Horning v Beasley
2025 NY Slip Op 35580(U)
April 25, 2025
Supreme Court, Onondaga County
Docket Number: Index No. 004068/2023
Judge: Robert E. Antonacci II

Supreme Court Chambers

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ROBERT E. ANTONACCI II
JUSTICE

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PRINCIPAL LAW CLERK

NANCY L. WHITE
SECRETARY

April 25, 2025

All Counsel (*via NYSCEF*)

Re: *Horning v Beasley et al.*
Index No.: 004068/2023

DECISION AND ORDER

Presently pending before the Court, in this medical malpractice action, is a motion filed by defendant Kenneth M. Beasley, M.D., seeking an order granting him summary judgment and dismissing the complaint and any cross-claims interposed against him (NYSCEF Doc Nos. [Doc Nos.] 30-42, 59-62). Plaintiff Jacob Horning contends that questions of fact exist requiring a trial and therefore opposes the motion (Doc Nos. 46-58). The Court has reviewed these filings in rendering its determination (*see generally* CPLR 2219 [a]).

Relevant Background

According to the parties' statements of material facts, on June 7, 2022, plaintiff, then 33 years old, underwent a cystoscopy with hydrodistension, bladder biopsy, as well as a prostate massage; treating urologist Dr. Gary Bozeman found plaintiff's prostatic urethra to be unremarkable (Doc No. 58 at ¶¶ 3-5; Doc No. 62 at ¶¶ 3-5). According to Dr. Bozeman's report, the impetus for this procedure included plaintiff's "[c]hronic pelvic/perineal pain and irritable voiding symptoms" and "[p]rior history of prostatitis" (Doc No. 38 at 2).[1]

Less than two weeks later, on June 16, 2022, plaintiff presented to the Crouse Hospital emergency room with "significant hematuria" (Doc No. 58 at ¶ 6; Doc No. 48 at 75), as well as "severe unbearable pain" and "a catheter that wasn't draining" (Doc No. 36 at 18). He was admitted at Crouse and, the next day, Dr. Beasley, a urologist, began treating plaintiff as attending physician (Doc No. 58 at ¶ 8). In the morning on June 17, Dr. Beasley noted his concern that a previously placed catheter was in plaintiff's prostate, causing plaintiff's reportedly severe pain (Doc No. 58 at ¶ 9). An ultrasound revealed "blood products and complex material within" plaintiff's bladder (Doc No. 58 at ¶ 10; *see also* Doc No. 48 at 102).

Plaintiff was brought to the operating room (Doc No. 58 at ¶ 12; Doc No. 62 at ¶ 12). An "Operative Consent" form signed by plaintiff reflects that the procedure would encompass a "cystoscopy, clot

[1] Generally, page citations to medical record exhibits refer to the page of the PDF file on NYSCEF.

evacuation, bladder possible fulguration/resection" (Doc No. 37 at 7). The same form provides, in part, "I also understand that during the course of the operation, unknown conditions may necessitate additional/different procedures than those mentioned above. I authorize the above named physician(s) to perform such procedures as are necessary in his/her clinical judgment" (Doc No. 37 at 7 ¶ 2).

Dr. Beasley testified during his deposition that, generally speaking, he advised surgical patients In plaintiff's circumstances that his "goal is to stop your bleeding," and to "use [his] judgment to do what is best for the patient and what works" in that "specific setting" (Doc No. 36 at 31 [Dr. Beasley's EBT]). In this case, Dr. Beasley testified that his "discussion" with plaintiff coincided with the notations on the consent form—that is, he anticipated a "clot evacuation of the bladder" and a "possible fulguration resection" (Doc No. 36 at 33). He noted that the "possible fulguration resection" was not limited to any particular "anatomic part of the body" (Doc No. 36 at 33).

For his part, plaintiff testified in his own deposition that he "was assuming" that the procedure would entail "put[ting] a camera in there and see what's bleeding," but that "nobody said anything about any sort of operation to me" (Doc No. 54 at 46-47 [plaintiff's EBT]).

During the procedure, Dr. Beasley observed "trauma and active bleeding throughout the prostate," and noted that plaintiff's "bladder was filled with clot" (Doc No. 48 at 120; *see also* Doc No. 58 at ¶ 26). He cleared "[l]arge amounts clot" from plaintiff's bladder, but it appeared to Dr. Beasley that "there was an area of active bleeding along the right trigone, which had some of the appearances of a previous resection or biopsy site" (Doc No. 48 at 120). As Dr. Beasley noted in his report,

> "There was still ongoing bleeding and as I reinspected more distally away from the bladder neck, the prostate had numerous sites of trauma and distortion from numerous catheterizations. With numerous areas of active bleeding, I elected to carry out a transurethral button TURP as this would ablate and vaporize abnormal traumatized bleeding tissue and provide a smooth prostate channel and it was excellent for hemostasis. This was carried out: I was able to easily identify the bladder neck, I was quite clear of the ureteral orifices and then we carried out a resection to the level of the proximal verumontanum. I reinspected the prostate fossa. Hemostasis was excellent. I reinspected the bladder. There was no ongoing bleeding at the bladder resection site. Placed a new 22-French three-way catheter into the bladder and inflated 10 cc into the balloon and commenced CBI. This ran completely clear. There were no complications. He went to the recovery room in stable condition" (Doc No. 48 at 121; *see also* Doc No. 58 at 26).

Plaintiff was discharged from Crouse Hospital on June 18, 2022 (Doc No. 58 at ¶ 29; Doc No. 62 at ¶ 29). He followed up with Dr. Bozeman on July 8, 2022 (Doc No. 58 at ¶ 31; *accord* Doc No. 49 at 99 [medical records from Associated Medical Professionals of NY, PLLC (AMP)]). The report from that visit reflected that plaintiff's "[p]rostate was completely normal on my evaluation earlier," that is, prior to his admission and procedure at Crouse (Doc No. 49 at 99, 102). Plaintiff expressed concern of "retrograde ejaculation" and complained of "moderate urinary urgency" and "stabbing and burning discomfort in the prostate area since his second procedure" (Doc No. 49 at 99).

Plaintiff testified that, since the procedure conducted by Dr. Beasley, upon ejaculation his semen "goes into [his] bladder" and irritates his bladder until he is able to evacuate it by urinating (Doc No. 54 at 68). He stated that he also experienced prostate pain following surgery, but that this pain had subsided as he took gabapentin (Doc No. 58 at ¶ 38; Doc No. 54 at 80). As to his other remaining symptoms persisting after the procedure, plaintiff testified, "I can't ejaculate. I can't have kids. It's hard to hold urine when I need to pee. . . . And peeing after sex is difficult and it takes like a long time to drain my bladder" (Doc No. 54 at 79-80).

In April 2023, plaintiff filed a verified complaint interposing three cause of action: (1) medical malpractice for, inter alia, defendants' failure to properly evaluate plaintiff's prostate and improperly performing the transurethral resection (i.e., the TURP) procedure, (2) lack of informed consent to conduct the procedure; and (3) as to Crouse Hospital, negligent hiring, retention, and supervision (Doc No. 1 at ¶¶ 10-28). Plaintiff alleges, in essence, that Dr. Beasley deviated from the relevant standard of care by improperly performing a TURP which was not indicated under the circumstances and without plaintiff's informed consent (*see generally* Doc No. 35 at ¶ 3 [amended bill of particulars]).

Dr. Beasley's Motion for Summary Judgment

In support of his motion for summary judgment, Dr. Beasley has filed, among other things, an affirmation from board certified urologist Irwin M. Lieb, M.D. (Doc No. 40). Based upon his review of, among other things, plaintiff's medical records and the depositions, Dr. Lieb identified the standard of care under the surrounding circumstances as requiring the urologist to "pursue conservative measures to resolve the patient's acute bleeding, such as hydration and/or flushing the patient's catheter line" (Doc No. 40 at ¶ 42). If those measures fail to control the bleeding, the standard of care requires the urologist to "take additional action," and, if "a drop in [the patient's] hemoglobin" is noted, then "emergency surgical intervention" may be warranted (Doc No. 40 at ¶¶ 43-44). At that stage, a urologist should "initiate a transurethral procedure to remove the clots and stop the patient's bleeding" (Doc No. 40 at ¶ 45).

According to Dr. Lieb, if the urologist "encounters a more complex or more serious intraoperative finding that was unexpected (and therefore, not previously discussed with the patient)," the standard of care "did not require the surgeon to leave this more complex or severe finding to be addressed at a later time after a discussion with the patient and obtaining informed consent for the unexpected finding" (Doc No. 40 at ¶ 45). To the contrary, the surgeon should address this finding "within the same procedure rather than subjecting the patient to a second and unnecessary procedure after the condition was permitted to worsen" (Doc No. 40 at ¶ 46).

Insofar as informed consent is concerned, Dr. Lieb asserted that the standard of care required the urologist "to advise the patient of the need to locate and stop the bleeding, as well as the need to remove any clots that were encountered," including the intent to conduct clot evacuation in the bladder and "potential fulguration and/or resection to address the bleeding, but that . . . unanticipated/unexpected/unknown conditions may arise that require additional or even different procedures or interventions in order to appropriately address and stabilize the patient and provide a better outcome" (Doc No. 40 at ¶ 49). If encountering bleeding in "an unexpected location" such as the prostate, the practitioner "should only resect as much as necessary to resolve the bleeding, taking care to minimize the resection as much as possible" (Doc No. 40 at ¶ 50). In such a case, rather than remove "significant portions of the prostate" as might be done during "a traditional or full TURP procedure," the urologist should "only resect or fulgurate those

portions that are the source of the patient's bleeding, leaving the remainder of the tissue" (Doc No. 40 at ¶ 51).

Based upon his review, Dr. Lieb opined, within a reasonable degree of medical certainty, that Dr. Beasley "at all times complied with the applicable standard of care for a urologist and that no action or inaction by [him] caused or contributed to any of [p]laintiff's injuries" (Doc No. 40 at ¶ 60). Preliminarily, Dr. Lieb concluded that, based upon the records, Dr. Beasley "did not improperly perform a TURP procedure where one was not indicated" or "improperly order and/or perform" such a procedure, because he did not perform a "traditional TURP procedure" at all (Doc No. 49 at ¶¶ 62, 66, 80). Rather, Dr. Beasley "selectively used a button electrode only to stop the bleeding" in plaintiff's prostate, and did not "resect additional portions of the prostate like would be done in a traditional TURP procedure" (Doc No. 40 at ¶ 62). A TURP procedure "involves resection of significant portions of tissue, typically" including the bladder neck to "relieve obstruction, as well as the lateral lobes, which could later be observed during a post-operative cystoscopy" (Doc No. 40 at ¶ 63). In this case, however, plaintiff's

> "postoperative cystoscopy confirmed Dr. Beasley's documentation of the June 17 procedure and demonstrated that the bladder neck and lateral lobes had not been resected. Dr. Bozeman documented that he found there was no evidence of any significant resection of the lateral lobes and he noted findings relative to the bladder neck – demonstrating that the bladder neck also had not been resected. This was also demonstrated on the images incorporated within the medical record from this September cystoscopy" (Doc No. 40 at ¶ 64).

Unlike a traditional TURP procedure, Dr. Beasley employed "a button electrode to vaporize only the tissue at the location of active bleeding [to] achieve hemostasis"—a fact corroborated by plaintiff's subsequent records from Dr. Bozeman (Doc No. 40 at ¶ 65).

Flowing from that conclusion about the nature of Dr. Beasley's procedure, Dr. Lieb opined that Dr. Beasley also "could not have failed to inform [p]laintiff of the possibility of the performance of a TURP procedure before performing same on him" (Doc No. 40 at ¶ 67). During a discussion before the procedure, Dr. Beasley "discussed the anticipated procedure" with plaintiff, "counseled him on what to expect," discussed risks and benefits, and, consistent with the standard of care, advised him "that the goal of the transurethral procedure was to locate and stop the bleeding believed to be originating in his bladder and acknowledge[d] that ultimately, this could result in the need to perform additional interventions that were not initially anticipated" (Doc No. 40 at ¶ 68). In Dr. Lieb's view, this discussion, and the execution of the written consent thereafter, served as the basis for the required informed consent to perform the procedure (Doc No. 40 at ¶ 69).

Dr. Lieb opined that, in the final analysis, Dr. Beasley "was required to use his clinical judgment intraoperatively to selectively cauterize tissue within the prostate to stop the active bleeding, which was not specifically laid out in the consent form, but which [p]laintiff did acknowledge could happen and consent to" (Doc No. 40 at ¶ 70).

As to plaintiff's allegations that Dr. Beasley "failed to properly evaluate [his] prostate and render proper medical advice based on this, properly and/or adequately treat [p]laintiff's prostate, and use

alternative procedures" in that treatment, Dr. Lieb opined to the contrary (Doc No. 40 at ¶ 72). In his view, Dr. Beasley "fully and appropriately evaluated" plaintiff's acute complaints and "provided the appropriate recommendation to treat and ultimately resolve" his bleeding and pain with which he presented at the hospital (Doc No. 40 at ¶ 72). Additionally, Dr. Lieb opined that, in light of the "emergent situation and [p]laintiff's decreased hemoglobin level, it was consistent with the standard of care for Dr. Beasley to use a button electrode to vaporize the tissue and stop the bleeding within his prostate" (Doc No. 40 at ¶ 72). Upon encountering a "more complex intraoperative finding" related to plaintiff's active and unresolved bleeding,

> "Dr. Beasley was not required to cease the procedure and obtain [p]laintiff's consent to proceed with further treatment once [p]laintiff was able to discuss the treatment options. Rather, Dr. Beasley was permitted to evaluate and treat the unexpected finding during the same procedure rather than subjecting him to a second and unnecessary procedure while continuing to experience further bleeding in the interim" (Doc No. 40 at ¶ 75; *see also* Doc No. 40 a ¶¶ 77-78).

In sum, although the source of plaintiff's bleeding was believed to be a biopsy site in his bladder, Dr. Beasley was tasked broadly with "locating and stopping [plaintiff's] acute bleeding, which was what he did when [he] selectively used the button electrode to stop the bleeding from [p]laintiff's prostate" (Doc No. 40 at ¶ 76). Under the circumstances presented—including both plaintiff's history and Dr. Beasley's intraoperative findings—"there were no alternative procedures that Dr. Beasley could have offered or used in treating [p]laintiff" (Doc No. 40 at ¶ 80).

Dr. Lieb also addressed causation, particularly the lack of a causal link between the "selective treatment" performed by Dr. Lieb and plaintiff's alleged injuries, including retrograde ejaculation:

> "The aforementioned complications from a TURP procedure can occur due to the resection of tissue at the bladder neck, lobes, or within other portions of the prostate. However, Plaintiff did not undergo a meaningful resection sufficient to cause these symptoms. Rather, Dr. Beasley vaporized the tissue at the surface of the prostate where Plaintiff was actively bleeding, in order to achieve hemostasis. This selective treatment could not cause Plaintiff's reported injuries, especially retrograde ejaculation, because Plaintiff did not undergo significant resection within his prostate" (Doc No. 40 at ¶¶ 81-82).

In opposition to Dr. Beasley's motion, plaintiff has marshaled an expert affirmation from a physician board certified in urology and surgery (*see* Doc No. 47). Plaintiff's expert observed that, although an ultrasound at Crouse Hospital revealed "blood products and complex material within [plaintiff's] bladder" and an operation was planned, the written consent form did not mention a "TURP" or plaintiff's prostate (Doc No. 47 at ¶ 10). Additionally, Dr. Beasley testified that he did not discuss the risks of a TURP procedure with plaintiff (Doc No. 47 at ¶ 12), principally because it "was an approach used to stop an unexpected finding" he encountered during the procedure (Doc No. 36 at 39). Upon review of plaintiff's medical records, plaintiff's expert noted that, following the procedure in question, Dr. Bozeman diagnosed plaintiff with retrograde ejaculation—a known risk of a TURP procedure (Doc No. 47 at ¶¶ 18-19, 24).

With respect to the standard of care, plaintiff's expert asserted that "[i]nformed consent must be obtained before any operative procedure being performed on a patient," and entails an explanation of "the procedures to be performed, and suspected to be performed, and the benefits, risks, and alternatives to each" (Doc No. 47 at ¶ 25). The failure to obtain informed consent amounts to a deviation of the standard of care, and "should not occur under any circumstances except for in an immediate life-threatening situation" (Doc No. 47 at ¶ 26) and, in the expert's view, the circumstances presented by plaintiff's case did not demand "an immediate emergent procedure to his prostate" (Doc No. 47 at ¶ 27). According plaintiff's expert, although plaintiff "did have blood clots, was in pain, and was not tolerating his clot retention," surgical intervention was "indicated, but not emergent," and Dr. Beasley had adequate time to "properly counsel" plaintiff and "consider other possible procedures to be performed . . . alternative to a TURP" (Doc No. 47 at ¶ 27).

Plaintiff's expert opined that Dr. Beasley's care fell below the applicable standard in "many" ways (Doc No. 47 at ¶ 29). First, plaintiff's expert asserted that Dr. Beasley failed to obtain informed consent because "the consent document in this case does not even mention the prostate, fulguration of the prostate, re-sectioning of the prostate or a TURP procedure" (Doc No. 47 at ¶ 30). In the expert's view,

> "[i]f Dr. Beasley intended to perform a TURP, or as he said, 'find the source of the bleeding and stop the bleeding', then he must include those implicated procedures on the consent form. See Beasley EBT at pg. 39. To do a transurethral procedure is not the same as a TURP and to get consent for 'bladder possible fulguration/re-sectioning' without listing the corresponding body parts for each procedure that will be performed on a patient is a deviation in the standard of care" (Doc No. 47 at ¶ 31).

Additionally, the expert disagreed with Dr. Lieb's suggestion that unanticipated intraoperative events in this case justified performing a "life-altering TURP procedure" without informed consent, and that a "less drastic procedure like a fulguration should have been performed" (Doc No. 47 at ¶ 36). Plaintiff's expert differentiated between a "simple fulguration" and a TURP, which is a "permanent and definitive procedure" not indicated for a "young and fertile patient" such as plaintiff (Doc No. 47 at ¶¶ 37-38). To that end, plaintiff's expert disagreed with the proposition that plaintiff underwent a minor procedure:

> "Mr. Horning did not receive a minor procedure on his prostate. Further, a resection such as the one Dr. Beasley performed without client consent has known effects to the patient's ejaculatory function. Indeed, peer-reviewed literature supports that aggressive and complete resection and vaporization of the prostate to the level of the verumontanum is associated with retrograde ejaculation" (Doc No. 47 at ¶ 40).

In the view of plaintiff's expert, Dr. Beasley deviated from the standard of care in performing a "TURP procedure" as opposed to a "simple prostatic fulguration," and the circumstances presented did not suggest that plaintiff's ongoing bleeding presented an "immediate emergency" (Doc No. 47 at ¶¶ 42-43). Finally, plaintiff's expert opined that plaintiff's retrograde ejaculation condition was caused by the "unindicated and unconsented to TURP procedure" (Doc No. 47 at ¶ 45).

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *accord Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *accord Zuckerman*, 49 NY2d at 562).

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice *or* that the plaintiff was not injured thereby" (*Carroll v Niagara Falls Mem. Med. Ctr.*, 218 AD3d 1373, 1374 [4th Dept 2023], quoting *Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). "To meet that burden, a defendant must submit in admissible form factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [the defendant] complied with the accepted standard of care or did not cause any injury to the patient" (*Carroll*, 218 AD3d at 1374, quoting *Edwards v Myers*, 180 AD3d 1350, 1352 [4th Dept 2020]; *accord Campbell v Bell-Thompson*, 189 AD3d 2149, 2150 [4th Dept 2020]).

"[T]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden" (*Carroll*, 218 AD3d at 1374, quoting *Bubar*, 177 AD3d at 1359). "General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant physician's summary judgment motion" (*Alvarez*, 68 NY2d at 325; *accord Campbell*, 189 AD3d at 2150-2151).

As for a claim of lack of informed consent, " '[t]o establish [such a cause of action], [a] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury' " (*Poreba-Gier v Suddaby*, 203 AD3d 1694, 1694-1695 [4th Dept 2022], quoting *Huichun Feng v Accord Physicians, PLLC*, 194 AD3d 795, 797 [2d Dept 2021]; *see also* Public Health Law § 2805-d).

Upon considering the parties' respective motion papers, including the affirmations of Dr. Lieb and plaintiff's expert, the Court concludes that genuine questions of fact exist warranting a trial. Even assuming that Dr. Beasley met his initial burden of establishing, prima facie, that he did not depart from the standard of care as identified by Dr. Lieb and that he secured informed consent to perform the electrode button procedure upon plaintiff's prostate (*see Carroll*, 218 AD3d at 1374; *Bubar*, 177 AD3d at 1359), plaintiff has raised questions of fact concerning whether the standard of care called for the procedure employed by Dr. Beasley under the attendant circumstances and whether that procedure caused the ongoing symptoms and/or conditions of which plaintiff complains.

With respect to plaintiff's medical malpractice cause of action, Dr. Beasley performed a "transurethral button vaporization of [plaintiff's] prostate" (Doc No. 48 at 120 [operative report])—a procedure

which he characterized in his deposition testimony as a "TURP," during which a portion of the prostate is removed (Doc No. 36 at 12). As Dr. Beasley recognized, retrograde ejaculation is a known risk of a TURP procedure (Doc No. 36 at 25). In opposition, plaintiff's expert did not opine that Dr. Beasley conducted the TURP itself in a negligent manner, but took the view that, under the circumstances presented, Dr. Beasley should have performed a "simple prostatic fulguration," which was more likely to "maintain the integrity of a patient's ejaculatory function while also controlling the bleeding" (Doc No. 47 at ¶¶ 39, 42).[2] When asked why he did not perform a fulguration on plaintiff's prostate, Dr. Beasley answered without elaboration that he "didn't think it would stop the bleeding" (Doc No. 36 at 84). Additionally, although Dr. Lieb endeavored to distinguish a more significant, "traditional" TURP procedure from the method employed by Dr. Beasley (*see e.g.* Doc No. 40 at ¶¶ 67, 70, 80-81), this attempted distinction does not resolve the questions of fact raised by the parties' papers, i.e., whether Dr. Beasley deviated from the standard of care by failing to employ a different procedure. In the Court's view, the competing assertions and inferences concerning the appropriateness of Dr. Beasley's procedure, and the viability and preferability of an alternative prostatic fulguration, present questions of fact driven by a "battle of the experts" not resolvable on a summary judgment motion (*see e.g. Combs v Madejski*, 224 AD3d 1298, 1300 [4th Dept 2024], citing *Edwards v Devine*, 111 AD3d 1370, 1372 [4th Dept 2013]).

The Court further concludes that questions of fact also preclude granting summary judgment dismissing plaintiff's informed consent cause of action (*see generally Zuckerman*, 49 NY2d at 562). Plaintiff's expert affirmation, plaintiff's deposition testimony (*see* Doc No. 54 at 45-46), and the terse consent form give rise to questions of fact concerning whether plaintiff was adequately informed about the potential for the unanticipated surgical intervention undertaken here (*see generally Angelhow v Chahfe*, 174 AD3d 1285, 1287-1288 [4th Dept 2019]), or whether the circumstances were of an emergent nature (*see generally Connelly v Warner*, 248 AD2d 941, 942 [4th Dept 1998]; Public Health Law § 2805-d [2] [a]).

For these reasons, as well as those set forth more fully in plaintiff's opposition papers, Dr. Beasley's motion for summary judgment is hereby **DENIED**. To the extent that Crouse Hospital seeks dismissal of plaintiff's complaint by joining in Dr. Beasley's motion (*see* Doc No. 43 [letter dated Oct. 29, 2024]), that application is also denied.

SO ORDERED.

Hon. Robert E. Antonacci II, J.S.C.

[2] As Dr. Beasley stated in his deposition, "fulguration" is "[b]urning the surface of something" (Doc No. 36 at 47). In his reply memorandum of law, Dr. Beasley takes pains to contend that, in essence (if not in identical terminology), Dr. Lieb opined that he did in fact perform a fulguration by employing a button electrode to stop plaintiff's prostatic bleeding (Doc No. 61 at 9). But Dr. Beasley's deposition testimony reflects that he did *not* perform a fulguration, and the reason was that he did not think it would be effective (Doc No. 36 at 83-84).