performed procedure and is unlikely to cause significant or permanent nerve damage," even though nerve damage is a known risk of podiatric surgery.

According to Dr. Wolf's reading of the relevant medical chart, on November 22, 2013, the patient reported that her pain had improved, but that the tip of her right second toe was numb. Dr. Wolf opined, however, that numbness to the tip of the toe where the k-wire had been placed is a normal postoperative finding, and that the defendant informed the patient thereof. According to the defendant, he informed the patient that he could remove the k-wire immediately to rule it out as the cause of discomfort, but that doing so might result in the need for revision surgery. At the patient's request, the defendant did indeed remove the k-wire on that date, and Dr. Wolf concluded that it was appropriate for the defendant to remove it at that time. Although the patient returned to see the defendant on November 29, 2013, and informed him that her pain had subsided somewhat, she complained that the sensation in the tip of her

second right toe continued to diminish. Dr. Wolf agreed with the defendant's advice to the patient at that visit that numbness to the tip of the toe was not unusual after hammertoe surgery.

After identifying the injuries that the plaintiffs alleged that the patient had sustained after the hammertoe surgery, Dr. Wolf opined that, inasmuch as the defendant properly performed both the plantar plate and hammertoe procedures, and properly performed the postoperative removal of k-wire, nothing that the defendant did or did not do in the course of those surgeries or postoperative care, including any failure to diagnose postoperative conditions, caused or contributed to the patient's alleged injuries.

In opposition to the motion, the plaintiffs relied on the same documents that the defendants had submitted. They also submitted an attorney's affirmation and the expert affidavit of Paul Klein, D.P.M., which had been sworn to on November 3, 2022, and, thus, more than one year before Dr. Wolf had sworn to his affidavit on December 12, 2023. Hence, Dr. Klein's affidavit did not expressly address any of the specific opinions rendered by Dr. Wolf. In fact, the entirety of the affidavit consisted of eight paragraphs. Dr. Klein set forth his qualifications as an expert, the fact that he had become the patient's regular podiatrist on September 17, 2014, and that he had reviewed all of the relevant records. The sum total of his opinion with respect to departures from proper care consisted of the following two paragraphs:

> "Based on my analysis of all of this information, I am of the opinion that the care and treatment provided by defendant fell outside podiatric standards, specifically his surgeries of August 21, 2013 and November 20, 2013. His negligent acts resulted in plaintiff suffering permanent nerve damage requiring further treatment including surgery.
>
> "In my opinion, plaintiff's [sic] is left with a permanent disabling condition including irreparable nerve damage and disfigurement."

In reply, the defendant submitted his attorney's affirmation, in which counsel challenged the validity of the notarization of Dr. Klein's affidavit by the plaintiffs' attorney, the latter of whom she alleged was not commissioned as a notary public in New York, and did not properly inscribe any information concerning any notarial authority that he may have obtained from any state.

Moreover, counsel argued that Dr. Klein's affidavit, even if considered by the court, was insufficient to raise a triable issue of fact, inasmuch as it was wholly conclusory, and failed to respond to Dr. Wolf opinions that each surgical step that the defendant performed was within the standard of care, and that all of the postoperative care that he rendered was proper.

The court notes that CPLR 2106, Part 1, was amended, effective January 1, 2024, to authorize the use of an affirmation in lieu of an affidavit by "*any person* wherever made," as long as the statement set forth therein had been "affirmed by that person to be true under the penalties of perjury" (L 2023, ch 559) (emphasis added). Inasmuch as Dr. Klein's affidavit was filed with the court on January 30, 2024 and, thus, after the effective date of CPLR 2106, Part 1, and he asserted, at the outset, that he "makes the following statement under penalty of perjury," the court discerns no reason why it should not consider that affidavit. Nonetheless, the court agrees with the defendant that the content of Dr. Klein's statement constitutes the very type of "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence," that courts have repeatedly rejected as insufficient to raise a triable issue of fact in opposition to a defendant's prima facie showing in a medical malpractice action (*Alvarez v Prospect Hosp.,* 68 NY2d at 325 *see Pancila v Romanzi,* 140 AD3d 516, 516 [1st Dept 2016] [plaintiff's expert's affidavit failed to explain "how defendant's positioning of plaintiff departed from accepted medical practices"]; *Callistro ex rel. Rivera v Bebbington*, 94 AD3d 408, 410 [1st Dept 2012], *affd sub nom. Callistro v Bebbington*, 20 NY3d 945 [2012]; *Frye v Montefiore Med. Ctr.*, 70 AD3d at 24). Here, Dr. Klein's affidavit "fails to reasonably define 'proper surgical technique' or explain what technique could have been employed under the facts of this particular surgery that could have prevented the injury" (*Matney v Boyle*, 2024 NY Slip Op 30001[U], *9, 2024 NY Misc LEXIS 6, *12 [Sup Ct, Saratoga County, Jan. 2, 2024]; *see Byrne v Sidhu*, 215 AD3d 622, 622 [2d Dept 2023]; *Palazzolo v Green*, 189 AD3d 1056, 1059 [2d Dept 2020]). Nor did his affidavit explain at all how the defendant departed from good and accepted practice in the postoperative care that he rendered to the patient.

Hence, that branch of the defendant's motion seeking summary judgment dismissing the medical malpractice cause of action must be granted.

The elements of a cause of action to recover 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]). Hence, where a defendant establishes his or her prima facie entitlement to judgment as a matter of law in connection with a lack of informed consent cause of action by submitting an expert affirmation from a physician, a plaintiff can only raise a triable issue of fact by submitting "an expert affirmation stating with certainty that the information defendant[ ] allegedly provided to plaintiff before the [medical] procedures at issue departed from what a reasonable practitioner would have disclosed" (*Leighton v Lowenberg*, 103 AD3d 530, 530 [1st Dept 2013]).

"A failure to diagnose cannot be the basis of a cause of action for lack of informed consent unless associated with a diagnostic procedure that 'involve[s] invasion or disruption of the integrity of the body'" (*Janeczko v Russell*, 46 AD3d 324, 325 [1st Dept 2007], quoting Public Health Law § 2805-d[2][b]; *see Lewis v Rutkovsky*, 153 AD3d at 456).

Dr. Wolf opined that, when the defendant first proposed to repair the patient's plantar plate, he explained to her that the risks of surgery included, but were not limited to, infection, nonunion, nerve injury, loss of toe purchase, and the need for additional surgery. Dr. Wolf further noted that the defendant had testified, at his deposition, that, when discussing the treatment of hammertoe with the patient, the defendant discussed conservative treatment options, including taping the toe, using padding, using orthotics, and allowing for more time to pass following the plantar plate repair. Dr. Wolf opined that the defendant appropriately informed patient that her hammertoe immediately could be corrected by surgery, but, alternatively, that she could try conservative options. Dr. Wolf explained that it was the patient herself who chose to proceed with the surgery, and that the surgery nonetheless was indicated even at that juncture. Moreover, as he characterized the defendant's testimony, prior to proceeding with the hammertoe repair surgery, the defendant once again informed the patient that the risks of surgery included, but were not limited to, infection, nonunion, nerve injury, and the need for additional surgery.

The patient's claim, in her bill of particulars, to the effect that the defendant failed to diagnose her with certain conditions all related to postoperative symptoms, and do not relate to the procedure itself. Hence, no cause of action lies with respect to so much of her lack of informed consent cause of action as was premised on the defendant's purported failure to diagnose postoperative conditions. In any event, in opposition to the defendant's prima facie showing of entitlement to judgment as a matter of law with respect to the lack of informed consent cause of action insofar as it related to the procedures themselves, Dr. Klein did not address the issue and, hence, the plaintiffs failed to raise a triable issue of fact. Consequently, summary judgment must be awarded to the defendant dismissing the lack of informed consent cause of action.

Claims for loss of consortium or loss of services must arise from tortious conduct (*see Odell v Dalrymple*, 156 AD2d 967, 967-968 [4th Dept 1989]), and are asserted to recover for

injury to the relationship between the injured plaintiff and the plaintiff who seeks to recover for those losses (*see Buckley v National Freight*, 90 NY2d 210, 214-216 [1997]). As a general rule, only a spouse may recover for loss of consortium (*see id*.; *Powell v City of New York*, 6 Misc 3d 1033[A], 2005 NY Slip Op 50282[U], *2-4, n 4, 2005 NY Misc LEXIS, *5, n 4 388 [Sup Ct, N.Y. County, Mar. 1, 2005]), As a derivative claim, the loss of consortium cause of action asserted by Christian Arnold, as the patient's husband, must also be summarily dismissed, inasmuch as the patient's claims are being summarily dismissed (*see Clarke v City of New York*, 82 AD3d 1143, 1144 [2d Dept 2011]; *Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]).

Accordingly, it is,

ORDERED that the defendant's motion is granted, he is awarded summary judgment dismissing the complaint, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint in its entirety.

This constitutes the Decision and Order of the court.

3/17/2025
DATE

JOHN J. KELLEY, J.S.C.

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