Goldberg v Rizk
2026 NY Slip Op 31568(U)
April 15, 2026
Supreme Court, New York County
Docket Number: Index No. 805109/2023
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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JENNIFER GOLDBERG and ERIC GOLDBERG, her spouse,

Plaintiffs,

- v -

SAM S. RIZK, M.D., F.A.C.S., MANHATTAN FACIAL PLASTIC SURGERY, PLLC, and JOHN/JANE DOES 1-10 (being medical practitioners who provided care to Plaintiff); and ABC CORPS. 1-10 (being entities that provided care Plaintiff),

Defendants.

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INDEX NO. 805109/2023

MOTION DATE 04/15/2026

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

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

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice and loss of spousal consortium, the defendants Sam S. Rizk, M.D., F.A.C.S., and Manhattan Facial Plastic Surgery, PLLC (together the MFPS defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiffs oppose the motion. The motion is granted to the extent that the MFPS defendants are awarded summary judgment dismissing the plaintiffs' lack of informed consent claim, which was improperly subsumed in the medical malpractice cause of action, and so much of the medical malpractice cause of action as was premised upon (a) Rizk's alleged employment of chromic sutures during an April 6, 2022 revision surgery that he performed upon the plaintiff Jennifer Goldberg (hereinafter the patient), (b) their alleged failure to maintain appropriate medical records, (c) their alleged failure to diagnose the conditions of, and prescribe appropriate medications to, the patient, (d) their determination to undertake

revision procedures too soon after the initial procedure, and (e) the doctrine of res ipsa loquitur, as well as so much of that cause of action as sought to recover for the patient's allergic reactions, clinical depression, and hair loss. The motion is otherwise denied, as there are triable issues of fact as to whether Rizk departed from good and accepted practice in the manner in which he performed plastic surgery upon the patient on three separate occasions, whether those departures caused or contributed to several of the patient's claimed injuries and the need for additional revision surgeries, and whether Manhattan Facial Plastic Surgery, PLLC (MFPS), is vicariously liable therefor.

The crux of the plaintiffs' claims against the MFPS defendants, as set forth in their complaint, is that, on February 16, 2022, March 28, 2022, and April 6, 2022, the defendant plastic surgeon Rizk, while working for MFPS, committed malpractice in the course of performing three procedures upon the patient's face and lips. They further alleged that Rizk failed properly to advise and instruct the patient with respect to postoperative care and procedures, and failed properly to diagnose, treat, and prescribe medications and other treatments for the conditions that the patient was experiencing when she first presented to Rizk. In their initial bill of particulars, the plaintiffs asserted that Rizk failed properly to perform surgical procedures on the patient's face and lips, more specifically a lip lift, improperly performed additional surgical procedures upon the patient's lips, and improperly determined to continue the initial surgery after complications arose. They further reiterated that Rizk failed properly to advise and instruct the patient concerning postoperative care and procedures, and failed properly to diagnose, treat, and prescribe medications and therapies for the conditions that the patient presented on February 16, 2022. The plaintiffs averred that Rizk failed to furnish timely and proper preoperative, intraoperative, and postoperative care and treatment to the patient, and failed to heed the complaints that the patient made to him, as well as the symptoms that she presented to him, both during and following the subject surgical procedures. In addition,

they contended that Rizk improperly evaluated the patient in connection with conditions that developed intraoperatively and postoperatively and failed to properly treat her therefor.

The plaintiffs further faulted Rizk for failing to record all facts, findings, test results, observations, recommendations, reports of consultations, physical findings, and the like that were relevant to the patient's care. Moreover, although not expressly set forth in the complaint, the plaintiffs alleged in their initial bill of particulars that the MFPS defendants failed to advise the patient of the known risks of lip lift procedure, including the risks inherent in an improper performance of that procedure and, thus, failed to obtain the patient's fully informed consent to the lip lift procedure.[1] The plaintiffs also asserted that they would rely upon the doctrine of res ipsa loquitur. In addition, they made nonspecific allegations that the MFPS defendants departed from the applicable standards of care, engaged in conduct that a reasonably prudent medical provider would not have undertaken, did not take reasonable steps to avoid injury or to avoid exacerbating any injuries that the patient sustained, and caused, created, allowed, and permitted the "irreversible complications and conditions which occurred." The plaintiffs further asserted that MFPS was vicariously liable for Rizk's wrongful acts.

The plaintiffs alleged in their initial bill of particulars that, as a consequence of these allegedly wrongful acts, the patient experienced deformity, disfiguration, severe bruising, lumpiness, and depressed scarring of her lips, specifically, "right side of lip further than the left side" (sic), significant scarring and tenderness around her nose, requiring additional scar

[1] "It is well settled that lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" (*Jolly v Russell*, 203 AD2d 527, 528 [2d Dept 1994]; *see Dodes v North Shore Univ. Hosp.*, 149 AD2d 455, 456 [2d Dept 1989]; *Culkin v Nassau Hosp. Assn.*, 143 AD2d 973, 974 [2d Dept 1988]). "In creating the cause of action, the Legislature not only established the unique factual allegations which support such a cause of action, but also established equally unique defenses to liability, and placed specific limitations on the types of cases in which the cause of action may be asserted" (*Jolly v Russell*, 203 AD2d at 528-529; *see* Public Health Law § 2805-d). Inasmuch as the plaintiff asserted a lack of informed consent claim in her bill of particulars, the court will address it as if it had been articulated in the complaint as a cause of action.

revision, altered skin, reduced movement in her upper lip, lip atrophy, pain, tenderness, swelling stiffness, emotional injuries, increased anxiety, and depression.

In their amended bill of particulars, the plaintiffs asserted that Rizk departed from good and accepted practice by lifting one side of the patient's top lip higher than the other side of the lip, causing asymmetry in the appearance of top lip. They added that Rizk committed malpractice both in the performance of an initial March 28, 2022 left upper lip lift revision procedure and a second left upper lip lift revision procedure on April 6, 2022. Moreover, they contended that he committed malpractice by performing two re-lifting procedures so close in time to the initial February 16, 2022 surgery, and failed to advise the patient of the risks of and alternatives to the re-lift procedures. Furthermore, the plaintiffs asserted that Rizk committed malpractice by failing to account for the patient's allergy to chromic sutures, thus causing her to experience an allergic reaction when he employed that type of suturing.

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]). Such a cause of action may be premised upon a claim that those departures allowed a patient's condition to worsen, and thus deprived him or her of an opportunity for a cure or a better outcome (*see Mortensen v Memorial Hosp.*, 105 AD2d 151, 156, 159 [1st Dept 1984]; *Kallenberg v Beth Israel Hosp.*, 45 AD2d 177, 178 [1st Dept 1974], *affd no op.* 37 NY2d 719 [1975]). Moreover, where a physician fails properly to diagnose a patient's condition, thus providing less than optimal treatment or delaying appropriate treatment, and the insufficiency of or delay in treatment proximately causes injury, he or she will be deemed to have departed from good and accepted medical practice (*see Perez v Fitzgerald,* 115 AD3d 177, 178 [1st Dept 2014]; *Perlin v King*, 36 AD3d 495, 495 [1st Dept 2007]; *see generally Zabary v North Shore Hosp. in Plainview,* 190

AD3d 790, 795 [2d Dept 2021]; *Lewis v Rutkovsky*, 153 AD3d 450, 451 [1st Dept 2017]; *Monzon v Chiaramonte*, 140 AD3d 1126, 1128 [2d Dept 2016] ["(c)ases . . . which allege medical malpractice for failure to diagnose a condition . . . pertain to the level or standard of care expected of a physician in the community"]; *O'Sullivan v Presbyterian Hosp. at Columbia Presbyterian Med. Ctr.*, 217 AD2d 98, 101 [1st Dept 1995]).

The court notes that 8 NYCRR 29.2(a), among other things, requires physicians and hospitals to maintain accurate records, and that a violation of that state regulation may, under certain circumstances, constitute a departure or deviation from accepted practice (*see generally Collado v New York and Presbyterian Hosp.,* 2022 NY Misc LEXIS 43557, *61-62 [Sup Ct, N.Y. County, Aug. 3, 2022] [Kelley, J.]; *Khosrova v Westermann*, 2011 NY Slip Op 32628[U], *5, 2011 NY Misc LEXIS 4768, *13 [Sup Ct, Suffolk County, Oct. 4, 2011] [plaintiff's expert opined that failure to maintain adequate records constituted a departure from good practice]; *cf. Pharr v Cortese*, 147 Misc 2d 1078, 1081 [Sup Ct, N.Y. County 1990] [no implied private right of action for violation of regulation]; *but cf. Sorrentino v Iofel*, 2021 NY Misc LEXIS 26098, *6 n 2 [Sup Ct, Queens County, Jan. 21, 2021] [even assuming that regulation creates private right of action, plaintiff failed to assert one]).

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 Kristie M. v. Mercy Hosp. of Buffalo,* 240 AD3d 1228 [4th Dept 2025]; *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]; *see also Kristal R. v Nichter,* 115 AD3d 409, 411-412 [1st Dept 2014]; *Bacani v Rosenberg*, 74 AD3d 500, 501-502 [1st Dept 2010]). 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).

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 619, 620 [3d Dept 1999], 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 required on 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]).

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

In support of their motion, the MFPS defendants referred to the pleadings and the plaintiffs' bills of particulars, which previously had been uploaded to the New York State Court Electronic Filing (NYSCEF) system (*see* CPLR 2214[c]), and submitted a statement of allegedly undisputed material facts, relevant medical and hospital records, transcripts of the parties' deposition testimony, two memoranda of law, an attorney's affirmation, and the affirmation of board-certified otolaryngologist and plastic surgeon, William Rosenblatt, M.D., who opined that the MFPS defendants did not depart from good and accepted practice, and that nothing that they did or did not do caused or contributed to the patient's injuries.

Dr. Rosenblatt first recounted the patient's surgical history, noting that she previously had undergone a breast-reduction procedure, two cesarian sections, a bunion surgery, a breast-augmentation procedure, the removal and replacement of breast implants, bilateral labial reduction surgery, a hernia repair, and an abdominoplasty, also known as a "tummy tuck," as well as the excision of skin from her axilla and upper lid blepharoplasties in February 2020.

According to Dr. Rosenblatt's reading of the patient's medical records, she also had sustained facial trauma as a teenager from a motor vehicle accident that, according to her deposition testimony, had distorted her lips and smile. He noted that the patient had testified that this distortion consisted of a defect in the vermillion border of her left upper lip that had been caused when the accident "took off the peak of my left bow on my lip." Dr. Rosenblatt further noted that the patient also claimed to be allergic to chromic sutures, an allergy that was discovered as a result of surgery performed by her gynecologist on her labia in 2018.

Dr. Rosenblatt asserted that the patient initially consulted Rizk on October 24, 2019 in connection with possible facial surgery, when she was 53 years old, but did not return to see him until September 22, 2021, after having undergone blepharoplasties performed by plastic surgeon Anthony Berlet, M.D. At her first visit with Rizk, the patient purportedly complained about aging skin on her face and neck, and that she had jowls, as well as protruding ears and lips, after which Rizk prepared diagram depicting lip asymmetry, with her right upper lip lower than the left upper lip. More specifically, based on his review of the medical records and deposition testimony, Dr. Rosenblatt asserted the patient complained of the space between her nose and the top of her upper lip, known as the philtrum, and the presence of an irregular vermillion border, and told Rizk that she wanted to look younger, have her ears "tucked," her eyebrows "lifted," and have "excessive jowls" removed. She allegedly requested Rizk to reduce the space between her nose and upper lip, fix the lip asymmetry, and leave her with "less skin between [her] nose[,]" while avoiding a big lip and leaving her with "symmetrical lips with a shortened border with [a] shortened nasal area." According to Dr. Rosenblatt, Rizk formulated a plan to remove slightly more tissue on the right than on the left. At her deposition, the patient purportedly conceded that she did not have a preoperative conversation with Rizk concerning the defect in the vermillion border of her upper lip. As Dr. Rosenblatt described them, preoperative photographs confirmed that the patient's right lip was droopier, that is, lower, than the left lip which, at least to Dr. Rosenblatt, explained why the patient manifested fewer exposed

teeth on her right side when smiling and an asymmetrical vermillion border of her lips, known as "Cupid's bows," or peaks, with the peak on the left appearing less distinct and "blunted," while the peak on the right was "triangular" in appearance.

Risz performed the subject procedure on February 16, 2022, including a face and neck lift, a bilateral otoplasty, or "ear pinning," a midline brow lift, and a "bullhorn" lip lift. As Dr. Rosenblatt interpreted and recited from the operative report, the markings that Rizk employed for the lip-lift phase of the procedure, which he explained were made for the purpose of properly placing and situating the necessary incisions, called for the removal of "approximately 6 mm of left excess skin in the upper lip and 8 mm on the right side as the patient's lips are asymmetrical with one being significantly droopier." He further asserted that the operative report documented that Rizk employed mono-filament polydioxanone sutures (PDS). Dr. Rosenblatt asserted that neither the operative report nor the recovery room records indicated the presence of any complications.

On March 22, 2022, the plaintiff presented to plastic surgeon Alexander Ovchinsky, M.D., complaining of continued lip asymmetry despite the February 16, 2022 procedure that Rizk had performed. Dr. Ovchinsky examined the patient, and reported the presence of scarring, although he also wrote "NL [normal] s[tatus]/p[ost] facelift/lip lift," while also noting the appearance of lip asymmetry and white lips, commenting that these observations also were seen on preoperative photographs, but were less pronounced in those photographs. His written plan was to "observe" and consider performing a direct left lip lift if there were "no improvement [with] stretching." The patient returned to see Rizk on March 28, 2022, complaining that her lip was "still low" on the left side, and that a deep suture had not dissolved, was protruding, and allowed a little bit of skin separation in the incision made under her left nostril. According to Dr. Rosenblatt, she asked for the corner of her left lip to be lifted. Rizk's chart reported that he removed the suture, closed the separation, and performed a "mini" left corner left-lip lift while the

patient was under local anesthesia, using Prolene sutures to address lid "droopiness," albeit without intending to correct the defect in the vermillion border of her upper lip

The patient again returned to seek Rizk on April 6, 2022, once more complaining that her left upper lip remained lower than her right upper lip, and that the scar under her left nostril was still visible and separated. According to Dr. Rosenblatt, Rizk "stitched" it again while the patient was under local anesthesia, and Rizk once again employed Prolene sutures in an attempt to minimize the separation while lifting the corner of the left lip a little higher. At her deposition, the patient claimed that she suffered from an allergic reaction to the sutures, attesting that her "wound did not heal and it was edematous and red," although she conceded that such a reaction had not occurred in connection with the initial lip lift or the first revision surgery, and that she had not developed a rash in the area after any of the subject procedures. Dr. Rosenblatt opined that there was no evidence that Rizk employed any type of suture to which the plaintiff was allergic, and that he previously had employed Prolene suturing with no adverse effects.

On June 1, 2022, Rizk performed a fractional carbon dioxide (CO2) laser resurfacing procedure upon the patient to treat both her facial scarring and left outer ear deformity, and he also performed a revision otoplasty. On July 18, 2022, Rizk injected the steroid Kenalog into the patient's nostril area to promote healing of the incision under her nostril. He wrote in the patient's chart that she needed a "corner lip lift, wants to lift more - Pt. had preexisting lip asymmetry due to scar earlier in life - wants to lift more." On August 22, 2022, the patient had a video consultation with plastic surgeon Gary Linkov, M.D., after which he wrote in her chart that she had informed him that she did not suffer from any allergies. She complained about the two prior revisions of her initial lip-lift surgery, insofar as she had concluded that her lip vermillion borders remained asymmetrical, she was unhappy with the residual scarring, and, according to Dr. Linkov, was "unhappy with overall shape of lip especially as sides are still down and inquired about a further revision, this time to her lower lip." According to Dr. Linkov's chart, the patient

inquired about a further lip-lift revision and a revision of a forehead scar resulting from her prior eyebrow lift. Dr. Linkov wrote that his plan included a lower lip-scar revision surgery and a corner left-lip revision surgery.

On November 14, 2022, the patient consulted with plastic surgeon Miguel Mascaró, M.D. On her patient history questionnaire, she answered “no” to a question inquiring as to whether she was allergic to any medications, adhesive tapes, or suturing. According to Dr. Rosenblatt, Dr. Mascaró’s preoperative photographs depicted Cupid’s bows/vermillion border unchanged from the patient’s appearance prior to Rizk's surgeries, albeit with an increase in erythema and in the surface area and number of visible teeth on her right when she smiled or opened her mouth, but no visible scar under her left nostril. Dr. Mascaró’s preoperative plan was to elevate the corners of the patient’s mouth, but Dr. Rosenblatt concluded that there was no plan to improve the vermillion border of the patient’s upper lip. On December 15, 2022, Dr. Mascaró performed a bilateral corner lip lift, employing 3.5 mm wedge excisions on the corner of each upper lip. Dr. Rosenblatt asserted that Dr. Mascaró’s preoperative and postoperative diagnosis was that the patient was suffering a ptotic, that is, a drooping, upper lip. On March 30, 2023, Dr. Mascaró performed a dermabrasion of the patient’s left upper lip scar, a right upper-lip reduction, and a CO2 laser perioral resurfacing. In connection with those procedures, Dr. Mascaró’s additional preoperative and postoperative diagnoses were a hypertrophic scar of the upper lip, scar tissue, and perioral rhytids, that is, wrinkling.

Dr. Rosenblatt expressly opined that Rizk's performance of a lip lift was proper in terms of his choice of procedure, which is known as a “bullhorn,” or indirect/subnasal, lip lift, and proper as to his surgical technique. As he explained it, this type of lip lift, in contrast to a direct lip lift, which would have involved an incision along the top of the upper lip, is effectuated via an incision under the patient’s nose. Dr. Rosenblatt asserted that the bullhorn lip lift was well suited to address the patient’s complaint of a widened space between her upper lip and her philtrum and, hence, was well within the standard of care. He concluded that such a procedure

is the most common type of lip lift, with advantages over other types of lip lifts in terms of reducing the distance between the nose and the upper lip, enhancing the visibility of the upper teeth when smiling, and creating a youthful look with an inconspicuous scar under the nose. Dr. Rosenblatt additionally opined that Rizk performed the lip lift properly by making an incision under the patient's nose and removing a small strip of skin, and by intentionally removing more tissue from the patient's right side (8 mm) than her left (6 mm) in an attempt to make her smile more even, leaving an equivalent number of teeth observable on both sides when the patient opened her mouth.

Dr. Rosenblatt expressly rejected the plaintiffs' claim that Rizk was negligent in "lifting one side of the top lip higher than the other side of the lip causing asymmetry in the appearance of top lip" since, given the patient's preexisting asymmetry in the number of exposed teeth, it was reasonable to remove more tissue on the right side. He explained that, once the area was allowed to heal, the vermillion border of the upper lip was no different than that of the lower. In this respect, as he described it, since it is difficult to remove the exact amount of tissue from each lip that will provide the best aesthetic result, "over and under corrections" occur that are not reflective of a departure from the standard of care, even where, as here, a revision might be required. Dr. Rosenblatt referred to competing concerns in the patient's case because she wanted a more even smile, which required lifting the right upper lip more than the left upper lip, but he asserted that, in doing so, the removal of more tissue on the right could make the preexisting defect in her vermillion border of her upper lip more pronounced, especially in the early postoperative period before the lip lift healed and the scars matured.

As Dr. Rosenblatt described it, the primary goal of the lip lift was to decrease the size of the patient's philtrum, while a secondary goal, if possible, was to even out her smile by making an equal number of teeth visible on each side when the patient was smiling or opened her mouth. Dr. Rosenblatt concluded that the postoperative photographs demonstrated that Rizk accomplished both goals. As relevant to this opinion, he asserted that the photographs that Dr.

Mascaró took of the patient before operating on her several months later depicted an improvement in the right-versus-left-exposure of teeth, and that the philtrum space had been narrowed. Dr. Rosenblatt attested that all of the photographs showed the same, very slight, preexisting difference in the vermillion border of the upper lip, while several depicted redness under the left nostril without a discreet scar. He stated that the same was true of photographs taken by the patient herself in June 2022 and on December 1, 2023, which he described as manifesting good symmetry and the same appearance of the vermillion border.

Dr. Rosenblatt opined that the plaintiffs' claim that Rizk performed revision lip lifts "too close" in time to the initial lip lift "ignores" the fact that "once the incision under the left nostril opened slightly, it had be explored to remove the retained suture and then sutures closed." He expressly concluded that the timing of two revisions that Rizk performed was neither a departure from the standard of care nor injurious in any event, since those revisions, and the timing thereof, had "nothing to do" with the patient's primary complaint, which he described as relating only to her perception of a difference in the vermillion border/Cupid's bows of her upper lips. He further characterized the plaintiffs' purported claim that Rizk performed contraindicated procedures as "vague," since the plaintiffs never specified the nature of the alleged contraindication. Dr. Rosenblatt contested the validity of the plaintiffs' claim that the patient suffered an allergic reaction to a chromic suture because, in the first instance, it was "unclear" if she is allergic to these or any sutures, inasmuch as chromic sutures had been employed during one of her cesarean section procedures without a reaction, and the reaction that occurred in connection with her 2018 labia surgery did not permit the conclusion that she suffers from a suture allergy. Additionally, he noted that the patients' history of an allergy to chromic sutures was always either noted with a question mark, or denied by the patient herself. Furthermore, Dr. Rosenblatt explained that, although the patient claimed that the adverse reaction occurred when chromic sutures were employed in the course of Rizk's second revision procedure, her incision actually had opened after the first revision, with no allergic effects, while the patient

conceded that she had never developed a rash at the surgical site of the second revision procedure, which Dr. Rosenblatt concluded was the hallmark of an allergy. In any event, and, most crucially, Dr. Rosenblatt asserted that Rizk did not use chromic sutures in any of the three procedures that he performed upon the patient, as corroborated both by Rizk's testimony and operative photographs depicting dark blue sutures that clearly were not chromic sutures.

Finally, Dr. Rosenblatt averred that there was a "disconnect" between the patient's complaint of uneven widow peaks and her submission to corner lip-lift surgeries. As he explained it, a corner lip lift is a minimally invasive procedure that is easily performed when a patient is merely under local anesthesia, and involves the raising of the outer edges, or corners, of the upper lip to create a "more youthful appearance, a better smile, and a more happy look." According to Dr. Rosenblatt, however, a lip-lift procedure is not capable of correcting any defect in the vermillion border of the lip.

In opposition to the MFPS defendants' motion, the plaintiff relied on many of the same documents that those defendants had submitted, and also submitted additional medical records, correspondence, a response to those defendants' statement of material facts, a counterstatement of material facts, additional photographs, an affirmation from the patient herself, an attorney's affirmation, a memorandum of law, and the curriculum vitae and expert affirmation of plastic surgeon Francis J. Collini, M.D.

In her own affirmation, the patient asserted that, following Rizk's initial February 16, 2022 procedure, she again saw him on March 28, 2022, complaining of continued lip asymmetry, as the right peak of her upper lip was significantly higher than the left peak, as well as complaining of scarring under her left nostril and the continued drooping of her right upper lip, which caused "more teeth" to become visible, upon which he agreed to perform a "revision" to re-lift the left side of her lip. According to the patient, she asked Rizk if it was advisable to perform a revision procedure since it was only six weeks after the initial surgery, in response to which Rizk informed her that it would be "fine." As explained above, Rizk did, in fact, perform

the first revision and re-lift procedure March 28, 2022, and the patient returned for another follow-up visit with Rizk on April 6, 2022. The patient attested that, at the April 6, 2022 appointment, she again expressed her concern that the scar under her nose was visible, and that her left lip was still low, upon which Rizk advised her that he would perform another revision, which he performed on that date.

As the patient explained it, prior to Rizk's procedures, she had become aware that she was allergic to chromic sutures, inasmuch as she had experienced an allergic reaction following a March 8, 2018 labial procedure that had been performed by gynecologist Joann Somers, M.D., who had diagnosed her with that allergy. According to the patient, following that procedure, she had experienced a rash, erythema, and edema. She averred that, in the course of her treatment by Rizk, she had made him, his nurses, and his office assistants aware of her allergy on multiple occasions during 2021 and 2022, all of which was done prior to Rizk's initial surgery, as well as on February 16, 2022, immediately prior to the first procedure. The patient asserted that she actually observed the nurses write down this information. As the patient recounted it,

> "[w]hile I was in Dr. Rizk's office operating room being prepared for the second revision lip lift procedure on April 6, 2022, during which I was awake, I overheard a nurse tell Dr. Rizk that he could not use chromic sutures because I said that I was allergic to them, and I heard him reply that it did not matter."

The patient averred that, following the April 6, 2022 procedure, she immediately experienced erythema and edema at the incision site, while the incision site under her left nostril failed to close or heal for several days, and she developed a "terrible scar" under that nostril.

As the patient framed the issue, based on the similarity between the symptoms associated with her 2018 allergic reaction and the symptoms that she experienced at the incision site under her left nostril following the April 6, 2022 procedure, along with her "knowledge and substantial experience working as a Physician Assistant in dermatology and often seeing such symptoms of allergic reactions," she formulated a "belief" that she had

experienced an allergic reaction immediately following the April 6, 2022 procedure. Moreover, based on the conversation that she overheard in the operating room on April 6, 2022, and the reaction that she experienced under her left nostril following that procedure, she had a "belief that Dr. Rizk used chromic sutures during the procedure, despite his knowledge" that she had "told his office that I was allergic to them."

In his affirmation, Dr. Collini reiterated much of the patient's medical and surgical history that the MFPS defendants had described, although he added certain details. Specifically, he pointed that that, on the day after the initial February 16, 2022 procedure, Rizk visited the patient at the hotel in which she had been recuperating postoperatively, at which time she "immediately" questioned the apparent postoperative lip asymmetry, asserting that the right side appeared too high. He explained that Rizk had responded that this outcome was intentional, and that eventually the lip would "fall." Nonetheless, Dr. Collini adverted to Rizk's own deposition testimony, in which the latter "admitted" that he had overcorrected the right side during the February 16, 2022 procedure. Dr. Collini further noted that the patient also had returned to Rizk's office on February 23, 2022, February 28, 2022, and March 2, 2022 for progressive suture removals, and that, at the March 2, 2022 visit, Rizk's assistants applied one milliliter (mL) of Volbella lip filler in an attempt to correct the visible volumetric asymmetry of the upper lip. In connection with the patient's March 23, 2022 visit to Dr. Ovchinsky, he asserted that the patient was concerned at that time about continued lip asymmetry, and had sought a second opinion from Dr. Ovchinsky, who, according to Dr. Collini, confirmed that the asymmetry was more pronounced postoperatively than in the patient's preoperative photos. As he interpreted Dr. Ovchinsky's chart, the latter recommended that the patient undergo a direct lip lift on the left side to correct the imbalance. With respect to the patient's March 28, 2022 return to Rizk, Dr. Collini explained that the patient made complaints at that visit of lip asymmetry and scarring under her left nostril, upon which Rizk told her that he would perform a revision procedure. As Dr. Collini characterized Rizk's response, the latter "brushed aside" the patient's

concerns about the short period of time between the initial procedure and the first revision procedure, and nonetheless performed that first revision procedure on that date, although Dr. Collini did not expressly opine that Rizk departed from accepted practice by performing the first revision procedure too soon after the initial procedure. Dr. Collini stated that, although no operative report was produced in connection with the first revision surgery, perioperative documentation indicated that the procedures performed at that visit included a revision bullhorn lip lift and a direct left upper lip lift. As explained above, despite the first revision procedure, the patient remained concerned about postoperative healing, and returned to see Rizk on April 6, 2022, complaining that the scar under her nose was visible and that her lip remained low on the left side, after which Rizk performed a second revision procedure on that date. According to Dr. Collini, the second revision procedure focused on a "revision left upper lip lift," but that Rizk again generated no formal operative report.

Dr. Collini reiterated the patient's contentions concerning her allergy to chromic sutures, her communication of this information to Rizk and his staff, and the fact that, contrary to the implications of Dr. Rosenblatt's affirmation, the MFPS defendants were indeed aware of this allergy prior to February 16, 2022, particularly because that allergy was "noted several times throughout her [MFPS] medical chart." Specifically, he referred to the cover page of the chart, which displayed a note expressly reciting the words "Chromic Suture allergy." Dr. Collini essentially accepted the patient's opinion that Rizk employed chromic sutures during the April 6, 2022 second revision surgery, and reiterated the patient's contentions that she overheard Rizk tell a nurse that the use of such sutures or the patient's allergy thereto "did not matter," as well as her assertions that she experienced symptoms of erythema, edema, and poor wound healing and "recognized it as an allergic reaction to chromic sutures, based on her prior allergic reaction and her experience as a Physician Assistant specializing in dermatology."

Relying on Rizk's chart, Dr. Collini asserted that, on April 13, 2022, Rizk removed the sutures from the second revision surgery, but Dr. Collini did not expressly conclude from

anything contained in that chart that the sutures were chromic in nature. On April 21, 2022, the patient texted one of Rizk's assistants, complaining about the persistence of left-nostril scarring and problems with the sutures, attaching an additional photograph of her appearance. In response, the assistant informed the patient that "Rizk recommends that you leave the dissolvable sutures alone they need to dissolve they are there to decrease the tension so please give it time for swelling to go down." On May 19, 2022, the patient emailed Rizk's office to express her growing concerns over persistent lip asymmetry, pain at the nasal scar, and the onset of depression and hair loss, which she attributed to stress related to the surgical outcomes. On June 1, 2022, Rizk performed CO2 laser resurfacing, targeting the scar around the patient's mouth, and also revised the otoplasty that the patient initially had undergone. Dr. Collini pointed out that Rizk again did not generate an operative report. On June 28, 2022, the patient emailed Rizk's office, again complaining of pain and discomfort that she was experiencing in connection with the scarring under her left nostril. On July 13, 2022, according to Dr. Collini, the patient saw her primary care physician, internist Ronna Sherman, M.D., who purportedly diagnosed her with depression secondary to the adverse outcome of the plastic surgery procedures, and prescribed her Lexapro. According to Dr. Collini, on July 18, 2022, Rizk attempted to treat the nasal scar with an intralesional injection of the steroid Kenalog.

After describing the patient's encounters with Drs. Linkov and Mascaró, Dr. Collini noted that, on November 30, 2022, the patient sent a "formal" email to Rizk, in which she expressed dissatisfaction with the care that he provided, asserting that, as a result, she had been suffering from depression and embarrassment, and had expended money for additional treatment by other providers. He reiterated Dr. Rosenblatt's description of the surgery that the patient underwent with Dr. Mascaró on December 15, 2022, and asserted that the operative report for that procedure confirmed that Dr. Mascaró performed a bilateral corner lip lift, with each corner of the patient's lip elevated by 3.5 mm via triangular wedge resections. As Dr. Collini interpreted the relevant medical records, the patient returned to see Dr. Sherman on March 8, 2023, for

ongoing management of her depression, after which she again saw Dr. Mascaró on March 30, 2023, at which time he performed a dermabrasion of her upper left-side lip scar, a right-side upper lip reduction of scarred orbicularis oralis muscle, and a CO2 perioral resurfacing. As Dr. Collini explained it, to improve her aesthetic presentation, the patient underwent further cosmetic refinements in 2024, including multiple lip blushing sessions at PermaLine Cosmetics.

Dr. Collini provided a detailed explanation of photographs taken of the patient's face both before and after the several procedures that Rizk performed. He asserted that photographs taken prior to Rizk's February 16, 2022 initial procedure depicted a preexisting defect in the patient's upper lip vermilion border/Cupid's bows, specifically that the right peak was higher than the left peak, while the underside of the right upper lip was lower than the left upper lip. Dr. Collini asserted that that photograph depicted the distance from the patient's nasal base to the Cupid's bows was 17 mm the right side and 20 mm on the left, while the photograph dated February 22, 2022 "clearly depicts a significant asymmetry in the appearance of the upper lip," inasmuch as the vermilion border of the right-sided Cupid's bow is approximately 5 mm higher than that on the left. He asserted that this imbalance was "readily apparent even to a casual observer at conversational distance and reflects poor surgical judgment and execution." Dr. Collini further asserted that there was a visible notch in the red mucosa of the patient's right upper lip, in contrast to the left side, where no such notch was present. He concluded that this finding suggested increased tension on the right upper lip incision, consistent with the operative report referable to the initial procedure, which recited that a greater amount of tissue had been excised from the right side than the left. Dr. Collini concluded that a February 27, 2022 photograph continued to depict upper-lip asymmetry, even though the sutures had already been removed from the surgical incision site, which, according to him, indicated that the asymmetry persisted beyond the initial healing phase. He further described a March 13, 2022 photograph as further confirmation of an ongoing upper-lip asymmetry that remained "clearly visible" to a casual observer at conversational distance.

According to Dr. Collini, a March 28, 2022 photograph depicted the results of the first revision surgery, showing that sutures were still in place, while an April 6, 2022 photograph reflected improved symmetry of the vermilion border of the left-sided Cupid's bow relative to the right. He did not explain whether this photograph was taken before or after the April 6, 2022 second revision surgery. Nonetheless, Dr. Collini asserted that a 2 mm asymmetry persisted, with the right side remaining higher, while the notch in the red mucosa of the patient's right upper lip was still present, and appeared more pronounced compared to the left. Dr. Collini averred that a photograph taken on April 8, 2022 depicted sutures at the junction of the left nasal ala and upper lip, concluding that this appearance was consistent with Rizk's second revision surgery, which involved the further elevation of the left upper lip. He explained that an April 15, 2022 photograph reflected that sutures have been removed from the patient's left upper lip lift, with the incision apparently healing in a satisfactory manner, even though it remained erythematous. Dr. Collini, however, concluded that the asymmetry of the vermilion border at the Cupid's bow persisted, and remained clearly visible to a casual observer at conversational distance.

Dr. Collini opined that, although a May 19, 2022 photograph showed that the patient's subnasal incision had healed, there nonetheless was evidence of hypertrophy on the left side, while the asymmetry of the vermilion border at the Cupid's bow persisted, and continued to be clearly visible to a casual observer at conversational distance. In addition, he concluded that a June 10, 2022 photograph revealed that the hypertrophy of the patient's left-sided subnasal surgical scar had worsened and was more obvious, while the asymmetry of the vermilion border at the Cupid's bow persisted and remained clearly visible. Dr. Collini further asserted that a December 15, 2022 photograph depicted evidence of Dr. Mascaró's bilateral corner upper lip lift, as well as apparent erythema around the subnasal scar, which he characterized as indicative of laser or dermabrasion treatment, although he conceded that the latter was not documented in the operative report. Additionally, Dr. Collini averred that photographs dated

January 14, 2023 revealed improvement in the appearance of the patient's left-sided subnasal hypertrophic scar deformity, despite the persistence and continued visibility of the Cupid's bow asymmetry. Furthermore, Dr. Collini opined that a March 1, 2023 photograph, taken more than one year after Rizk's initial procedure, continued to show a visible asymmetry between the right and left peaks of the Cupid's bow vermilion border, which remained evident to a casual observer from a normal viewing distance. With respect to a December 1, 2023 photograph, Dr. Collini asserted that it revealed the patient's left upper lip to be fuller than her right, with the left vermilion border of the Cupid's bow appearing flattened, in contrast to the more defined right peak, which he concluded had created a persistent, noticeable asymmetry that remained apparent to a casual observer. Nonetheless, he asserted that an April 11, 2024 photograph did not reveal the vermilion border/Cupid's bow of the patient's upper lip, while photographs taken on April 2, 2025 clearly showed improvement in the appearance of the upper lip, which Dr. Collini attributed to the fact that the patient had undergone a PermaLine cosmetic lip procedure, which he described as a semi-permanent cosmetic tattooing, or micropigmentation, which is specifically designed to enhance the color, shape, and symmetry of the lips. Dr. Collini opined that PermaLine cosmetic procedures are often used for patients who manifest scarring, asymmetry, or pigment loss, such as after surgery or trauma, or even where they manifested naturally uneven lip borders.

Dr. Collini expressly opined that Rizk failed to exercise proper surgical judgment and deviated from the acceptable standards of care by intentionally lifting the right side of the patient's lip higher than the left side in an attempt to rectify the asymmetry that had been caused by the patient's motor vehicle accident decades earlier. In this respect, he adverted to Rizk's deposition testimony, which was to the effect that Rizk intentionally lifted the right side of the patient's lip more than the left side in an attempt to improve the preexisting asymmetry of her lip and, thus, "overcorrected" the right side of the lip. Dr. Collini asserted that Rizk should have appreciated the patient's prior medical history and preexisting vermilion border asymmetry, and

thereupon recognized that, by intentionally lifting the right side of patient's lip to a greater extent than the left side, he would "exacerbate" the preexisting asymmetry of her vermilion border. In this respect, Dr. Collini expressly disagreed with Dr. Rosenblatt's opinions to the contrary, noting that Dr. Rosenblatt acknowledged that "removing more tissue on the right could make the preexisting defect in her vermilion border of her upper lip more noticeable," and explicitly rejecting Dr. Rosenblatt's interpretations of the many postoperative photographs in the record.

In addition, Dr. Collini explicitly concluded that the patient suffered from an allergic reaction to chromic sutures that Rizk had employed during the April 6, 2022 revision procedure, and that Rizk deviated from applicable standards of care by utilizing those sutures. In connection with this opinion, Dr. Collini against referred to the patient's testimony concerning her "belief" that she had experienced such an allergic reaction, which was

> "based upon the similarity between the symptoms she experienced during a prior allergic reaction and the symptoms she experienced after the second revision, along with her knowledge and experience as a Physician Assistant specializing in dermatology and often seeing such symptoms of allergic reactions."

He explained in this respect that her symptoms of erythema, edema, and poor wound healing were common symptoms that he had observed in patients suffering from allergic reactions following plastic surgery. Dr. Collini further noted that there was no evidence in the record that the patient had an allergy to anything else that could have caused her reaction, while she did not have an allergic reaction to the Prolene sutures that were used in the February 16, 2022 procedure. Furthermore, Dr. Collini opined that, inasmuch as an operative report was not recorded that might have included the details of the April 6, 2022 procedure, "there is no evidence within the medical records to prove that chromic sutures were not used." He additionally referred to the text message that Rizk's office dispatched to the patient, advising the patient that Rizk's recommendation was to "leave the dissolvable sutures alone they need to dissolve," and pointed out that chromic sutures are both dissolvable and absorbable. Moreover, Dr. Collini again referred to the patient's recounting of the conversation that she overheard

between Rizk and one of his nurses, in which, upon being reminded of the patient's allergy to chromic sutures, Rizk reportedly asserted that the allergy didn't matter.

Dr. Collini further opined that Rizk departed from the applicable standard of care by failing to maintain adequate documentation, specifically failing to complete operative reports for the procedures performed on March 28, 2022 and April 6, 2022, instead generating only preoperative documentation and consent forms. In addition, Dr. Collini concluded that Rizk deviated from the applicable standard of care by providing negligent follow-up treatment, which he asserted had been demonstrated by "under-addressed postoperative complications" and an "apparent lack of appropriate patient counseling."

Dr. Collini expressly averred that Rizk's conduct was the proximate cause of a significant exacerbation of the preexisting asymmetry of the patient's upper lip vermilion border/Cupid's bow, resulting in the right peak being significantly higher than the left peak, which is clearly visible to a casual observer at conversational distance, as well as the enlargement of a left-sided subnasal hypertrophic scar deformity due to the employment of chromic sutures, the need for additional procedures and treatment by multiple providers due to persistent disfigurement, and depression, hair loss, embarrassment, and emotional distress.

In reply, the MFPS defendants submitted an additional affirmation from Dr. Rosenblatt, along with a memorandum of law. Dr. Rosenblatt asserted that, in concluding that the patient experienced an allergic reaction to chromic sutures in connection with the April 6, 2022 second revision procedure, Dr. Collini made the "unwarranted" assumption that an isolated allergic reaction four years earlier in connection with a gynecological procedure was sufficient to conclude that the patient was, in fact, allergic to chromic sutures. He made this conclusion in light of the patient's "considerable" surgical history in the absence of a similar reaction, as well as the rarity in the general population of allergies to chromic sutures, and the patient's ensuing medical histories, in which she reported a "possible" allergy to chromic sutures, which was noted with a question mark and her later denial of allergies that was not limited to medications.

Dr. Rosenblatt further criticized Dr. Collini for assuming that chromic sutures were placed during the April 6, 2022 procedure in the first instance, despite Rizk's testimony that Prolene sutures were employed to close the skin, and despite the photographs taken after that procedure that depicted dark blue sutures that appear to be Prolene sutures, rather than chromic sutures, which Dr. Rosenblatt explained are gold or yellow. In addition, Dr. Rosenblatt averred that Dr. Collini ignored the patient's own testimony that the incision under her left nostril opened up and had generated a scar *prior to* the April 6, 2022 second revision procedure, which explained why Rizk was compelled to close it. Finally, he asserted that Dr. Collini merely presumed that the patient's reaction to the April 6, 2022 procedure was similar to her March 2018 reaction, even though "they were markedly different," since the March 2018 reaction involved a pruritic, that is, an "itchy," rash, while the patient denied having developed a rash after the April 6, 2022 revision procedure, the photographic evidence did not reveal the presence of a rash, and the patient never reported itchiness.

In connection with Dr. Collini's criticism of Rizk's overcorrection during the initial February 16, 2022 procedure, Dr. Rosenblatt asserted that Dr. Collini did not take into account that Rizk was "faced with a patient who had a dropping right upper lip (causing less teeth to be exposed on that side when she smiled) and a left vermillion border defect (blunting of the left Cupid's bow) and wanted her drooping lip corrected (meaning lifted)." As Dr. Rosenblatt framed the issue, to accomplish this goal, Rizk had to remove more tissue on the right side, and he further noted that Dr. Collini never expressly concluded that the same amount of tissue should have been removed from each side, nor, if removal of an equal amount were indeed unwarranted, how much more should have been removed on the right side. Dr. Rosenblatt further faulted Dr. Collini for failing to explain how the patient's stated goals could have been addressed without removing more tissue on the right. He reiterated that, although the patient subsequently underwent bilateral corner lip lifts, such lifts addressed only the corners of here mouth and were not intended to correct, or capable of correcting, a Cupid's bow defect. Dr.

Rosenblatt further noted that, although Dr. Collini asserted that Rizk exacerbated this defect, the latter essentially conceded that photographs from January 2023 and March 2023 revealed that the *initial* defect persisted and remained evident.

In their reply memorandum of law, the MPFS defendants reiterated that they established their prima facie entitlement to judgment as a matter of law, and asserted that, not only did the plaintiffs fail to adduce any evidence in connection with the lack of informed consent cause of action, but that the plaintiffs had withdrawn that cause of action in any event. They further argued that the plaintiffs' claims in connection with the patient's alleged allergic reaction to Rizk's April 6, 2022 suturing was speculative. In addition, the MFPS defendants noted that, based on the patient's stated goals for the initial plastic surgery, Rizk did precisely what was required to be done. They further argued that Dr. Collini's opinions were altogether conclusory and speculative, were premised upon assumptions unsupported by the evidence, and that Dr. Collini disregarded several undisputed facts in reaching his conclusions.

The court concludes that, with their submissions, including Dr. Rosenblatt's initial expert affirmation, the MFPS defendants established their prima facie entitlement to judgment as a matter of law in connection with all of the plaintiffs' claims and causes of action.

Inasmuch as Dr. Collini did not render an opinion as to whether the consent that Rizk obtained from the patient was qualitatively insufficient, and the plaintiffs adduced no evidence whatsoever that a reasonable person in the patient's situation would have declined to undergo any of the procedures that Rizk performed, they plaintiffs failed to raise a triable issue of fact in opposition to the MFPS defendants' showing of entitlement to judgment as a matter of law in connection with the lack of informed consent claim. Hence, summary judgment must be awarded to the MFPS defendants dismissing that claim insofar as asserted against them. In connection with the medical malpractice cause of action, Dr. Collini did not render any opinion in connection with the plaintiffs' claim that Rizk failed to properly prescribe medications and therapies for the condition the patient was suffering from on February 16, 2022, or that Rizk

performed the revision procedures too soon after the initial procedure. Moreover, although Dr. Collini opined that the MFPS defendants departed from the standard of care in failing properly to maintain medical records, charts, and operative reports, he did not address the issue of how that departure caused or contributed to any of the patient's injuries, asymmetries, or need for additional procedures. Hence, the MFPS defendants are entitled to summary judgment dismissing so much of the medical malpractice cause of action as was premised upon these claims. Moreover, to establish a prima facie case of negligence in support of a res ipsa loquitur charge, plaintiff must establish three elements:

> "[1.] the event must be of a kind that ordinarily does not occur in the absence of someone's negligence;
>
> "[2.] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
>
> "[3.] it must not have been due to any voluntary action or contribution on the part of the plaintiff"

(*Kambat v St. Francis Hosp*., 89 NY2d 489, 494 [1997]; *see James v Wormuth*, 21 NY3d 540, 545-546 [2013]; *Ebanks v New York City Tr. Auth*., 70 NY2d 621, 623 [1987]; Prosser and Keeton, Torts § 39 at 244 [5th ed]). Because the MFPS defendants established that the outcome of the several surgeries performed by Rizk could indeed occur in the absence of negligence, and the plaintiffs failed to raise a triable issue of fact in opposition to that showing, those defendants must be awarded summary judgment dismissing so much of the medical malpractice cause of action as was premised upon the doctrine of res ipsa loquitur.

Furthermore, Dr. Collini's conclusion that Rizk employed chromic sutures during the April 6, 2022 revision procedure was speculative, as was his conclusion that the reaction experienced by the patient thereafter was indeed due to the use of such sutures. Hence, his conclusion that Rizk committed malpractice in this regard is equally speculative. Rizk testified that he did not employ chromic sutures during the April 6, 2022 procedure. In his initial affirmation, Dr. Rosenblatt noted that the relevant photographs taken after that procedure

depicted blue suturing and, hence, that the suturing was not chromic suturing. In fact, the relevant April 6, 2022, April 7, 2022, and April 8, 2022 photographs, annexed as Exhibit L to the MFPS defendants' motion papers, and uploaded to NYSCEF as Docket Entry No. 81, Pictures 8, 9, and 10, indeed depict blue suturing. Dr. Collini did not address this fact in his affirmation, and Dr. Rosenblatt explained in his reply affirmation that chromic sutures are gold or yellow. Moreover, the plaintiffs did not submit the affirmation of an allergist who could have opined that the allergic reaction that the patient sustained after her 2018 procedure was identical or even similar to that she sustained after the April 6, 2022 procedure. As Dr. Rosenblatt pointed out, Dr. Collini did not address the fact that the alleged consequences of Rizk's purported employment of chromic sutures, which included the unfurling of the incision under her left nostril and the creation of a scar, occurred prior to that revision procedure. Rather, Dr. Collini relied on the patient's "belief" that her allergic reaction in 2022 was caused by the same allergen as caused her 2018 reaction, and thereupon applied the fallacy of *post hoc ergo propter hoc* to reach the conclusion that, since she experienced an allergic reaction after the April 6, 2022 procedure, it must have been caused by exposure to chromic sutures. Moreover, he also improperly relied on the patient's recounting of the conversation between Rizk and a nurse to the effect that Rizk stated that her known allergy did not matter. Dr. Collini interpreted this to mean that Rizk knew of the allergy, but discounted that information, and proceeded to employ allergenic sutures regardless of the consequences, when it just as easily could have meant that the patient's allergy to chromic sutures didn't matter because he was not intending to employ them in the first place. In the absence of any admissible evidence that Rizk did, in fact, employ chromic sutures, or that the reaction that the patient experienced was characteristic of an allergic reaction to chromic sutures, summary judgment must be awarded to the MFPS defendants dismissing that claim.

In addition to the summary dismissal of the claim to recover for an allergic reaction, the court also awards summary judgment to the MFPS defendants dismissing the plaintiffs' claims

to recover for the patient's hair loss and clinical depression. Although general claims to recover for emotional distress remain viable, clinical depression is a diagnosis that is defined in the Diagnostic and Statistical Manual, Fifth Series, that must be made by a psychiatrist, psychologist, or other practitioner who is familiar with diagnosing that condition after proper examination. Although Dr. Sherman, as the patient's internist, might be qualified to render such an opinion, she did not submit her own affirmation establishing that she was indeed so qualified, and opining that the patient's depression was indeed caused by the adverse outcome of Rizk's procedures. Moreover, Sherman's office records, which were submitted by the plaintiffs to establish this causal connection, were uncertified and, hence, in inadmissible form (*see Brito v City of New York,* ____AD3d_____, 2026 NY Slip Op 00576, *1 [1st Dept, Feb. 5, 2026]; *Ciancarelli v Timmins,* 226 AD3d 643, 644-645 [2d Dept 2024]; *cf. Uribe v Jimenez*, 133 AD3d 844, 844 [2d Dept 2015] [defendant moving for summary judgment may rely on uncertified records of plaintiff's treating physician]). Dr. Collini is a plastic surgeon who has attested to no familiarity with psychiatric or psychological examinations and therapies and, thus, to the extent that he purported to support Sherman's conclusions in his affirmation, the court concludes that he is not qualified to do so. Similarly, any claims that Rizk's alleged departures caused the patient to sustain hair loss is unsupported by any expert testimony. Hence, those branches of the MFPS defendants' motion which were for summary judgment dismissing claims to recover for those injuries must be granted.

Nonetheless, Dr. Collini's affirmation raised triable issues of fact as to whether the three procedures that Rizk performed upon the patient were performed improperly, and whether the manner in which Rizk performed them caused or contributed to the adverse outcomes experienced by the patient, including her persistent facial asymmetries in the corners of her lips and Cupid's bows, facial scarring, and the need for additional revision surgeries and cosmetic procedures. The court concludes that Dr. Collini's opinions in this regard were "neither conclusory nor speculative, as [they] established the elements of a medical malpractice claim by

specific factual references to the care and treatment" of the patient (*Wiands v Albany Med. Ctr.*, 29 AD3d 982, 984 [2d Dept 2006]), particularly with respect to the removal of excess tissue from one side of the patient's face, and Rizk's conceded "overcorrection." It is well settled that a battle of experts, such as presented here, raises credibility issues which must be resolved by a fact finder, thus precluding summary judgment (*see Frye v Montefiore Med. Ctr.*, 70 AD3d at 25).

The court further concludes that the purported failure of both the MFPS defendants' attorney and Dr. Rosenblatt to include statutorily required language in their moving affirmations does not require a different result. In the first instance, even if the court were completely to ignore counsel's moving affirmation, all of the facts necessary to the determination of the motion were set forth in transcripts of depositions that were taken under oath and documentary evidence, while all of the legal argument propounded by the MFPS defendants were set forth in memoranda of law. In any event, the failure of counsel to include the language required by CPLR 2106 [Part I] in his affirmation, and the failure of Dr. Rosenblatt to affirm his statement "to be true under the penalties of perjury," as required by CPLR 2106 [Part II] can be rectified by the submission of affirmations containing the same content, but including the required language.

The language set forth in the second paragraph of CPLR 2106 [Part I] (L 2023, ch 559, eff. Jan. 1, 2024) provides that the statement required to be included in an affirmation by "any person wherever made" who elects to employ an affirmation in lieu of an affidavit must be in "substantially the following form:

> I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law,"

This language is mandatory (*see Matter of Sweet v Fonvil*, 227 AD3d 849, 851 [2d Dept 2024]; *Lasano v Alternative Funding Group Corp. v Dancie Enters., Inc.,* 2025 NY Slip Op 51363[U], *2-3, 2025 NY Misc LEXIS 7034, *6 [Sup Ct, Kings County, Aug. 19, 2025]). There is some

confusion as to whether the inclusion of this language is also mandatory for attorneys licensed to practice law in New York and physicians licensed to practice medicine in New York who elect to employ an affirmation rather than an affidavit, because CPLR 2106 [Part II] (L 2023, ch 585), which did not purport to repeal CPLR 2106 [Part I], provides, in relevant part, that

> "[t]he statement of any attorney admitted to practice in the court of the state, or of a health care practitioner licensed, certified, or authorized under title eight of the education law to practice in the state, who is not a party to the action, when subscribed and affirmed by him or her to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit."

(CPLR 2106 [Part II] [a]). This provision does not expressly include the requirement that the attorney or physician affirmant attest, in writing, that he or she may be subject to fine or imprisonment, but only that the affirmant is making a statement "under the penalties of perjury."

In the introduction to his affirmation, the MFPS defendants' attorney averred that he "affirms under penalty of perjury" the language that followed the introduction. Although this language satisfies the requirements of CPLR 2106(a), as set forth in CPLR 2106 Part II, applicable to attorneys, this averment is not in substantially the form required by CPLR 2106 Part I, since it did not include the statutory language concerning a potential fine or imprisonment as particular penaltidx for perjury (*cf. Davenport v Lumibao*, 2026 NY Slip Op 30756[U], *11-12, 2026 NY Misc LEXIS 1240 *17-18 [Kelley, J.] [statement in affirmation that "I understand that if anything in this Affirmation is untrue, I am subject to punishment" substantially complied with CPLR 2106, as amended]). Moreover, Dr. Rosenblatt completely omitted any acknowledgment that he was signing his affirmation under the penalties of perjury.

Nonetheless,

> "CPLR 2001 permits a court to disregard a party's mistake, omission, defect or irregularity . . . if a substantial right of a party is not prejudiced. A court may therefore consider materials submitted in reply that serve to correct procedural, technical, and/or ministerial defects in a party's moving papers by exercising its discretion pursuant to CPLR 2001, so long as the opposing party suffers no prejudice"

(*Kallo v Kane St. Synagogue,* 241 AD3d 522, 523-524 [2d Dept 2025]). Any defect in notarization or the inclusion of language satisfying the 2024 amendments to CPLR 2106 may thus be rectified by submitting an affidavit or affirmation that complies with the statute (*see id*.; *Bruning v Pharney Group LLC*, 87 Misc 3d 1208[A], 2025 NY Slip Op 51502[U], *6-7, 2025 NY Misc LEXIS 7546, *17-18 [Sup Ct, Westchester County, Sep. 24, 2025]). The court concludes that the failure of counsel and Dr. Rosenblatt to comply with the requirements of CPLR 2106 [Part I] and Dr. Rosenblatt's failure to include language required by CPLR 2106 [Part II] are technical deficiencies that can be rectified by the submission of new affirmations that recite the required statutory language or something substantially similar thereto. They are thus directed, on or before May 15, 2026, to submit amended affirmations that include the language codified in CPLR 2106 [Part I].

Where a healthcare professional working for a professional corporation, professional limited liability company, or professional limited liability partnership renders health care to a patient "within the scope of his or her employment" for that corporation, company, or partnership, that entity may be held vicariously liable for the negligence of that healthcare provider (*Petruzzi v Purow*, 180 AD3d 1083, 1084-1085 [2d Dept 2020]; *see Yaniv v Taub*, 256 AD2d 273, 274 [1st Dept 1998]; *Connell v Hayden*, 83 AD2d 30, 46, 50 [2d Dept 1981] ["a professional service corporation is liable, like any other corporation, for the torts of its . . . employees when acting in those capacities"]; Business Corporation Law § 1505[a][i]; Limited Liability Company Law § 1205[a]; Partnership Law § 121-1500[q] *see also Galpern v De Vos & Co., PLLC,* 10-CV-1952 (CBA) (JMA), 2011 US Dist LEXIS 117095 *39 , 2011 WL 4597491, *13 [ED NY, Sep. 30, 2011] [Limited Liability Company Law is simply a reflection of the common-law rule that a member of a professional limited liability company is liable for those torts of the company in which he or she is a participant]; *see generally Brown-Jodoin v Pirrotti,* 2011 NY Slip Op 34223[U], 2011 NY Misc LEXIS 7307 [Sup Ct, Westchester County Aug. 17, 2011] [denying motion to dismiss in legal malpractice action made by attorney and his professional

limited liability partnership]). Inasmuch as MFPS is a professional limited liability company that employed Rizk, who committed the acts complained of in the course of his work for MFPS, it may be held vicariously liable for his conduct to the extent he is found to have committed malpractice. Hence, to the extent that summary judgment is being denied to Rizk, summary judgment also must be denied to MFPS.

As a derivative claim, the loss of consortium cause of action asserted by the plaintiff Eric Goldberg, as the patient's husband, remains viable to the extent that the patient's medical malpractice cause of action remains viable (*see Robinson v Northwell Health, Inc*., 2021 NY Slip Op 33146[U], *8, 2021 NY Misc LEXIS 8552, *16-17 [Sup Ct, Queens County, Dec. 6, 2021]; *see generally Clarke v City of New York*, 82 AD3d 1143, 1144 [2d Dept 2011]; *Kaisman v Hernandez*, 61 AD3d 565, 566 [1st Dept 2009]).

With respect to the defendants denominated as "John/Jane Does 1-10" and "ABC Corps. 1-10," the plaintiffs made no showing of any efforts that were expended to identify these fictitious defendants, and never sought to amend the caption or complaint to substitute any actual person or entity as a party defendant. Consequently, the plaintiffs are precluded from relying on CPLR 1024 to maintain this action against these fictitious parties (*see generally Fountain v Ocean View II Assocs., L.P*., 266 AD2d 339 [2d Dept 1999]), and the complaint must be dismissed insofar as asserted against them.

In light of the foregoing, it is,

ORDERED that the motion of the defendants Sam S. Rizk, M.D., F.A.C.S., and Manhattan Facial Plastic Surgery, PLLC, for summary judgment dismissing the complaint insofar as asserted against them is granted only to the extent that they are awarded summary judgment dismissing, insofar as asserted against them, the lack of informed consent claim and so much of the medical malpractice cause of action as was premised upon (a) those defendants' alleged employment of chromic sutures during an April 6, 2022 revision surgery performed upon the plaintiff Jennifer Goldberg, (b) those defendants' alleged failure to maintain

appropriate medical records, (c) those defendants' alleged failure properly to diagnose the condition of, and prescribe medications to, the plaintiff Jennifer Goldberg, (d) those defendants' determination to undertake revision procedures too soon after the initial procedure, and (e) the doctrine of res ipsa loquitur, and so much of the medical malpractice cause of action as sought to recover for Jennifer Goldberg's allergic reactions, clinical depression, and hair loss, those claims are dismissed, provided that, on or before May 15, 2026, those defendants submit the contents of the moving affirmations of their attorney and William Rosenblatt, M.D., that include the language required by CPLR 2106 [Part I], and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the complaint is dismissed insofar as asserted against the fictitious defendants "John/Jane Does 1-10" and "ABC Corps. 1-10"; and it is further,

ORDERED that, on the court's own motion, the attorneys for the remaining parties shall appear for an initial pretrial settlement conference before the court, in Room 204 at 71 Thomas Street, New York, New York 10013, on May 7, 2026, at 11:00 a.m., at which time they shall be prepared to discuss resolution of the action, the scheduling of a future two-hour, mediation-style settlement conference, and the scheduling of a firm date for the commencement of jury selection.

This constitutes the Decision and Order of the court.

4/15/2026
DATE

JOHN J. KELLEY, J.S.C.

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