SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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DORCENE SIMS,

Plaintiff,

- v -

RICHARD PEARL, M.D., and SURGICORE SURGICAL CENTER,

Defendants.

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INDEX NO. 805217/2020

MOTION DATE 10/14/2025
10/14/2025

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 97, 99, 100, 101, 106, 107

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 102, 103, 104, 105, 108

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

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, negligent hiring, training, supervision, retention, and credentialing of healthcare personnel, negligent staffing, and negligent healthcare facility administration, the defendant SurgiCore Surgical Center (SSC) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against it (MOT SEQ 001). The plaintiff opposes that motion. The defendant Richard Pearl, M.D., separately moves for the same relief as to him (MOT SEQ 002). The plaintiff opposes that motion as well. The motions are granted, and the complaint is dismissed.

The crux of the plaintiff's claim is that, on August 10, 2017 and December 20, 2017, the defendant orthopedic surgeon Pearl, who performed his operative procedures at SSC, negligently examined and diagnosed the condition of her right rotator cuff and labrum, and thereupon negligently performed a procedure upon that rotator cuff and labrum. In her

complaint, she specifically asserted that Pearl failed properly and timely to diagnose, care for, and treat a right rotator cuff tear, a superior labral anterior posterior (SLAP) tear of the right shoulder, and right shoulder impingement syndrome. The plaintiff further asserted that Pearl failed properly to perform a right rotator cuff repair, a right labral repair, a right acromioplasty, and a right Mumford procedure. More specifically, he alleged that Pearl failed properly to implant a right rotator cuff anchor. In addition, she asserted that the defendants failed to obtain her fully informed consent to the procedure that Pearl did perform. The plaintiff averred that, as a consequence of this tortious conduct, she experienced right shoulder pain, tenderness, stiffness, weakness, and limitation of motion, including a decreased ability to reach and lift overhead, leading to the need for repeat right shoulder surgery, physical therapy, and the need for the administration of analgesics, anti-inflammatory medications, and intra-articular injections. She asserted, moreover, that she missed time from work, and thus sustained a loss of earnings.

In her bill of particulars, the plaintiff essentially reiterated the allegations set forth in her complaint, adding that the defendants failed to assemble a proper, experienced, and trained medical team to care for and render treatment to her, and negligently granted privileges to the medical and other personnel who rendered that medical care and treatment to her. She alleged that the defendants negligently hired and retained medical and other personnel who rendered care and treatment to her, and negligently entrusted that medical care and treatment to persons not fully qualified to render that care and treatment. In this respect, she contended that the defendants failed properly to investigate and ascertain the qualifications, credentials, background, and skills of the medical and other personnel who rendered care and treatment to her prior to granting them privileges or employ them. The plaintiff further faulted the defendants for failing to maintain, monitor, review, investigate, and consult logs of the medical and other personnel who rendered care and treatment to her in order to determine the fitness and skill level of their personnel. In addition, she argued that the defendants failed properly and adequately supervise, monitor, and evaluate medical and other personnel who rendered care

and treatment to her. Specifically, the plaintiff alleged that SSC negligently granted surgical privileges to Pearl, negligently hired, retained, and entrusted the plaintiff's medical care to Pearl, and failed properly to investigate his qualifications, credentials, background, and skills before granting him privileges and/or employing him. She further alleged that SSC failed to maintain, monitor, review, investigate logs referable to Pearl to determine his fitness and level of skill and experience in determining the care and treatment rendered to her, and failed properly and adequately to supervise him or evaluate his performance prior to granting him privileges and/or employing him. Finally, she alleged that SSC failed adequately to staff its patient, treatment, examination, emergency, and operating rooms at its facility with a sufficient number of personnel, and negligently administered its healthcare facility duties, functions, and obligations.

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,* 44 NY3d 57, 62-63 [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]).

"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, but 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]). 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]; *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]; *Jones v Ricciardelli*, 40 AD3d 935, 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 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).

"'Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause'" (*McAlwee v Westchester Health Assoc., PLLC*, 163 AD3d 549, 551 [2d Dept 2018], quoting *Burns v Goyal*, 145 AD3d 952, 954 [2d Dept 2016]). Thus, where a moving defendant in a medical malpractice action makes a prima facie showing that he or she did not depart from good and accepted practice, or that the treatment rendered to the plaintiff did not cause or contribute to the plaintiff's injuries, the plaintiff, to defeat summary judgment, must submit an expert affirmation or affidavit in opposition; a plaintiff's failure to submit such an expert affirmation or affidavit under such circumstances requires the court to award summary judgment to the moving defendant (*see Benedetto v Tannenbaum*, 186 AD3d 1596, 1598 [2d Dept 2020]; *Bethune v Monhian*, 168 AD3d 902, 903 [2d Dept 2019]; *Koster v Davenport*, 142 AD3d 966, 969 [2d Dept 2016]; *Whitnum v Plastic & Reconstructive Surgery, P.C.*, 142 AD3d 495, 497 [2d Dept 2016]; *Roques v Noble*, 73 AD3d at 207; *Bailey v Owens*, 17 AD3d 222, 223 [1st Dept 2005]; *cf. Williams v Sahay*, 12 AD3d 366, 368 [2d Dept 2004] [unsworn affidavit of unnamed expert that was not affirmed under the penalties for perjury is insufficient to raise triable issue of fact as to defendants' alleged malpractice]).

In support of its motion, SSC submitted the pleadings, the plaintiff's bills of particulars, transcripts of the parties' deposition testimony, relevant hospital, medical, and pharmacy records, a statement of allegedly undisputed material facts, a memorandum of law, an attorney's affirmation, and the expert affirmations of board-certified orthopedic surgeon Bradley D. Wiener, M.D., and healthcare consulting and management executive Bruce Podrat. Dr. Wiener opined that the defendants did not depart from good and accepted medical practice, and that nothing that they did or did not do caused or contributed to the plaintiff's claimed injuries. Podrat opined that SSC properly vetted and supervised surgeons who performed surgery at its facility, properly staffed its facility, and properly managed all aspects of medical and surgical practice undertaken at its facility, and that nothing that SSC did or failed to do in connection with the management of its facility caused or contributed to the plaintiff's injuries.

In support of his motion, Pearl relied on many of the same documents that SSC had submitted in support of its motion, and also submitted his own statement of allegedly undisputed material facts, an attorney's affirmation, a memorandum of law, and the expert affirmation of board-certified orthopedic surgeon James M. Lee, Jr., M.D., who opined that Pearl did not depart from accepted standards of medical care in treating the plaintiff, and that nothing that Pearl did or did not do caused or contributed to any of the plaintiff's claimed injuries.

Dr. Wiener first recapitulated the plaintiff's relevant medical history, noting that, during the plaintiff's first presentation to Pearl on August 10, 2017, when she was 55 years old, she reported having been struck by a motor vehicle while riding a bicycle on September 27, 2016, rendering her unconscious and unable to move her right shoulder, and causing severe pain in her right hip. She was taken from the accident scene to Brookdale Hospital in Brooklyn, New York. At the plaintiff's first visit with him, Pearl performed a physical examination of the plaintiff and reviewed magnetic resonance imaging (MRI) studies of her right shoulder and right hip, after which he recommended a right shoulder rotator cuff repair. Dr. Wiener characterized a December 4, 2017 preoperative medical evaluation report, written by Daniel Klein, M.D., of East

Side Primary Medical Care, P.C., as "unremarkable," suggesting that there was nothing to preclude the plaintiff from undergoing the anticipated arthroscopy.

Dr. Wiener stated that, on December 20, 2017, Pearl took a presurgical history of the plaintiff's medical conditions, performed a physical examination of the plaintiff, and performed the subject procedure at SSC's facility in Saddle Brook, New Jersey. As Dr. Wiener interpreted the relevant operative report, the procedure included a right shoulder diagnostic arthroscopy, a superior complete synovectomy of the glenohumeral joint, extensive debridement of a SLAP and rotator cuff tear, a tenotomy of the long head of the biceps, a subacromial decompression with acromioplasty, a Mumford procedure with excision of distal clavicle, and a rotator cuff repair. Dr. Wiener asserted that Pearl had written in the operative report that an Arthrex 4.75-millimeter (mm) SwiveLock had been employed for the rotator cuff repair, characterized by Dr. Wiener as consistent with SSC's December 20, 2017 implant record, which identified the implant as an Arthrex PEEKSwiveLock self-punching, 4.75 mm by 24.5 mm anchor. Dr. Wiener further stated that intraoperative photographs depicted significant fraying along the superior labrum, with evidence of a Type II SLAP tear, along with a biceps tenotomy procedure, followed by subacromial decompression and distal clavicle excision. He also identified images of a tear of the supraspinatus, with evidence that a non-metallic anchor had been employed in the repair.

Dr. Wiener asserted that, following the procedure, the plaintiff was transferred to the post-anesthesia care unit to recover, and that healthcare staff at SSC were provided with an operative report, a report of the plaintiff's condition upon arrival at that unit, instructions for further care, and instructions for the administration of postoperative medications, the latter two of which also were provided directly to the plaintiff. According to Dr. Wiener, those personnel also obtained and documented Pearl's orders, along with a letter of medical necessity permitting the plaintiff to obtain an ice machine to assist with her recovery. As Dr. Wiener recounted the relevant records, after the plaintiff was discharged, she never followed up with Pearl.

Dr. Wiener asserted that SSC did not deviate from the applicable standards of care referable to the plaintiff's December 20, 2017 procedure. In this respect, he noted that preoperative clearance was obtained and documented, a medical history was appropriately obtained, and a proper preoperative physical examination was conducted on the day of the procedure. Moreover, he concluded that the intraoperative photographs documented competent and successful treatment of the pathology that had been observed within the plaintiff's right shoulder at the time of the surgery, and that there was no evidence of an improper repair or any failure by Pearl to repair the defects in her right shoulder. In addition, Dr. Wiener noted that relevant medical records maintained by the New York City Department of Correction, and generated when the plaintiff was incarcerated at the Rose M. Singer Center in Bronx, New York, reflected that she reported to healthcare personnel from the New York City Health and Hospitals Corporation (NYC HHC) that she not only had undergone a rotator cuff repair procedure on December 20, 2017, but that she had "reinjured the right shoulder on 1/31/18 'after being attacked by another inmate,'" after which she complained of "pain and inability to move the shoulder." As Dr. Wiener interpreted the NYC HHC chart, a May 3, 2018 report of an X-ray of the plaintiff's right shoulder documented a history of rotator cuff surgery, revealing "a surgical anchor in the humeral head," with the radiologist forming an impression that the plaintiff had sustained "degenerative changes."

In addition, Dr. Wiener noted that, on April 5, 2019, the plaintiff presented to orthopedic surgeon Vladimir Tress, M.D., complaining of right shoulder pain and limited range of motion in that shoulder. She reported that she had been involved in a motor vehicle accident in 2016, and informed Dr. Tress that Pearl had performed a right shoulder arthroscopy upon her in December 2017. According to Dr. Wiener, Dr. Tress performed a right trigger thumb injection. Dr. Wiener also adverted to a September 11, 2019 report of an X-ray of the plaintiff's right shoulder taken at Kings County Hospital (KCH), in which healthcare personnel there observed the rotator cuff repair, changes of acromioclavicular decompression, and mild glenohumeral osteoarthritis,

albeit with no acute findings. Dr. Wiener further referred to a September 19, 2019 note written by healthcare personnel at the KCH orthopedic clinic in response to the plaintiff's request for an evaluation of right shoulder pain and her additional request that "metal be removed from shoulder to help with pain and stiffness." In addition, he noted that an October 16, 2019 MRI report from KCH indicated that the plaintiff was then suffering from moderate supraspinatus tendinosis, with a longitudinally oriented focus of intrasubstance cystic degeneration in the anterior fibers, but no additional tear of the rotator cuff. As Dr. Wiener phrased it, the MRI report depicted the results of the December 20, 2017 procedure, along with the distal clavicular resection and subacromial decompression that the plaintiff had undergone, and he explained that "[n]on-visualization of the intra-articular portion of the long head of the biceps tendon may reflect the presence of a high-grade tear versus previous tenotomy with or without concomitant tenodesis, mild degeneration of glenohumeral articular cartilage." Nonetheless, Dr. Wiener expressly concluded that these findings did not establish that the December 20, 2017 repair had failed, and that a later procedure reflected that the rotator cuff was intact and well repaired. On January 2, 2020, the plaintiff again presented to the KCH orthopedics department, making the same complaints, providing them with the same history that she had provided to Dr. Tress, and informing staff that she "wanted hardware removed." Healthcare personnel at KCH concluded that additional surgery was not indicated, and instead referred the plaintiff for physical therapy.

On June 1, 2020, the plaintiff presented to orthopedic surgeon Gregory R. Palutsis, M.D., at the Medical University of South Carolina (MUSC) in Florence, South Carolina, requesting an evaluation of her three-year history of right shoulder pain. Dr. Palutsis wrote in the MUSC chart that the plaintiff did not follow up with Pearl because she was moving from New Jersey to New York, and also indicated that she did not seem eager for physical therapy, instead preferring him to perform additional surgery on her right should. June 29, 2020, and again on August 20, 2020, Dr. Palutsis performed an evaluation of the plaintiff's right shoulder and, according to Dr. Wiener, referred in the chart to repeat MRI studies that did not reflect

evidence of further tearing of the rotator cuff, but instead showed inflammation. On September 9, 2020, Dr. Palutsis performed a right shoulder arthroscopy on the plaintiff, along with distal clavicle excision and lysis of adhesions, and diagnosed the plaintiff with acromioclavicular joint osteoarthritis. In the relevant operative report, Dr. Palutsis wrote that he inspected the glenohumeral joint intraoperatively, and concluded that the labrum showed mild degenerative changes, but no "frank tearing," while the plaintiff's subscapularis, middle and superior glenohumeral ligaments, inferior glenohumeral ligament, and the rotator cuff bursal surface all were intact, with no evidence of tearing in the rotator cuff bursal surface, no loose anchors in the shoulder from the 2017 surgery, and a "well-repaired" rotator cuff. He further noted that, upon Dr. Palutsis's September 21, 2020 postoperative examination of the plaintiff, the latter wrote in the MUSC chart that the plaintiff had excellent passive range of motion in the shoulder and a negative drop arm test. Dr. Wiener further explained that, on October 19, 2020, Dr. Palutsis wrote that a physical examination demonstrated "excellent range of motion," and that Dr. Palutsis recommended a further evaluation and the commencement of a physical therapy regimen that the plaintiff could execute at home. After a February 15, 2021 appointment, Dr. Palutsis wrote in the MUSC chart that the plaintiff continued to complain of pain, and appeared agitated, but that, when he continued to recommend physical therapy, the plaintiff told him that she could not afford it. Dr. Paultsis further noted in the chart that the plaintiff informed him that she presented to him so that she could complete application forms for disability insurance benefits. Dr. Wiener expressly concluded that, in light of Dr. Palutsis's findings, the September 9, 2020 procedure at MUSC was not occasioned by any deviation from the standard of care allegedly committed by Pearl on December 20, 2017.

In his affirmation, Dr. Lee reiterated the plaintiff's medical history, as described by Dr. Wiener, and concurred with Dr. Wiener's opinions that the subject procedure was indicated, that Pearl properly performed the surgery, and that neither the surgery nor any postoperative care

rendered by Pearl to the plaintiff caused or contributed to her ongoing pain or complaints of injury. He added, however, that,

> "[t]he only possible criticism raised as to The Surgery in any medical record I reviewed comes from a January 24, 2018 radiology report interpreting a right shoulder x-ray when plaintiff was incarcerated. The report indicates a '[m]etallic density overlying the humeral head' that 'does not have the typical appearance of a surgical device', that 'may represent a metallic pellet' and 'should be evaluated clinically'. This 'metallic density' was confirmed to be the anchor implanted by Dr. Pearl during The Surgery in a subsequent x-ray by an outside radiology company while plaintiff was still incarcerated [o]n May 3, 2018.
>
> "Perhaps plaintiff was advised about the questionable metallic density from the January 24, 2018 surgery, because she herself advocated for removal of hardware following her release. Specifically, [a] September 19, 2019 office note from Kings County Hospital recorded that plaintiff underwent a rotator cuff repair procedure, and 'wanted metal [to] be removed.'"

After recapitulating the examinations, care, and treatment rendered to the plaintiff by Dr. Palutsis in South Carolina, Dr. Lee asserted that the only other reference to an issue with the right shoulder anchor had been copied and pasted multiple times within the records of the plaintiff's primary care physician, Issa Jaradeh, M.D., of Prominis Medical Services in Brooklyn, New York, which recited that, as per Dr. Palutsis's note, "pt had a loose anchor in the shoulder that needed to be padded." Upon reviewing Dr. Palutsis's records, however, Dr. Lee asserted that he did not "see anywhere in Dr. Palutsis's note, nor in any medical record for that matter that I reviewed in this action, reference to a loose anchor." Rather, Dr. Lee stated that "intraoperative photographs taken during The Surgery show a well-placed and secured anchor, and all notes from subsequent treating physicians do not claim any issues with The Surgery."

Dr. Lee went on to opine that, at the plaintiff's only office visit with Pearl, the latter took and obtained a full, proper, and informative medical and treatment history from the plaintiff, and recorded this history completely, accurately, and contemporaneously with the receipt of such information. He stated that, after Pearl reviewed an MRI scan of the plaintiff's right shoulder, which "revealed impingement with what appears to be a full-thickness tear of the rotator cuff" and "a tear of the labrum and a large joint effusion," Pearl properly diagnosed plaintiff with right

shoulder impingement syndrome, a right shoulder complete rotator cuff tear, and a right shoulder SLAP tear, and properly recommended the plaintiff undergo an arthroscopic repair of the right shoulder, particularly in the setting of a possible full-thickness tear of the rotator cuff and SLAP tear. As Dr. Lee explained it, an arthroscopic repair is routinely performed to treat patients who present with a right full-thickness rotator cuff tear and SLAP tear. He asserted that there was no indication in any record that he reviewed as to why the plaintiff did not receive medical clearance for the arthroscopic repair until December 4, 2017, but that there was no reason to believe that a delay of surgery from August 10, 2017 to December 20, 2017 would have caused plaintiff to sustain any further injury. As Dr. Lee pointed out, the plaintiff's medical records indicated that she injured her right shoulder in a car accident September 27, 2016, almost one year before she initially met with Pearl, so there was almost a one-year delay before she even saw Dr. Pearl.

Consequently, Dr. Lee explicitly concluded that there was no merit to the plaintiff's contentions that Pearl departed from good and accepted practice by failing properly and timely to diagnose, care for, and treat her right rotator cuff tear, failing properly and timely to diagnose, care for, and treat her right SLAP tear, or failing properly and timely to diagnose, care for, and treat her right shoulder impingement syndrome. He further concluded that there was no merit to the plaintiff's contentions that Pearl departed from good and accepted practice by failing properly to perform a right rotator cuff repair, failing properly to perform a right labral repair, failing properly to perform a right acromioplasty, failing properly to perform a right Mumford procedure, or failing properly to implant a right rotator cuff anchor. Dr. Lee, adverting to Dr. Palutsis's findings, further expressly concluded that all aspects of the December 20, 2017 surgery were properly performed, that there was no indication of any improper technique or failure on Pearl's part to address the medical issues identified in the plaintiff's right shoulder, and that the plaintiff's acromioclavicular joint osteoarthritis and the existing pathology in her right shoulder were not caused by any deviation from the standard of care during the subject surgery.

Dr. Lee noted that the plaintiff made no allegations that Pearl was negligent in the postoperative care that he rendered to her, but he nonetheless opined that Pearl provided proper postoperative care and discharge instructions in any event, which included an instruction that the plaintiff contact Pearl to schedule a postoperative appointment, which she never did.

In opposition to the motions, the plaintiff did not submit an affirmation or affidavit from any expert, either in orthopedic surgery, orthopedics, neurology, or the administration of surgical clinics. Rather, she submitted counter statements of material facts, and only one attorney's affirmation responding to both motions. In that affirmation, counsel argued that neither defendant established the requisite prima facie entitlement to judgment as a matter of law, that the orthopedic surgery experts premised their opinions solely on Pearl's custom and practice, and not on what Pearl actually did in the plaintiff's case, and that the mere fact of the plaintiff's ongoing pain subsequent to the December 20, 2017 procedure was a sufficient predicate upon which the court could conclude that the defendants failed to make the necessary prima facie showing. In reply, the attorneys for both defendants argued that each defendant did, in fact, make the necessary prima facie showing, that their experts were indeed qualified to render the opinions that they proffered, that their experts' affirmations were detailed and supported by the medical records, and that the plaintiff's failure to oppose the motions with expert affirmations of her own required the motions to be granted.

The court agrees with the defendants. The defendants' expert affirmations were detailed, precise, and addressed all of the claims raised by the plaintiff in her complaint and bills of particulars. The determination of whether a witness is qualified to give expert testimony is entrusted to the sound discretion of the trial court, the provident exercise of which will not be disturbed absent a serious mistake or an error of law (*see Guzman v 4030 Bronx Blvd. Assoc., LLC*, 54 AD3d 42, 49 [1st Dept 2008]). An orthopedic surgeon, such as Drs. Wiener or Lee, clearly is qualified to render an opinion as to whether a defendant orthopedic surgeon departed from good and accepted practice, or whether anything that the latter did or did not do did not

cause of contribute to a patient's injuries, even where the expert and the defendant practice in slightly different subspecialities (*see Martino v Bendo*, 93 AD3d 500, 501 [1st Dept 2012] [orthopedic surgeon whose subspecialty was in joint replacements was qualified to render an opinion as to the care rendered by an orthopedic surgeon whose subspeciality was in spinal surgery]). The defendants' did not premise their opinions solely on custom and practice testimony, but on the relevant December 20, 2017 operative report, which was generated contemporaneously with the subject surgery, and upon follow-up imaging, records, and reports from subsequent treating physicians, all of which they concluded had demonstrated that no departures were committed in the plaintiff's diagnosis and treatment. Hence, the court concludes that, contrary to the plaintiff's contention, both defendants established their prima facie entitlements to judgment as a matter of law in connection with the medical malpractice cause of action. Since the plaintiff did not oppose the motion with affirmations or affidavits from a qualified medical expert, she failed to raise a triable issue of fact in response to the defendants' showings, and summary judgment must be awarded to both defendants dismissing the medical malpractice cause of action insofar as asserted against each of them.

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]). 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]). 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 a 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]).

In his affirmation, Dr. Wiener asserted that the plaintiff signed an acknowledgment of rights and responsibilities, along with other requisite authorizations, and that Pearl obtained separate signed consents for the operation and for the administration of anesthesia, each dated December 20, 2017, and executed prior to the commencement of the procedure. According to Dr. Wiener, Pearl documented that he had "explained to her in detail the risks, alternatives, and benefits of the procedure, and she wants to have this done in the near future," while the plaintiff

acknowledged that the nature of procedure was explained to her, along with risks and consequences of the procedure, and that there were no guarantees concerning the results of the procedure. He further asserted that SSC also obtained Pearl's private office note that the risks and benefits of, and alternatives to, the procedure were previously discussed with the plaintiff, and that she wished to undergo the procedure. Dr. Lee stated that Pearl discussed the medical need for a rotator cuff repair with the plaintiff, along with the risks of the procedure, the benefits of the procedure, and the alternative treatment options, after which the plaintiff consented to undergo the procedure. He further explained that medical clearance was obtained prior to the surgery, while an August 10, 2017 note reported that Pearl discussed alternative treatments to surgery with the plaintiff on that date.

Contrary to the plaintiff's contention, both defendants established their prima facie entitlement to judgment as a matter of law in connection with the lack of informed consent cause of action. Inasmuch as she failed to submit an expert affirmation attesting to the qualitative insufficiency of the consent that Pearl obtained, she failed to raise a triable issue of fact in opposition to the defendants' showings in this regard. Hence, summary judgment must be awarded to the defendants dismissing the lack of informed consent cause of action insofar as asserted against each of them.

To establish a cause of action to recover for negligent hiring, supervision, training, and retention of health-care 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]). While a cause of action alleging inadequate staffing may be maintained in the context of a statutory cause of action pursuant to Public Health Law § 2801-d, applicable to nursing homes (*see Jenack v Goshen Operations, LLC,* 222 AD3d 36, 37-38, 47 [2d Dept 2023]), a negligence cause of action based on inadequate staffing also may be asserted against a surgical facility or

a hospital (*see Currie v Oneida Health Sys., Inc.,* 222 AD3d 1284, 1288-1289 [3d Dept 2023]; *Zellar v Tompkins Community Hosp., Inc.,* 124 AD2d 287, 289 [3d Dept 1986]).

In connection with the causes of action alleging negligent hiring, supervision, and credentialing, Dr. Wiener asserted that Pearl was a licensed medical doctor and was board certified as an orthopedic surgeon, so that it was appropriate for SSC to allow him to employ its facility for his surgeries. Moreover, he opined that the standard of care did not require SSC to monitor or supervise Pearl during the procedure. He further concluded that SSC was appropriately staffed to permit Pearl to perform an arthroscopy upon the plaintiff, inasmuch as the plaintiff's chart at SSC revealed that SSC provided preoperative and postoperative staff who provided care and treatment to the plaintiff. In addition, he averred that there was no evidence that Pearl lacked proper surgical equipment or personnel to complete the subject procedure, or that there were an insufficient number of healthcare employees to monitor the plaintiff in an appropriate fashion prior to her discharge.

Podrat opined that SSC did not depart from the administrative standards of care, either in its credentialing process or in its determination to grant surgical privileges to Pearl both initially, and in subsequently renewing his privileges to perform orthopedic procedures at SSC. He also concluded that SSC was not negligent in providing staffing, or in administrating its surgical facility. He asserted that SSC satisfied the generally accepted administrative standards in the procedures it employed to credential Pearl, inasmuch as it required Pearl to provide it with personal information, educational details, current hospital and surgical center privileges, board certifications, licensure, proof of professional liability insurance, a statement of his own health, medical references, professional status information, and his federal Drug Enforcement Administration (DEA) identification number. Podrat noted that SSC required Pearl to specify the particular orthopedic surgical privileges that he was and was not requesting permission to undertake at SSC. He further explained that SSC obtained a copy of Pearl's curriculum vitae, verified his identity, confirmed that he was registered with and had an active medical license

from both the State of New Jersey Board of Medical Examiners and the State of New York Board of Medical Examiners, and confirmed that he was registered with the DEA and the New Jersey Division of Consumer Affairs Controlled Dangerous Substances division. He stated that SSC also obtained copies of Pearl's diplomas and certificates, including, but not limited to, certification by the American Board of Clinical Orthopaedic Surgery. Podrat explained that SSC obtained Pearl's certificate of liability insurance, obtained signed reference forms, obtained Pearl's verified certifications for cardiopulmonary resuscitation, infection control, and opioid prescriber trainings, verified his active status at other medical facilities, made inquiry to National Practitioner Data Bank, conducted a search of the federal National Plan and Provider Enumeration System for his National Provider Identifier number, and obtained a physician profile from the American Medical Association. Podrat asserted that SSC's inquiry to the Office of the Inspector General of the United States Department of Health and Human Services reflected that Pearl was not included on that agency's list of excluded individuals. Podrat thus concluded that SSC's process for credentialing Pearl to perform orthopedic procedures at SSC met the generally accepted administrative standards with respect to its May 24, 2016 determination to credential him. He further opined that SSC's administrative file documented that Pearl had completed an orientation and skills checklist, and had provided a completed annual health assessment form from an October 24, 2017 examination.

Podrat further concluded that the applicable administrative standard of care did not require SSC to keep, monitor, review, investigate, or consult logs of Pearl's care of patients to assess the specific care and treatment that Pearl had determined was appropriate in the plaintiff's case. In this respect, he noted that Pearl was a licensed physician with active board certification in orthopedic surgery, and that the subject arthroscopy that Pearl performed upon the plaintiff on December 20, 2017 was within the scope of the orthopedic surgery privileges that SSC granted to Pearl.

In opposition to Podrat's affirmation, the plaintiff did not submit an affirmation or affidavit from anyone qualified to render an opinion in the fields of administration and management of hospitals or surgical facilities. Rather, she again relied only upon her attorney's affirmation, in which counsel argued that Podrat was not qualified to render the opinions set forth in his expert affirmation, thus necessitating a *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]). Contrary to the plaintiff's contention, Podrat clearly is qualified to render an opinion as to whether a surgical facility adhered to appropriate standards of care as to the vetting and credentialing of physicians, as well as the standard of care for staffing a surgical facility with healthcare employees. There is no need for a *Frye* hearing, since the argument of the plaintiff's attorney is an insufficient basis on which to require such a hearing, and the proper administration of surgical facilities does not present an unresolved scientific dispute within any scientific community in any event (*see Gayle v Port Auth. of N.Y. & N.J.,* 6 AD3d 183, 184 [1st Dept 2004] ["Defendant's factual disagreement with plaintiff's medical causation theory did not warrant a hearing under *Frye v United States* . . .since no scientific technique or novel application of science was at issue"]; *see generally Lustenring v AC&S, Inc.,* 13 AD3d 69, 70 [1st Dept 2004]). Consequently, the court concludes that SSC established its prima facie entitlement to judgment as a matter of law in connection with the negligent hiring, training, supervision, retention, staffing, credentialing, and medical facility administration causes of action. Since the plaintiff did not submit expert affirmations rebutting or refuting Podrat's opinions, she failed to raise triable issues of fact in opposition to SSC's showing is this regard, and summary judgment thus must be awarded to SSC dismissing those causes of action.

An expert need not be licensed in New York in connection with his or her profession for his or her affidavit to be considered by a court in connection with a summary judgment motion (*see Grey v Garcia-Fusco*, 2020 NY Slip Op 32280[U], *20 n 19, 2020 NY Misc LEXIS 3270, *30 n 19 [Sup Ct, N.Y. County, Jun. 16, 2020]; *Solano v Ronak Med. Care*, 2013 NY Slip Op 30837[U], *7, 2013 NY Misc LEXIS 170, *8-9 [Sup Ct, N.Y. County, Apr. 22, 2013]). The court

notes that, although Podrat submitted an affirmation rather than an affidavit, CPLR 2106 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).

The court further notes that, although CPLR 2106 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), that statute did not repeal the requirement, set forth in CPLR 2309, that an

> "*affirmation* taken without the state shall be treated as taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the . . . *affirmation*."

(emphasis added). Although Podrat's affirmation was executed in Florida, his affirmation was not accompanied by the certificate of conformity required by CPLR 2309. The certificate of conformity required by that statute is a written instrument, pursuant to which a person qualified by the laws of the state in which an affidavit or affirmation is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit or affirmation has indeed been drafted, executed, or notarized in conformity with the laws of that state. The absence of the certificate of conformity, however, does not require the court to disregard Podrat's affirmation, as the failure to include a certificate of conformity is a mere irregularity that may be cured by the submission of the proper certificate nunc pro tunc (*see Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024]; *Parra v Cardenas,* 183 AD3d 462, 463 [1st Dept 2020]; *Bank of New York v Singh*, 139 AD3d 486, 487 [1st Dept 2016]; *DaSilva v KS Realty, L.P.,* 138 AD3d 619, 620 [1st Dept 2016]; *Diggs v Karen Manor Assoc., LLC*, 117 AD3d 401, 402-403 [1st Dept 2014]; *Matapos Tech., Ltd. v Compania Andina de Comercio Ltda.*, 68 AD3d 672, 673 [1st Dept 2009]). The court thus directs SSC to serve and file the certificate of conformity on or before December 9, 2025.

The plaintiff's remaining contentions are without merit.

Accordingly, it is,

ORDERED that the motion of the defendant SurgiCore Surgical Center for summary judgment dismissing the complaint insofar as asserted against it (MOT SEQ 001) is granted, and the complaint is dismissed insofar as asserted against it; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant SurgiCore Surgical Center; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant SurgiCore Surgical Center; and it is further,

ORDERED that the motion of the defendant Richard Pearl, M.D., for summary judgment dismissing the complaint insofar as asserted against him (MOT SEQ 002) is granted, and the complaint is dismissed insofar as asserted against him; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Richard Pearl, M.D.

This constitutes the Decision and Order of the court.

10/31/2025
DATE

JOHN J. KELLEY, J.S.C.

MOTION:	[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**	
MOTION:	[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**	