

**Guerrero v New York Downtown Orthopaedic Assoc.
of Manhattan**

2025 NY Slip Op 33831(U)

October 8, 2025

Supreme Court, New York County

Docket Number: Index No. 805126/2018

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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ELIZABETH GUERRERO,

Plaintiff,

- v -

NEW YORK DOWNTOWN ORTHOPAEDIC ASSOCIATES
OF MANHATTAN and NEW YORK DOWNTOWN
ORTHOPAEDIC ASSOCIATES,

Defendants.

-----X

BIK ORTHOPEDICS, P.C. (doing business as NEW YORK
DOWNTOWN ORTHOPAEDIC ASSOCIATES
OF MANHATTAN and NEW YORK DOWNTOWN
ORTHOPAEDIC ASSOCIATES),

Third-Party Plaintiffs,

-against-

ELIZABETH MELVIN, P.T., and WOJCIECH KARPINSKI,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 129, 130, 131, 132, 133, 138, 139, 144, 146

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 005) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 134, 135, 136, 137, 140, 141, 142, 143, 147

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

In this action to recover damages for medical malpractice, the defendant third-party plaintiff, BIK Orthopedics, P.C., doing business as New York Downtown Orthopaedic Associates of Manhattan, and as New York Downtown Orthopaedic Associates (BIK), moves pursuant to CPLR 3212 for summary judgment dismissing the complaint (MOT SEQ 004). The plaintiff

opposes BIK's motion. That motion is granted to the extent that BIK is awarded summary judgment dismissing so much of the medical malpractice cause of action as was premised upon its employment of a defective electrical stimulation device, its failure to assess the plaintiff's sensitivity and tolerance to electrical stimulation therapy, and its failure to monitor the plaintiff while she was undergoing that therapy, as well as any claims to recover for lack of informed consent and negligent hiring, training, supervision, retention, and credentialing of healthcare employees. That motion is otherwise denied, since BIK failed to establish, prima facie, that its personnel did not depart from the applicable standard of care in the administration of electrical stimulation therapy to the plaintiff, specifically as to whether the electricity was administered at an excessive level of intensity for an excessive period of time, thus causing her to sustain burns.

The third-party defendant Elizabeth Melvin, P.T., separately moves for summary judgment dismissing the third-party complaint insofar as asserted against her (MOT SEQ 005). Both BIK and the plaintiff oppose her motion. Melvin's motion is granted, and the third-party complaint is dismissed insofar as asserted against her.

The crux of the plaintiff's claims against BIK is that, on December 19, 2016, its healthcare personnel, in the course of treating her for right upper back and shoulder pain, negligently employed an electrical stimulation device upon her, thus burning her skin. In her complaint, she asserted that the electrical stimulation treatment involved the administration of a small quantity of electrical current through small pads that were placed on the skin surface of her upper back and shoulder region, and that the pads were intended to remain in place for a certain limited period of time so as to stimulate her muscles, but avoid burns or damage her skin. The plaintiff averred that BIK's employees departed from good and accepted practice by permitting the pads to remain on her skin for an excessive period of time at an inappropriate level of intensity, thus causing skin burns and damage.

In her bill of particulars, the plaintiff alleged that BIK's employees committed malpractice by failing properly to assess her sensitivity and tolerance levels to the electrical therapy device

that they utilized. The plaintiff also asserted that they failed properly and safely to apply and utilize electrical physical therapy instruments in treating her, specifically, in employing and applying an electrical stimulation device to her skin, despite the defective nature of that device, and despite the fact that the device was set to an excessive and dangerous temperature and/or was applied for an excessive period of time, thus causing and allowing her to be overexposed to electrical current and pulses. She alleged that BIK's therapists and technicians failed to keep and maintain the device that they utilized in safe condition. She further averred that BIK failed properly to monitor both her and the device while the pads on the device were attached to her, and in abandoning her while the pads were attached. The plaintiff further faulted BIK for failing properly to inspect, maintain, adjust, and utilize the device, in failing properly to calibrate the device, and in failing to determine and follow safety limits for the use of the device. In addition, the plaintiff contended that BIK's personnel failed to establish safe and adequate protocols and regimens for the treatment rendered to her. Moreover, she averred that BIK's personnel failed to perceive and react to the burn in a timely fashion, and, thus, failed to discontinue the electrical stimulation procedure in a timely manner. She also claimed that BIK failed to treat her burn in a proper and timely fashion. The plaintiff further noted that she was going to rely upon the doctrine of *res ipsa loquitur* "in inference" of BIK's negligence and malpractice.

Although she only asserted one cause of action in her complaint, which sounded in medical malpractice, in her bill of particulars, she alleged that BIK failed properly to warn her of the risks involved in utilization of an electrical stimulation device, and, thus, failed to obtain her fully informed consent to the treatment provided.¹ Moreover, she asserted in her bill of

¹ "It is well settled that lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" (*Jolly v Russell*, 203 AD2d 527, 528 [2d Dept 1994]; see *Dodes v North Shore Univ. Hosp.*, 149 AD2d 455, 456 [2d Dept 1989]; *Culkin v Nassau Hosp. Assn.*, 143 AD2d 973, 974 [2d Dept 1988]). "In creating the cause of action, the Legislature not only established the unique factual allegations which support such a cause of action, but also established equally unique defenses to liability, and placed specific limitations on the types of cases in which the cause of action may be asserted" (*Jolly v Russell*, 203 AD2d at 528-529; see Public Health

particulars that BIK failed properly to vet and investigate the credentials and qualifications of treating therapy providers, failed to keep therapists under proper medical supervision, and failed properly to train and otherwise supervise those providers.²

The plaintiff further contended in her bill of particulars that, as a consequence of the wrongdoing committed by BIK's personnel, she sustained severe acute traumatic electrical burns on the back of the neck, near its border with the upper back and right shoulder, with open deep wounds, intense pain, swelling, restriction of motion, and limitation of function and use of the upper back and right shoulder. She averred that large scabs thereafter formed at the location of the burns, with itching and erythema of the affected skin, with resultant adhesive and inelastic scarring and disfigurement of the burned area, including a widened scar of the back of the neck. The plaintiff also claimed that the burns caused damage to nearby connective tissue and blood vessels. The plaintiff asserted that the scarring could not be revised by plastic surgery, and that she suffered from residual embarrassment because of those wounds and the associated cosmetic deformity. The plaintiff also alleged that her sleep was impaired as a consequence of her injuries, with resultant further pain and fatigue, and that her existing physical therapy regimen was disrupted, causing the intensification of her symptoms of cervical spine discogenic pain and discomfort, which was the condition for which BIK had been treating her in the first instance.

In its third-party complaint, BIK asserted causes of action against the third-party defendant Melvin, a BIK physical therapist, for contribution and common-law indemnification,

Law § 2805-d). Inasmuch as the plaintiff asserted a lack of informed consent claim in her bill of particulars, the court will address it as if it had been articulated in the complaint as a cause of action.

² The court notes that, while allegations of negligent hiring, training, supervision, and retention constitute a cause of action independent of a medical malpractice cause of action, and the plaintiff did not separately plead a such cause of action, the court will address that claim as if it had been separately pleaded (see *Burgos v Lau*, 2025 NY Slip Op 33250[U], *2 n 2, 2025 NY Misc LEXIS 7290, *2 n 2 [Sup Ct, N.Y. County, Aug. 28, 2025] [Kelley, J.]; *Estate of Gebert v Huntington Hills Ctr. for Health*, 2024 NY Misc LEXIS 51911, *16 [Sup Ct, Suffolk County, Sep. 5, 2024]; see also *Taylor v Methodist Hosp.*, 6 Misc 3d 1008[A], 2004 NY Slip Op 51750[U], *4, 2004 NY Misc LEXIS 2898, *9 [Sup Ct, Kings County, Nov. 1, 2004] [deeming allegation of "negligent credentialing" to constitute an independent cause of action]).

the latter on the ground that, if BIK were to be held liable to the plaintiff, its liability would only arise because it was being held vicariously liable for Melvin's malpractice.³ Although the plaintiff did not seek leave to amend her complaint to add a direct cause of action against Melvin, the plaintiff did serve a bill of particulars in response to Melvin's demand, in which she essentially reiterated the claims that she had asserted against BIK, and asserted that Melvin was one of the two BIK therapists who had administered the subject electric stimulation therapy.

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 *Flanders v Goodfellow*, _____ NY3d_____, 2025 NY Slip Op 02261, *1 [Apr. 17, 2025]; *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]; see *Haymon v Pettit*, 9 NY3d 324, 327 n [2007]). Once the movant meets that 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]).

³ In an order dated December 9, 2022, this court granted BIK's motion for leave to enter a default judgment on the issue of liability against third-party defendant Walter Karpinski (MOT SEQ 002), with the trial on the issue of apportionment of damages to be held simultaneously with the trial on the main action.

“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 its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of its defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]). Moreover, where a party's submission itself reveals the existence of a triable issue of fact, that party is deemed to have failed to establish its prima facie entitlement to judgment as a matter of law (see *Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016]; *Kimber Mfg., Inc. v Hanzus*, 56 AD3d 615, 617 [2d Dept 2008]).

“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-Sturup 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]).

Even where an adverse outcome is a known risk of a medical or therapeutic procedure, a plaintiff may raise a triable issue of fact as to whether a healthcare provider committed malpractice by showing that the outcome was caused by improper surgical, medical, or therapeutic technique, rather than by an unexplained or incidental event (see *Matney v Boyle*, 237 AD3d 1382, 1384-1385 [3d Dept 2025]; *Bengston v Wang*, 41 AD3d 625, 626 [2d Dept 2007]; see also *Hoffman v Taubel*, 2021 NY Slip Op 31523[U], *4-5, 2021 NY Misc LEXIS 2379, *8-9 [Sup Ct, N.Y. County, Apr. 30, 2021] [Kelley, J.], *affd* 208 AD3d 1099 [1st Dept 2022] [merely because the transection of a ureter is a known risk of a hysterectomy, it does not follow

that a surgeon or a surgeon's assistant is excused from properly performing the procedure]; *Mathias v Capuano*, 2015 NY Slip Op 32160[U], *5-6, 2015 NY Misc LEXIS 4141, *12-14 [Sup Ct, Suffolk County, Nov. 5, 2015]; cf. *Henry v Duncan*, 169 AD3d 421, 421 [1st Dept 2019] [plaintiff failed to raise triable issue of fact in opposition to physician's showing that injury was a "known risk that may occur despite competent surgical care having been provided"]).

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 the burden on a summary judgment motion, 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, 1045 [2d Dept 2010]; *Grant v Hudson Val. Hosp. Ctr.*, 55 AD3d 874, 874 [2d Dept 2008]; *Terranova v Finklea*, 45 AD3d 572, 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; *Luu v Paskowski*, 57 AD3d 856, 857 [2d Dept 2008]). Thus, to defeat a defendant's prima facie showing of entitlement to judgment as a matter of law, a plaintiff usually must produce expert testimony regarding specific acts of malpractice, and not just testimony that contains "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*Alvarez v Prospect Hosp.*, 68 NY2d at 325; see also *Pancila v Romanzi*, 140 AD3d 516, 516 [1st Dept 2016]; *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). 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).

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

it” (*id.*; see *States v Lourdes Hosp.*, 100 NY2d 208, 211-212 [2003]; Restatement [Second] of Torts § 328D). To establish a prima facie case of negligence in support of a *res ipsa loquitur* charge, plaintiff must establish three elements:

“[1.] the event must be of a kind that ordinarily does not occur in the absence of someone’s negligence;

“[2.] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and

“[3.] it must not have been due to any voluntary action or contribution on the part of the plaintiff”

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

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

In support of its motion, BIK submitted the pleadings, the plaintiff's bills of particulars, transcripts of the parties' deposition testimony, relevant medical records, a statement of allegedly undisputed material facts, an attorney's affirmation, the affirmation of its principal, orthopedist Eli Bryk, M.D., and the expert affirmation of physical therapist Thomas Gallagher, P.T., D.P.T., O.C.S., the latter of whom opined that none of BIK's therapists, assistant therapists, aides, or technicians departed from the applicable standards of care, and that nothing that they did or did not do caused or contributed to the plaintiff's injuries.

Dr. Bryk asserted in his affirmation that, in 2016, BIK employed two physical therapists, one of whom was Melvin, and the other a therapist by the name of Ahmed Abdalaal, P.T. He stated that, at that time, BIK also employed a physical therapy assistant named Wojchiech "Walter" Karpinski, who was named as a third-party defendant in this action. Dr. Bryk explained that, as physical therapists, Melvin and Abdalaal were responsible for evaluating new patients and establishing care plans, among other duties. He further explained that licensed physical therapy assistant Karpinski was responsible for the implementation of care plans under the direction and supervision of Melvin and Abdalaal.

Dr. Bryk explained that electrical stimulation treatment has a variety of uses and that, in the plaintiff's case, it was delivered as a means of pain relief by transmitting electrical signals through muscles, which he asserted reduces the sensitivity of neurons responsible for detecting painful stimuli. According to Dr. Bryk, this treatment is very safe, as any person can purchase an electrical stimulation machine for personal use, although he noted that those purchased for personal use are much less complex and offer fewer features than those used at BIK and similar physical therapy practices. He stated that, in 2016, electrical stimulation treatment was administered at BIK via devices known as an Intellect Legend XT, which were owned and maintained by New York Presbyterian/Lower Manhattan Hospital (NYPH). Dr. Bryk averred that, prior to the plaintiff's treatment at BIK on December 19, 2016, there were no known incidents of burns caused by electrical stimulation machines at BIK, and that none of the Intellect Legend XT machines at BIK had ever malfunctioned. He further asserted that each machine in operation at BIK on that date continued to be operated without malfunction even after that date.

Dr. Bryk concluded that, had the plaintiff's injury actually been caused by a malfunction of the Intellect Legend XT, such occurrence was without any prior notice to BIK, as the machine did not manifest any signs of defect prior to December 19, 2016, and had never malfunctioned previously. Consequently, and because that device was employed without incident after December 19, 2016, he opined that it was "highly unlikely" that the plaintiff's injuries were caused by a machine malfunction or defect.

In his affirmation, Gallagher opined that no BIK therapist, assistant therapist, technician, aide, or employee departed from the applicable standards of care, and that nothing that they did or did not do caused or contributed to the plaintiff's injuries.

As Gallagher recounted the plaintiff's relevant medical history, on December 24, 2015, the plaintiff presented to internist Rowland Chavez, M.D., for an annual physical, at which she reported that she had sustained a work-related accident in October 2015. She complained of sharp left upper quadrant pain, for which she was taking the muscle relaxant Methocarbamol

and the non-steroidal anti-inflammatory drug (NSAID) Ibuprofen. She returned to see Dr. Chavez on January 22, 2016, complaining of continued right shoulder and upper back pain. On that date, Dr. Chavez conducted a physical examination of the plaintiff, noting that her right trapezius was tender to palpation, and that she exhibited limited internal rotation of her right arm. According to Gallagher, Dr. Chavez prescribed the NSAID naproxen, the muscle relaxant cyclobenzaprine, and home exercises. Gallagher explained that, on August 1, 2016, the plaintiff presented to neurologist Kishan Patel, M.D., reporting a history of neck pain and headaches since the October 2015 work-related injury, and describing the pain as constant and located in the neck, with occasional numbness and tingling in the bilateral upper extremities. Dr. Patel ordered a cervical magnetic resonance imaging (MRI) scan, which he concluded depicted the presence of degenerative disc disease. Dr. Patel thereupon prescribed physical therapy three times per week over a period of six weeks to address cervical radiculopathy, with no specific modalities identified or recommended.

The plaintiff presented to BIK for the first time on November 18, 2016, at which time Abdalaal evaluated her, and concluded that she suffered from moderate-to-severe upper trapezius muscle spasm and severe neck pain, which the plaintiff characterized as an 8 on a scale of 10. Abdalaal developed a treatment plan that included manual muscle exercise, electrical stimulation, administration of ultrasound, and stretching. The plaintiff returned to BIK on November 21, 2016, after which Karpinski authored a progress note, co-signed by Melvin, which reported that Karpinski had applied ice and electrical stimulation to the plaintiff's neck and shoulders, and that the plaintiff tolerated the treatment well. As set forth in BIK's chart, on November 28, 2016 and December 2, 2016, Abdalaal administered electrical stimulation and heat to the plaintiff's neck and shoulders, which she again tolerated well. On December 5, 2016, Karpinski authored a note, co-signed by Melvin, reporting that he had applied ice over the electrical stimulation pads, which the plaintiff tolerated well. On December 14, 2016, the plaintiff returned, and was treated by Melvin with electrical stimulation and heat.

As Gallagher interpreted BIK's chart, on December 19, 2016, the plaintiff returned to BIK, at which time Karpinski treated her with electrical stimulation. According to Gallagher, Karpinski's note, which Melvin co-signed, reported a "normal" visit. He noted, however, that the plaintiff testified at her deposition that, after 14 to 15 minutes of electric stimulation on that date, she "suddenly" started feeling an itching or burning sensation, and thereupon gestured to a female employee, after which the electrical stimulation patches were removed. Gallagher further adverted to the plaintiff's deposition testimony, which was to the effect that the plaintiff then had to return to work, consequently placed her uniform back on, and left BIK's offices, albeit without having any discussions with anyone before leaving the facility or notifying anyone that she had experienced itching or burning. As Gallagher summarized the plaintiff's testimony,

"electric stimulation was performed at each of her visits, always in the same manner and for the same duration, of which she kept track. This included the subject visit. Ms. Guerrero described the process as, 'putting patches on me and the towel for about 15 minutes.' Two patches were placed on her right shoulder towards the base of her neck on the posterior, upper trapezius area."

Nonetheless, Gallagher asserted that, later in the afternoon of December 19, 2016, the plaintiff returned to BIK, complaining of "burn blisters" in her upper trapezius area. As set forth in a note that Karpinski authored, the plaintiff did, in fact, present with blisters, which, according to Karpinski, resembled an "electrical stimulation burn." BIK personnel treated the plaintiff with topical alcohol and antibacterial cream, and the burns were covered with sterile gauze. During the evening of December 19, 2016, the plaintiff presented to St. Luke's Cornwall Hospital in Cornwall, New York, complaining of a burn on her upper back and shoulder. Hospital physicians prescribed the NSAID ketorolac tromethamine, calcium carbonate/vitamin DS and magnesium oxide supplements, and the narcotic/NSAID compound hydrocodone/acetaminophen. She was discharged from the hospital after slightly more than one hour.

Gallagher explained that the intensity of the electrical stimulation machines is controlled by a dial, which is set by the person providing the therapy, and that the intensity is dictated by the patient's subjective tolerance. He asserted that, during electrical stimulation therapy at BIK,

patients are never left unattended, inasmuch as they are treated in an open facility, with several physical therapists, physical therapy assistants, or physical therapy aides nearby. He further explained that, in accordance with the relevant treatment plan, either ice or heat could be applied to the plaintiff's neck and shoulder along with the with electrical stimulation.

As Gallagher summarized the plaintiff's course of treatment at BIK, she had undergone electrical stimulation therapy without incident on six occasions prior to December 19, 2016, and each those prior treatments was of equal duration to the treatment in question. He opined that a burn is an uncommon, but known, risk of electrical stimulation treatment, and are not indicative of negligent administration of treatment, since they can and do occur even when electrical stimulation is applied at an appropriate intensity and for an appropriate amount of time. Gallagher concluded that BIK's personnel properly monitored the plaintiff during treatment, since the plaintiff herself testified that, when she experienced discomfort on December 19, 2016, she notified a nearby employee, who promptly terminated the treatment. He asserted, in this respect, that the intensity of electrical stimulation treatment is dictated by patient comfort, and that the only way to know if such treatment is causing discomfort is for the patient to notify the provider, which the plaintiff did on December 19, 2016.

Gallagher concluded that there was no merit to the contention that BIK failed to assess her sensitivity to electrical stimulation treatment, again noting that she had successfully undergone identical treatment on six prior occasions, which did not reflect or reveal a heightened sensitivity to such treatment, which would have "become apparent" during the first such treatment. As he framed it, even if she had manifested such a sensitivity, there was no way for BIK to know until such time that she notified BIK that she was experiencing discomfort.

Gallagher expressly opined that BIK satisfied the applicable standard of care when administering electrical stimulation treatment to the plaintiff on December 19, 2016. In this respect, he again asserted that the plaintiff had undergone electrical stimulation therapy on six prior occasions without incident, and that each of the six prior electrical stimulation treatments

was of equal duration and “identical” to the treatment in question. He reiterated Dr. Bryk’s opinion that electrical stimulation therapy is generally safe, and can be self-administered.

Gallagher expressly rejected the plaintiff’s contentions that the therapy was administered at an “excessive temperature” and for an “excessive” amount of time. In this regard, he averred that electrical stimulation treatment is not administered at any particular temperature, but at varying levels of intensity of electrical impulse, and that, consequently, the administration of the electrical impulses cannot be characterized by its temperature. Gallagher explained that “[e]lectricity can generate heat, and heat applied to skin can cause burns, *as it appears to have in this case*, but for the purposes of discussion of treatment administered in this case, Ms. Guerrero’s allegation of excessive temperature is understood to mean excessive intensity” (emphasis added). Nonetheless, Gallagher concluded that the plaintiff’s own deposition testimony undercut her contentions of wrongdoing, since she testified that the December 19, 2016 treatment was administered in the same manner as the six prior administrations, none of which resulted in injury. He asserted that, “[i]f the treatment intensity and time were the same or similar as to the prior occasions, which did not result in burns, neither excessive intensity nor excessive time could have caused the alleged subject burn on December 19, 2016.” Gallagher further asserted that the nature and intensity of the treatment is “dictated by the patient,” adverting in this respect to Melvin’s deposition testimony, in which the latter explained that, when electrical therapy begins, the treatment provider works with the patient to set the machine at an appropriate intensity, while the only feedback that the provider obtains is from the patient himself or herself, and that patient tolerance varies greatly. Gallagher thus explained that, if the intensity is uncomfortable for a patient, the only way the treatment provider can know is if the patient says so. Since the plaintiff did so in the course of her therapy on December 19, 2016, Gallagher concluded that Karpinski and other BIK personnel responded immediately and appropriately to her complaints, and did so within the standard of care.

Gallagher asserted that,

“[g]iven Ms. Guerrero’s testimony that the treatment was always rendered in the same manner, the only explanation for her injuries is that she did not inform anyone of her discomfort until after she had already suffered a burn. *Burns can occur quickly*, so Ms. Guerrero did not necessarily sit idly by, experiencing great discomfort for minutes, before getting someone’s attention. However, the only way for a treating therapist can know of discomfort is by patient feedback and, per Ms. Guerrero’s testimony, the treatment was stopped as soon as she complained of discomfort”

(emphasis added). Consequently, Gallagher concluded that BIK personnel appropriately and properly monitored the plaintiff, particularly in light of the plaintiff’s deposition testimony that she “suddenly” started feeling an itching or burning sensation,

With respect to the plaintiff’s contention that the electrical stimulation machine employed on December 19, 2016 had malfunctioned, was defective, or was otherwise responsible for her injuries, Gallagher asserted that “there was no way for BIK or its personnel to know injuries would occur. As Dr. Bryk establishes in his affirmation, the machines used were owned and maintained by” NYPH, and “there were no known incidents of burns caused by such machines at BIK prior to December 19, 2016, and no such issues have occurred since.”

Gallagher further opined that Karpinski was appropriately licensed, trained, and supervised, was authorized to administer electrical stimulation treatment, and administered such treatment to the plaintiff on three occasions prior to December 19, 2016 without incident. Moreover, he opined that BIK had no duty to obtain any patient’s informed consent prior to administering electrical stimulation treatment, since such therapy is not an invasive procedure and that, in any event, the plaintiff’s injury was known and accepted risk of electrical stimulation.

In opposition to BIK’s motion, the plaintiff relied on many of the same documents that BIK had submitted, and also submitted an attorney’s affirmation, photographs of the plaintiff’s burns, and safety protocols applicable to the electrical stimulation device that BIK had employed in treating the plaintiff on December 19, 2016. The plaintiff essentially argued that BIK failed to establish its prima facie entitlement to judgment as a matter of law, since its expert admitted that Karpinski’s administration of electrical stimulation therapy caused the burns to the plaintiff’s

upper back, and that the length, width, and depth of the burn, as depicted in photographs of the plaintiff taken shortly after the occurrence, raised an inference that the burn could only have been caused if Karpinski negligently administered the electrical stimulation therapy due to excessive intensity for an excessive period of time. The plaintiff declined to submit an affirmation or affidavit from an expert physician, physical therapist, or assistant physical therapist to counter the opinions rendered by Gallagher and Dr. Bryk.

In reply, BIK submitted an attorney's affirmation, in which counsel argued that, inasmuch as BIK established its prima facie entitlement to judgment as a matter of law by, among other things, submitting expert affirmations, the plaintiff's failure to oppose the motion with expert testimony required the court to award it summary judgment dismissing the complaint.

Although the plaintiff's failure to submit an expert affirmation or affidavit was a risky tactic, the court concludes that BIK's own submissions reflected the existence of triable issues of fact as to whether Karpinski negligently administered electrical stimulation therapy to the plaintiff at an excessive intensity for an excessive duration, thus causing the burns that were concededly caused by that therapy. Although Gallagher opined that the burns could have, and did, occur in the absence of negligence, he provided no plausible explanation as to why the December 19, 2016 administration of stimulation, which he characterized as "identical" to the intensity and duration of six prior administrations, yielded a deep and wide burn, other than that it was an "unfortunate" occurrence. In the absence of an explanation by a qualified physician, such as a dermatologist, as to why and how identical treatments could yield such disparate outcomes, the court concludes that BIK failed to make the necessary prima facie showing. Gallagher essentially argued that the onus is always on the patient, and only on the patient, immediately to report discomfort, but, since burns usually develop quickly, a provider of electrical stimulation therapy can never be held liable for the *initiation* of a burn. He thus suggested that a provider could only be held liable for failing timely to terminate the electrical stimulation treatment after a patient complained of discomfort, thus causing a more extensive

burn. If the court were to accept this analysis, it would essentially be positing what is, in effect, a "one bite" rule for healthcare providers who administer electrical stimulation therapy, permitting them to initiate a burn without liability, which it declines to do.⁴

"In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself" (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d 948, 949 [2d Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; see *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Dupree v Westchester County Health Care Corp.*, 164 AD3d 1211, 1213 [2d Dept 2018]). Since there is no dispute that Karpinski was employed by BIK, and acting in the course of that employment on December 19, 2016, the court must deny that branch of BIK's motion seeking summary judgment dismissing so much of the medical malpractice cause of action was premised upon Karpinski's negligence in administering the electrical stimulation therapy to the plaintiff (see *Lawi v Complete Wellness Med., P.C.*, 2020 NY Slip Op 33659[U], 2020 NY Misc LEXIS 9936 [Sup Ct, N.Y. County, Oct. 28, 2020]). Since, however, the plaintiff declined to submit expert testimony to rebut Dr. Bryk's and Gallagher's opinions that the subject electrical stimulation device was not defective and did not malfunction, they had no notice of any defect, and that BIK's personnel did not fail properly to assess the sensitivity of the plaintiff's skin to electrical stimulation or fail properly to monitor the plaintiff on December 19, 2016, BIK must be awarded summary judgment dismissing those claims.

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

⁴ The court also concludes that, inasmuch as BIK failed to establish, prima facie, that the plaintiff's burn could have been caused even in the absence of negligence, the claim of malpractice based on the doctrine of res ipsa loquitur cannot be dismissed at this juncture, although it notes that the cause of the plaintiff's injury was not "unknown," as it clearly was caused by the stimulation device.

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]). 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 or healthcare provider, 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]). Expert testimony, however, is not necessary with respect to the issue of whether a reasonably prudent person, fully informed, would not have consented to the treatment (see *Gray v Williams*, 108 AD3d 1085, 1086-1087 [4th Dept 2013]; *Hugh v Ofodile*, 87 AD3d 508, 509 [1st Dept 2011]; *Andersen v Delaney*, 269 AD2d 193, 193 [1st Dept 2000]; *Hardt v LaTrenta*, 251 AD2d 174, 174 [1st Dept 1998]; *Osorio v Brauner*, 242 AD2d 511, 511-512 [1st Dept 1997]).

“The mere fact that the plaintiff signed a consent form does not establish the defendants’ prima facie entitlement to judgment as a matter of law” (*Huichun Feng v. Accord Physicians*, 194 AD3d 795, 797 [2d Dept 2021], quoting *Schussheim v Barazani*, 136 AD3d 787, 789 [2d Dept 2016]). Nonetheless, a defendant may satisfy the burden of demonstrating

its prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a detailed consent form, and there is also evidence that the necessity of the procedure, along with known risks and dangers, were discussed prior to the surgery (see *Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

BIK contended that the plaintiff was fully informed of the risks and benefits of electrical stimulation therapy, and the alternatives thereto, and that her consent to the therapy thus was fully informed. In any event, it further argued that electrical stimulation therapy is “non-invasive,” and, hence, may not be the subject of a claim of lack of informed consent. Inasmuch as the plaintiff did not submit an expert affirmation or affidavit addressing the qualitative sufficiency of the consent that was obtained, her claim to recover for lack of informed consent must be summarily dismissed. The court notes that BIK cited, and research has revealed, no authority for the proposition that electrical stimulation therapy is not a procedure subject to the Public Health Law’s informed consent provisions. In fact, the only authority related to that issue discovered by the court involved a case arising from electrical stimulation therapy in which the lack of informed consent cause of action was dismissed for the plaintiff’s failure to oppose the defendant’s motion with expert testimony, not because the treatment was “non-invasive” (see *Lawi v Complete Wellness Med., P.C.*, 2020 NY Slip Op 33659[U], 2020 NY Misc LEXIS 9936). The court thus need not address that issue, but nonetheless suggests that, if a procedure is one that routinely may result in the breach of the outer layer of skin, as would be caused by a burn, then the procedure might, in fact, be deemed to be an “invasive” one.

To establish a cause of action to recover for negligent hiring, supervision, training, retention, and credentialing of healthcare personnel, a plaintiff must demonstrate that the defendants either “knew, or should have known,” of their employees’ “propensity for the sort of conduct which caused the [patient’s] injury” (*Sheila C. v Povich*, 11 AD3d 120, 129-130 [1st Dept 2004]; see *Kuhfeldt v New York Presbyt./Weill Cornell Med. Ctr.*, 205 AD3d 480, 481-482 [1st Dept 2022]). BIK established, prima facie, that Karpinski was licensed, that he was trained

and authorized to administer electrical stimulation therapy, and that he performed his work under the supervision of a licensed physical therapist. In opposition to that showing, the plaintiff failed to raise a triable issue of fact as to whether Karpinski was unlicensed, unauthorized, or incapable of performing such a procedure, or that he treated the plaintiff without any supervision. Hence, that claim must be summarily dismissed.

Melvin moved for summary judgment dismissing the third-party complaint insofar as asserted against her. She did not, however, move for summary judgment dismissing the complaint in the main action, since she did not did not make any argument in her initial motion papers as to whether the complaint in the main action should be dismissed, and she did not submit an expert affirmation addressing whether Karpinski or other BIK employees committed malpractice. In support of her motion, Melvin relied on many of the same documents that BIK had submitted in support of its own motion, and also submitted a statement of allegedly undisputed material facts, additional deposition transcripts, an attorney's affirmation, her own affidavit, and photographs of herself and BIK physical therapy aide Michelle Batista.

In her affidavit, she stated as follows:

"I had my own schedule of patients to treat, I did not see plaintiff on December 19, 2016; I was not involved with plaintiff's treatment, and I did not see her when she returned to the facility later that afternoon. . . . Moreover, because I consistently took my lunch every day from 12:45 PM to 1:30 PM, I would not have even been present within the physical therapy treatment room during plaintiff's visit on December 19, 2016. . . . Although PTA Karpinski's treatment note from December 19, 2016 does not specify what time plaintiff's physical therapy began and/or ended, it estimated that her treatment ended at approximately 1:15 PM, as plaintiff testified that her therapy was during her lunch break that day, and PTA Karpinski's addendum to the December 19th treatment note states that plaintiff returned at 4:15 PM, approximately three (3) hours after plaintiff had received physical therapy Given that I was on my lunch break during plaintiff's visit at BIK Orthopedics on December 19, 2016, PT Abdelaal would have been PTA Karpinski's supervising physical therapist."

Melvin further adverted to the plaintiff's deposition testimony, in which the plaintiff averred that, upon first complaining of discomfort on December 19, 2016, a female in her mid-30s with curly, mid-length hair came to the plaintiff's assistance and helped to terminate the therapy. Melvin

described herself as having had long, straight, blonde hair in December 2016, and that she believed that it was therapy aide Michelle Batista who assisted the plaintiff, since Batista matched the plaintiff's description. Melvin further stated that since she was neither present for, nor involved with, the plaintiff's treatment on December 19, 2016, she had no information as to what happened to the plaintiff on that day, apart from what she subsequently learned later that evening from BIK's office manager, Jaclyn Murray. Specifically, Melvin asserted that, prior to signing out at 5:30 p.m. on December 19, 2016, Murray explained to her that Karpinski had treated the plaintiff earlier that day, and that the plaintiff returned in the afternoon, complaining about a burn. According to Melvin, this was the first time that she learned that the plaintiff was even present at BIK on that date. As Melvin explained it, Abdelaal, who was the physical therapist in charge of the plaintiff's case, refused to co-sign the note that Karpinski authored in connection with the plaintiff's December 19, 2016 treatment. She asserted that, despite informing Murray that she had nothing to do with that day's treatment, Murray instructed her to co-sign the note, and explained to her "that co-signing the treatment note did not mean anything and was part of my job responsibilities."

In opposition to Melvin's motion, BIK submitted an attorney's affirmation, in which counsel adverted to Melvin's deposition testimony, in which Melvin asserted that she was the only female at the practice who could have administered hands-on treatment to the plaintiff, and that, although there were female aides at the practice, BIK's management did not allow any aides to render physical therapy treatment to patients. Counsel further argued that Melvin's "only evidence" was an "unauthenticated, inadmissible, hearsay photograph" of Batista, whom he described as "someone purported to be an aide at the practice." He additionally contended that Melvin had admitted that her responsibility was to supervise physical therapy aides, and that the plaintiff herself testified that the stimulation pads were *placed* on her by a woman. Counsel reasoned that, since physical therapy aides were not permitted to render hands-on treatment, and that Melvin was the only female physical therapist or physical therapy assistant

who was authorized to engage in hands-on treatment at BIK, Melvin must have been the person who placed the stimulation pads on the plaintiff on December 19, 2016.

In reply, Melvin's attorney argued in an affirmation that BIK ignored documentary evidence establishing that Melvin was on her lunch break during the plaintiff's treatment at BIK's offices on December 19, 2016, and that any inference that Melvin might have been the woman who was involved with the plaintiff's treatment was mere speculation.

Melvin was entitled, as a third-party defendant, to move for summary judgment dismissing the complaint in the main action, despite the fact that the plaintiff had not asserted a claim directly against her (*see De Pan v First Natl. Bank of Glens Falls*, 98 AD2d 885, 885 [3d Dept 1983]), inasmuch she may assert, against the plaintiff, any defenses that BIK has to the plaintiff's claims (*see CPLR 1008; Martinez v One Plus Rental Sys.*, 247 AD2d 594, 594 [2d Dept 1998]; *Muniz v Church of Our Lady of Mt. Carmel*, 238 AD2d 101, 102 [1st Dept 1997]; *Lewis v Borg-Warner Corp.*, 35 AD2d 722, 723 [2d Dept 1970]; 2 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 1008.03]; *Can Lan Lu v Elk Mas 86 E. 10th, LLC*, 2025 NY Slip Op 32394[U], *2 n, 2025 NY Misc LEXIS 6001, *2 n [Sup Ct, N.Y. County, Jul. 3, 2025] [Kelley, J.]). Melvin elected, however, only to move for summary judgment dismissing the third-party complaint insofar as asserted against her. The plaintiff lacks standing to oppose Melvin's motion seeking summary judgment dismissing the third-party complaint, since the plaintiff has no direct interest in the outcome of that motion, and will not be aggrieved by any order disposing of that motion (*see Can Lan Lu v Elk Mas 86 E. 10th, LLC*, 2025 NY Slip Op 32394[U], *2 n, 2025 NY Misc LEXIS 6001, *2 n; *Lopez v Philip Ross Indus., Inc.*, 85 Misc 3d 1285[A], 2025 NY Slip Op 50799[U], *4, 2025 NY Misc LEXIS 4236, *8 [Sup Ct, Nassau County, May 16, 2025]; *Pianin v Altorki*, 2022 NY Misc LEXIS 37682, *22 [Sup Ct, N.Y. County, May 17, 2022] [Kelley, J.]; *see also Augustine v Halcyon Constr. Corp.*, 71 Misc 3d 715, 716-717 [Sup Ct, Bronx County 2021]; *cf. Mixon v TBV, Inc.*, 76 AD3d 144, 149 [2d Dept 2010] [defining "aggrievement" for appellate purposes])." Hence, the court declines to consider the papers that the plaintiff submitted in

opposition to Melvin's motion. Since the only time that Melvin urged that BIK's summary judgment motion should be granted was in reply papers that she submitted in connection with her own motion, the court also declines to consider those reply papers.

The court concludes that Melvin established her prima facie entitlement to judgment as a matter of law. It rejects BIK's contention that the "only evidence" that Melvin submitted to establish that she was not at all involved in the plaintiff's treatment was an unauthenticated photograph. Melvin identified the person in the photograph, explained her own whereabouts during all times on December 19, 2016, and unequivocally stated that she was not present at BIK during the times relevant to the plaintiff's claims, that she neither placed nor removed the electrical stimulation pads, and that, although she clearly is female, she did not resemble the description of the woman provided by the plaintiff. In opposition, BIK relied solely on speculation and attenuated inferences that Melvin simply had to have been the woman described by the plaintiff simply because aides were "not allowed" to provide hands-on treatment. Hence, summary judgment must be awarded to Melvin dismissing the third-party complaint insofar as asserted against her.

The parties' remaining contentions are without merit.

Accordingly, it is,

ORDERED that the motion of the defendants New York Downtown Orthopaedic Associates of Manhattan and New York Downtown Orthopaedic Associates, also known as BIK Orthopedics, P.C., doing business as New York Downtown Orthopaedic Associates of Manhattan, and as New York Downtown Orthopaedic Associates, for summary judgment dismissing the complaint (MOT SEQ 004) is granted only to the extent that they are awarded summary judgment is dismissing so much of the medical malpractice cause of action as was premised upon the employment of a defective electrical stimulation device, the failure to assess the plaintiff's sensitivity and tolerance to electrical stimulation therapy, and the failure to monitor the plaintiff while she was undergoing that therapy, as well as any claims to recover for lack of

informed consent and negligent hiring, training, supervision, retention, and credentialing, those claims are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the motion of the third-party defendant Elizabeth Melvin, P.T., for summary judgment dismissing the third-party complaint insofar as asserted against her is granted, and the third-party complaint is dismissed insofar as asserted against her; and it is further,

ORDERED that, on the court's own motion, the third-party action is severed against the third-party defendant Elizabeth Melvin, P.T.; and it is further,

ORDERED that the Clerk of the court is directed to enter judgment dismissing the third-party complaint insofar as asserted against the third-party defendant Elizabeth Melvin, P.T.; and it is further,

ORDERED that, on the court's own motion, the attorneys for all of the remaining parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on October 30, 2025, at 11:00 a.m., at which time they shall be prepared to discuss resolution of the action and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

10/8/2025
DATE

JOHN J. KELLEY, J.S.C.

MOTION 004:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE
MOTION 005:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE
MOTION:	<input type="checkbox"/>	CASE DISPOSED		NON-FINAL DISPOSITION	