

Vereen v Roberts

2026 NY Slip Op 31206(U)

March 25, 2026

Supreme Court, New York County

Docket Number: Index No. 805268/2022

Judge: Kathy J. King

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY J. KING PART 06

Justice

INDEX NO. 805268/2022

BENJAMIN VEREEN,

05/21/2025,

Plaintiff,

MOTION DATE 09/18/2025

- v -

MOTION SEQ. NO. 002 003

MATTHEW ROBERTS, MATTHEW CONTI, and THE HOSPITAL FOR SPECIAL SURGERY,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 60, 80

were read on this motion to/for TRIAL PREFERENCE

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after oral argument, the parties move for the following requested relief:

Benjamin A. Vereen ("Plaintiff") seeks an Order granting a special trial preference, pursuant to CPLR 3403(a)(4), putting this case on the trial calendar as soon as possible so that the case can go to trial at the Court's earliest convenience (Mot. Seq.002).

Matthew M. Roberts, M.D., Matthew S. Conti, M.D. ("Dr. Conti"), and Hospital for Special Surgery ("HSS") (collectively "Defendants") move for an Order granting summary judgment dismissal in favor of all Defendants, on all causes of action, pursuant to CPLR 3212 (Mot. Seq. 003).

Opposition to the motions are submitted by Defendants and Plaintiff, respectively.

BACKGROUND

This is an action sounding in medical malpractice. Plaintiff commenced this action by filing a summons and complaint on August 18, 2022. Issue was joined as to each of the Defendants based on service of their respective answers on September 13, 2022.

Plaintiff alleges three causes of action against Dr. Roberts and Dr. Conti, employees for the Hospital for Special Surgery: (1) medical negligence, (2) lack of informed consent, (3) negligent hiring, supervision or training¹, arising from Defendants' alleged negligence in performing the October 9, 2019 bunionectomy to correct his bunion and hammertoe, and restore proper balance and stability to his right foot.

Defendants now move for summary judgment.

MOTION SEQ. 002 **PLAINTIFF'S MOTION FOR TRIAL PREFERENCE**

Plaintiff's motion for trial preference pursuant to CPLR 3403(a)(5) is denied as moot, insofar as the instant action is already subject to a trial preference pursuant to CPLR 3403(a)(5). The Court finds that the case law is well settled that there is no stacking of trial preferences (*see White v Metro. Opera Associations, Inc.*, 224 AD3d 422, 423 [1st Dept 2024]).

MOTION SEQ. 003 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

A proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by submitting admissible evidence that demonstrates the absence of material issues of fact that would require a trial (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

¹ The Court agrees with Defendants that Plaintiff's third cause of action, although labeled "vicarious liability" sounds in negligent hiring, training, and supervision (*Rivera v State*, 34 NY3d 383 [2019]; *Detone v Bullit Courier Serv.*, 140 AD2d 278 [1st Dept 1988]; *Rivera v State of New York*, 34 NY3d 383 [2019]).

To satisfy this burden, in a medical malpractice action, a movant must provide evidentiary proof in the form of expert opinions and factual evidence establishing that the defendant complied with accepted standards of medical care and practice, and/or the defendant's conduct was not a proximate cause of plaintiff's alleged injuries (*see Alvarez v Prospect Hospital*, 68 NY2d 325).

In support of their motion, Defendants submit the expert affirmations of Justin Greisberg, M.D. ("Dr. Greisberg"), an Orthopedist, who is presently the Chief of the Division of Foot and Ankle Orthopedics at Columbia University Medical Center and the Head of Orthopedic Trauma at New York Presbyterian Lawrence Hospital. Dr. Greisberg opines, to a reasonable degree of medical certainty, based upon his education, training, and experience in Orthopedic Surgery, and review of the records, that Defendants' treatment of Plaintiff from 2019 to 2022 was within the standard of care in all respects, and did not cause or contribute to Plaintiff's alleged injuries.

Plaintiff, a longtime dancer, who had been suffering from a right bunion for many years, first presented to Dr. Roberts on August 8, 2019. First, Dr. Greisberg opined that Dr. Roberts appropriately assessed Plaintiff on his initial examination, by reviewing Plaintiff's x-rays and assessing Plaintiff's sensation, pulses, flexibility, and mobility of the right foot and ankle. Based on this assessment, Dr. Roberts diagnosed Plaintiff with a progressive right bunion with an equinus deformity. Dr. Greisberg opined that given the use of Plaintiff's right foot as a professional dancer, Dr. Roberts appropriately recommended the October 9, 2019 Achilles tendon lengthening, bone graft, and bunionectomy, based on Plaintiff's symptoms upon examination, radiological findings, and exhaustion of conservative measures.

On the day of surgery, Dr. Roberts's physician's assistant, Nicole Kortmann performed a pre-operative exam which did not show whether there was limited range of motion, however, Dr. Greisberg opined that the standard of care did not require a physician to note the specific degree

of range of motion on examination. Dr. Greisberg further noted that Dr. Roberts properly examined Plaintiff's range of motion and appreciated the findings.

As to Plaintiff's surgery on October 9, 2019, Dr. Greisberg opined that Dr. Roberts decision to proceed with a percutaneous approach to lengthen the Achilles tendon during the surgery was entirely consistent with the standard of care. Notably, based on Dr. Roberts' evaluation of the Achilles contracture on August 8, 2019, the Achilles lengthening aspect of the procedure was indicated and necessary to restore proper balance, stability and function to Plaintiff's right foot. Dr. Greisberg further opined that there is no credible evidence to support the claim that Dr. Roberts actually overlengthened Plaintiff's Achilles tendon during the October 9, 2019 surgery. Post surgery, Plaintiff had treated with Dr. Robert on December 17, 2019 and February 21, 2020. Notably, when Plaintiff returned to Dr. Roberts on May 26, 2022, two years later, Dr. Roberts, upon physical examination of Plaintiff, specifically documented his finding of "a neutral aligned foot without overcorrection." In any event, overlengthening of the Achilles tendon occurs absent a deviation from the standard of care and is a known risk of any Achilles tendon lengthening procedure. According to Dr. Greisberg, absent proper follow up by Plaintiff post-operatively, and considering his extensive and complicated history of balance and mobility issues due to his prior stroke and surgeries, it was appropriate for Dr. Roberts to attribute Plaintiff's complaints at the May 26, 2022 visit to recurrent hammering of his lesser toes related to persistent muscle imbalance in the foot.

Lastly, Defendants' expert opines that the alleged injuries were not the result of any negligent acts or omissions on the part of the Defendants, and specifically not the result of Dr. Roberts' surgery, but rather attributable to Plaintiff's underlying medical condition, including

clawing of his toes, limited range of motion, difficulties walking, the need to ambulate with a cane, stiffness, tenderness, and the inability to dance.

Based on the expert affirmation of Dr. Greisberg, the Court finds that Defendants have established prima facie entitlement for summary judgment dismissing Plaintiff's medical malpractice cause of action by demonstrating that the Defendants did not deviate from the standard of care in treating Plaintiff and/or proximately caused his alleged injuries.

As to Defendant, Matthew Conti, MD, Dr. Greisberg indicates that Dr. Conti, was acting as the attending orthopedic surgeon in the operating room on October 9, 2019, and opines that Dr. Conti did not render any independent medical treatment to Plaintiff, and did not deviate from the standard of care in any respect during Plaintiff's surgery. Dr. Greisberg opined that Dr. Roberts appropriately supervised the orthopedic surgery team while treating Plaintiff.

Where competent evidence is presented by a defendant in support of a motion for summary judgment, the burden shifts to the Plaintiff to produce proof in admissible form sufficient to establish the existence of material issues of fact that requires a trial, through a medical expert who opines to both a departure from accepted standards of care and that the treatment rendered by the Defendants was a proximate cause of Plaintiff's injuries (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 558-59 [1980]; see e.g., *Prete v Rafla-Demetrious*, 224 AD2d 674 [2d Dept 1996]; *Canter v Mulnick*, 60 NY2d 689 [1983]; see also *Fridovich v David*, 188 AD2d 984 [3d Dept 1992]; *Ferrara v South Shore Orthopedic Associates*, 178 AD 2d 364 [1st Dept 1991]).

In opposition, Plaintiff submits the expert affirmation of Joseph Daniel, D.O. ("Dr. Daniel"), a board-certified Orthopedic Surgeon, who opined, to a reasonable degree of medical

certainty, that Defendants' treatment of Plaintiff deviated from accepted standards of care, and that the care rendered by the Defendants was a proximate cause of Plaintiff's injuries.

Specifically, Dr. Daniel opined that Dr. Roberts deviated from the accepted standard of care when Plaintiff presented to him pre-operatively. According to Plaintiff's expert, Dr. Roberts did not perform simple non-invasive tests and procedures, like a Silfverskiold examination, consistent with the standard of care, to determine whether a gastrocnemius resection versus an Achilles tendon lengthening was indicated. According to Dr. Daniel, with a prior medical history of diabetes and a previous CVA, Plaintiff's right leg weakness was more likely due to gastrocnemius muscle injury than to a tendon contracture. Dr. Daniel opined that the tendon lengthening procedure Dr. Roberts performed was not indicated nor within the boundaries of the standard of care. Without documentation of whether the Silfverskiold examination was positive or negative, a reasonably prudent physician acting within the standard of care would not have performed an Achilles lengthening procedure.

Dr. Daniel's opinion that the surgical procedure performed by Dr. Roberts proximately caused or substantially contributed to an aggravation of Plaintiff's injuries, and subjected him to unnecessary pain and discomfort, additional medical treatment, and an acceleration in his balance issues due to a decrease in his leg and ankle strength. He further opined that there is no documentation with regard to an attempt at improving dorsiflexion range of motion of the ankle using a wall push technique prior to the October 9, 2019 surgery. As such, it was below the standard of care to advise surgery without first having the patient attempt such procedure. Moreover, Dr. Roberts' decision to perform a percutaneous Achilles tendon lengthening on Plaintiff was a deviation from accepted standards of care, as there was not any documented objective indication that it was necessary, leaving no objective basis to justify lengthening.

Notably, Dr. Daniel concludes that the over-lengthening of Plaintiff's Achilles tendon that occurred during the surgery directly led to his postoperative calf weakness and balance difficulties. In addition, he opined that Dr. Thordarson's August 10, 2022 evaluation, supports the finding that over-lengthening of the tendon caused calf weakness. Dr. Daniel indicates that Plaintiff's injuries, including excessive ankle dorsiflexion past neutral with unilateral calf atrophy and corresponding calf weakness — is anatomically and clinically consistent with excessive Achilles tendon length rather than with a bunion deformity alone. As such, he disagrees with Dr. Greisberg, who opined that no evidence supported the finding that Dr. Roberts over-lengthened Plaintiff's Achilles tendon. Further, the record reflects that balance and ambulation difficulty was noted during Defendants' post-operative course and has persisted years later on independent evaluation, supporting a chronic functional impairment rather than transient post-surgical soreness.

Based on the expert affirmation of Dr. Daniel, the Court finds that Plaintiff has raised triable issues of fact sufficient to rebut the Defendants' prima facie showing to summary judgment as to the care rendered by Dr. Roberts. "Summary judgment is not appropriate ... [when] the parties [submit] conflicting medical expert opinions because [s]uch conflicting expert opinions will raise credibility issues which can only be resolved by a jury" (*Cummings v Brooklyn Hosp. Ctr.*, 147 AD3d 902, 904 [2d Dept 2017], quoting *DiGeronimo v Fuchs*, 101 AD3d 933 [2d Dept 2012] [internal quotation marks omitted]; see *Elmes v Yelon*, 140 AD3d 1009 [2d Dept 2016]; *Leto v Feld*, 131 AD3d 590 [2d Dept 2015]).

Since triable issues of fact exist as to the care and treatment provided by Dr. Roberts under the doctrine of respondeat superior, dismissal is also precluded as to HHS, (see *Sessa v Peconic Bay Medical Center*, 200 AD3d 1085 [2d Dept 2021]; *Klippel v Rubinstein*, 300 AD2d 448 [2d Dept 2002]; *Rivera v County of Suffolk*, 290 AD2d 430 [2d Dept 2002]). 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 (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]; *Finnin v St. Barnabas Hosp.*, 306 AD3d 189 [1st Dept 2003]).

The Court notes, however, that the branch of the motion seeking dismissal of the complaint as to Dr. Conti is granted, since Plaintiff fails to rebut Defendants prima facie regarding Dr. Conti (*see Sukhraj v New York City Health and Hospitals Corp.*, 106 AD3d 809 [2d Dept 2013]; *Barrett v Hudson Valley Cardiovascular Associates*, 91 AD3d 691 [2d Dept 2012]; *Swanson v Raju*, 95 AD3d 1105 [2d Dept 2012]).

SUMMARY JUDGMENT AS TO LACK OF INFORMED CONSENT

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to and reasonably foreseeable risks and benefits of the treatment (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op30369(U) [Sup Ct, NY County 2020]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 643 [2d Dept 2009]). A defendant may satisfy his or her 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 consent form indicating his or her understanding of the possible risks of the procedure along with corroborating medical records (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In support of their motion, Defendants submits the expert affirmation of Dr. Greisberg, who opines that Dr. Roberts properly obtained Plaintiff's informed consent prior to surgery. Dr. Greisberg notes that the medical records was discussed with Plaintiff as part of the informed consent discussion on August 8, 2019. Dr. Roberts also discussed the surgical plan, including documentation as to the Achilles tendon lengthening along with its risks, benefits, and alternatives

with Plaintiff. Further, Plaintiff's deposition indicated that on the morning of surgery signed the consent form memorializing his understanding of the risks.

Based on the expert affirmation of Dr. Greisberg, the Court finds that the Defendant has showed prima facie his entitlement to summary judgment as a matter of law as to Plaintiff's lack of informed consent claim.

In opposition, Plaintiff submits the expert affirmation of Dr. Daniel, who opined that Dr. Roberts failed to properly inform Plaintiff before surgery about the reasonably foreseeable risks of the proposed treatment, and the alternatives thereto. According to Dr. Daniel, less intrusive treatments could have been considered and a more predictable surgery would include a first metatarsophalangeal joint arthrodesis rather than a joint sparing procedure. As a result, Plaintiff was not sufficiently informed of the alternatives, risks, and contraindications for the surgery that Dr. Roberts performed. Further, Dr. Daniel opines that Dr. Roberts did not discuss that Plaintiff was not going to return to dancing after the procedure considering Plaintiff's advanced age, medical history, prior CVAs and present diabetes mellitus, regardless of how well the procedure was performed. Moreover, he opines that Plaintiff should have been informed that he was at an exceedingly high rate of risk to experience complications coming out of any orthopedic surgery.

Based on the foregoing, this branch of Defendants' motion is denied since Plaintiff raises a triable issue of fact regarding Plaintiff's lack of informed cause of action (*see Gobind v Nercessian*, 227 ADsd 464 [1st Dept 2024]).

SUMMARY JUDGMENT AS TO NEGLIGENT HIRING, TRAINING AND SUPERVISION

With regard to the branch of the moving Defendants' motion seeking dismissal of Plaintiffs' negligent hiring and supervision claim, generally, where an employee is acting within the scope of his or her employment, the employer is liable under the theory of vicarious liability,

and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training (see *Saretto v Panos*, 120 AD3d 786 [2d Dept 2014]; *Quiroz v Zottola*, 96 AD3d 1035 [2d Dept 2012]).

Here, Dr. Greisberg opines, based on the records, that Dr. Roberts was and is well-trained, well-credentialed, and well-experienced, thus, making a prima facie showing with respect to that branch of the motion, which Plaintiff has failed to rebut, thus, this branch of Defendants' motion is granted.

Based on the foregoing, it is hereby

ORDERED that Plaintiff's motion (motion sequence 002) is denied; and it is further

ORDERED that Defendants' motion for summary judgment (motion sequence 003) is granted to the extent of: (1) dismissing the medical malpractice cause of action as to Defendant MATTHEW S. CONTI, M.D., and (2) dismissing Plaintiff's third cause of action sounding in negligent hiring, training and supervision as against all Defendants; and it is further

ORDERED that the Plaintiff's complaint is dismissed as to Defendant MATTHEW S. CONTI, M.D.; and it is further

ORDERED that Defendants' motion for summary judgment is denied in all other respects; and it is further

ORDERED that Defendants are to serve a copy of this order upon Plaintiff with notice of entry within twenty (20) days of entry of this Order; and it is further

ORDERED that within twenty (20) days of entry of this Order, the Defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that service upon the Clerk of the Court and the Clerk of the General Clerk's

Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with this Order; and it is further

ORDERED that the parties shall appear for a virtual settlement/pre-trial conference on November 18, 2026, at 12:00pm, after consultation with the Court's Alternative Dispute Resolution (ADR) department. The ADR Order and specific date, time, and appearance link for the virtual conference shall be set forth in subsequent correspondence by the Court.

This constitutes the Decision and Order of the Court.

3/25/2026
DATE

Kathy J. King
KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE