Shere v Rozbruch
2026 NY Slip Op 32037(U)
May 11, 2026
Supreme Court, New York County
Docket Number: Index No. 805186/2022
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ALAN SHERE,

Plaintiff,

- v -

ANDREW D. ROZBRUCH, D.O., CENTURION ANESTHESIA, MICHAEL A. LEVINE, M.D., ADVANCED UROLOGY CENTERS OF NEW YORK, a division of INTEGRATED MEDICAL PROFESSIONALS, PLLC, CRISTINA E. PEZZINO, M.A., and LYNN M. FACKELMAN, also known as LYNN M. CORCORAN, M.A.,

Defendants.

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INDEX NO. 805186/2022

MOTION DATE 05/11/2026

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67

were read on this motion to/for SUMMARY JUDGMENT.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, the defendants Michael A. Levine, M.D., Advanced Urology Centers of New York (AUC), a division of Integrated Medical Professionals, PLLC, Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn M. Corcoran, M.A. (collectively the IMP defendants), move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted to the extent that summary judgment is awarded to Levine, Pezzino, and Fackelman dismissing the complaint insofar as asserted against them, and to AUC dismissing so much of the complaint insofar as asserted against it as was premised upon allegations that it was vicariously liable for the alleged wrongdoing of Levine, Pezzino, and Fackelman. The motion is otherwise denied.

In his complaint, the plaintiff alleged that, on April 13, 2021, Levine, Pezzino, and Fackelman, while working in the course of their employment for AUC, committed malpractice

while undergoing a urological procedure that Levine performed. Specifically, he asserted that, at 9:37 a.m. on April 13, 2021, while he was at AUC's offices, the defendant anesthesiologist Andrew Rozbruch, D.O., attempted to administer anesthesia to him by placing an intravenous (IV) line containing anesthesia into his right hand. The plaintiff averred that Rozbruch immediately noticed saline infiltration and removed the line. He stated that Rozbruch's next attempt to administer the intravenous line involved an attempt to insert the line into a vein in the antecubital fossa region his right arm, that is, the inner fold/elbow crease of the arm. According to the plaintiff, however, Rozbruch instead improperly inserted the IV line into an artery in that region of his arm, thus injecting the antibiotic Clindamycin and the anesthetic Propofol intra-arterially, and that the plaintiff nonetheless remained awake, while Rozbruch allegedly felt swelling in or near the antecubital fossa region of the plaintiff's right arm. The plaintiff further alleged that, during Rozbruch's third and final attempt to administer anesthesia, the latter inserted an IV line containing Propofol into his right hand, after which he fell asleep.

The plaintiff further alleged in his complaint that, after he was finally anesthetized, and beginning at 9:53 a.m., Levine performed a Rezum™ water vapor therapy procedure upon him to destroy excess prostate tissue, completing the procedure by 9:57 a.m. According to the plaintiff, the anesthesia wore off at 9:59 a.m., he was transferred to the post anesthesia care unit (PACU), and remained there until 10:40 a.m., when he was discharged to his home. He averred that, during his stay in the PACU, he complained of right arm and hand pain to medical assistants Pezzino and/or Fackelman. The plaintiff further asserted that, when his mother came to pick him up, she asked the medical assistants to have a physician examine his arm, but that they told both his mother and him that his arm would be fine, despite the fact that several of the plaintiff's fingernails had turned blue. He additionally alleged that, after his mother again requested a physician to examine him, Levine told the plaintiff's mother that the plaintiff was fine, and that she should take the plaintiff home and apply ice to the painful area of the arm.

The plaintiff averred that he remained in pain during his entire car ride home and that, when he arrived home, his thumb and index finger had turned purple.

In his complaint, the plaintiff further alleged that, upon his arrival back home, his mother called Levine's office, and Levine told her that the plaintiff should come back into the office that day. When the plaintiff returned to the office, Rozbruch examined him, after which Rozbruch wrote in the plaintiff's chart that the plaintiff had complained of severe right arm pain, and that the plaintiff manifested poor capillary refill in his right thumb and index finger. According to the plaintiff, Rozbruch expressed concern that the plaintiff had sustained arterial spasm as a result of local trauma to the area in which the IV line had been placed into the antecubital fossa region of the right arm, and instructed him to go directly to the emergency room at St. Francis Hospital in Roslyn, New York, for further evaluation, which the plaintiff did.

The plaintiff alleged in his complaint that all of the defendants failed properly to treat him on April 13, 2021, in that they failed properly and timely to diagnose his condition, failed timely recommend or prescribe emergent care or treatment, and instead waited for him to return to the office several hours after his initial symptoms had arisen. He alleged that the IMP defendants, failed properly to staff the PACU with adequately trained, credentialed, certified, competent, and otherwise qualified medical or nursing professionals, instead entrusting the PACU unit to one or more medical assistants who "were not adequately trained, credentialed, certified, competent or otherwise qualified to evaluate/assess patients for post-anesthesia complications and/or criteria for discharge."[1] He further maintained that the IMP defendants departed from good and

[1] The court notes that, while allegations of negligent hiring, training, supervision, and retention constitute a cause of action independent of a medical malpractice cause of action (*see Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015]), and the plaintiff did not separately plead a such cause of action, the court will address that claim as if it had been separately pleaded (*see Burgos v Lau*, 2025 NY Slip Op 33250[U], *2 n 2, 2025 NY Misc LEXIS 7290, *2 n 2 [Sup Ct, N.Y. County, Aug. 28, 2025] [Kelley, J.]; *Estate of Gebert v Huntington Hills Ctr. for Health*, 2024 NY Misc LEXIS 51911, *16 [Sup Ct, Suffolk County, Sep. 5, 2024]; *see also Taylor v Methodist Hosp.*, 6 Misc 3d 1008[A], 2004 NY Slip Op 51750[U], *4, 2004 NY Misc LEXIS 2898, *9 [Sup Ct, Kings County, Nov. 1, 2004] [deeming allegation of "negligent credentialing" to constitute an independent cause of action]). Similarly, a negligence cause of action based on inadequate staffing may also be asserted against a surgical facility or a hospital (*see Currie v Oneida Health Sys., Inc.*, 1284, 1288-1289 [3d Dept 2023]; *Zellar v Tompkins Community Hosp.*, 124 AD2d 287, 289 [3d Dept

accepted practice by failing to evaluate or examine his right arm prior to his discharge, or to monitor or assess him for potential post-anesthesia complications arising from the intra-arterial administration of Clindamycin, such as discoloration, swelling, and pain, despite his complaints and his mother's and his requests, thus delaying emergent care of his ischemic right hand. In this respect, he contended that the IMP defendants failed timely to consider, recognize, or appreciate that he was experiencing an ischemic right hand prior to his discharge, and improperly discharged him despite those complaints and requests, without attempting to ascertain the etiology of his complaints, signs, or symptoms, and without attempting to treat his condition. In addition, the plaintiff asserted that Pezzino and Fackelman departed from accepted medical assistants' practice by failing timely and adequately to advise and alert Rozbruch or Levine as to the plaintiff's complaints and symptoms, and as to his mother's requests, thus also delaying emergent care of his ischemic right hand.

The plaintiff alleged in his complaint that, as a consequence of the IMP defendants' tortious conduct, he was compelled to undergo multiple surgeries, including multiple radial artery thrombectomies, a right forearm fasciotomy, arm fasciotomy, and hand fasciotomy, necessitating his hospitalization from April 13, 2021 until April 27, 2021. He asserted that, after this hospitalization, his right thumb, index finger, and thenar eminence were "left to demarcate," after which he was admitted to North Shore University Hospital on June 6, 2021, and diagnosed with right hand cellulitis and gangrene of the right thenar eminence, thumb, and index finger. He asserted that he then was transferred to NYU Langone Hospital (NYU) in Manhattan, where he remained from June 6, 2021 until June 26, 2021. As he explained it, during his admission to NYU, medical personnel performed an excisional debridement on his right forearm, with a split thickness skin graft harvested from his right thigh, after which they performed an open

1986] ["plaintiffs' contention of inadequate staffing speaks to negligence" and not to medical malpractice]). To the extent that the plaintiff intended to pursue such a claim, the court will also address it as if it had been pleaded as a separate cause of action.

amputation of his right thumb, index finger, and thenar eminence. He asserted that operative cultures grew multiple organisms including vancomycin-resistant Enterococcus, which necessitated placement of a basilic vein, peripherally inserted central catheter (PICC) line and a six-week-long regimen of the intravenous antibiotics Daptomycin and Meropenem. The plaintiff additionally asserted in his complaint that, during the NYU admission, he underwent a repeat right hand debridement and a buried right-hand groin flap, pursuant to which his right hand remained sutured to his right groin, ultimately undergoing a division of his right groin flap on July 14, 2021, upon which he resumed right arm mobility. He averred that the amputation of his right index finger, thumb, and the radial side of his hand left him with a permanently nonfunctional, disabled, and severely disfigured right hand, which is his dominant hand.

In his bills of particulars addressed to the several IMP defendants, the plaintiff essentially reiterated, in verbatim fashion, and in granular detail, all of the allegations set forth in his complaint with respect to those defendants' purported departures from good and accepted practice, along with the nature, extent, and course of his injuries, and the treatments rendered to him in connection therewith.

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 the 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]).

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]).

"[A] party who is qualified by reason of education or training in a specific field, may serve as his own expert may serve as his or her own expert" in rebutting the plaintiff's prima face case (*Bade v Partridge*, 25 Misc 3d 1236[A], 2009 NY Slip Op 52435[U],*5, 2009 NY Misc LEXIS 3261, *17 [Sup Ct, Nassau County, Nov. 23, 2009]; *see Zinn v Jefferson Towers,* 14 AD3d 398, 399 [1st Dept 2005] ["an expert witness should not be disqualified merely because of a personal interest in the event"]; *Hirschfeld v IC Sec*., 132 AD2d 332, 337 [1st Dept 1987] ["parties with firsthand knowledge have been permitted and even compelled to render expert testimony"

Dantzig v Mueller, 2022 NY Slip Op 33119[U], *25, 2022 NY Misc LEXIS 5623, *43-44 [Sup Ct, N.Y. County, Sep. 14, 2022] [Kelley, J.]; *Coccia v Liotti,* 2008 NY Slip Op 31335, *8, 2008 NY Misc LEXIS 10149, *16 [Sup Ct, Nassau County, Apr. 30, 2008]; *Rodriguez v Pacificare, Inc*., 980 F2d 1014, 1019 [5th Cir 1993]).

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).

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

A claim to recover for inadequate staffing must be based upon proof that a facility's staffing plan, staffing schedule, and time records established that the number of doctors, nurses, and physician's assistants who were hired and working for the facility was insufficient properly to examine, monitor, and treat all of the patients that the facility was examining and treating (*see e.g. Murphy v Kaleida Health*, 243 AD3d 1261, 1263 [4th Dept 2025]; *Vila v Manhattanville SBV, LLC,* 2024 NY Misc LEXIS 11042, *4-5 [Sup Ct, Bronx County, May 13, 2024]).

In support of their motion, the IMP defendants submitted the pleadings, the plaintiff's bills of particulars, relevant medical records, the note of issue, transcripts of the parties' deposition testimony, a statement of allegedly undisputed material facts, an attorney's affirmation, and an expert affirmation from the defendant Levine himself.

Levine asserted that, as of April 13, 2021, he had been treating the plaintiff for approximately three months, and that the plaintiff came to his office to undergo a Rezum™ procedure. He acknowledged that a complication arose following Rozbruch's intravenous administration of anesthesia and an antibiotic to the plaintiff prior to his commencement of that procedure. Levine averred that neither he nor anyone working for his practice was responsible for the administration of anesthesia or the antibiotic, which he attributed to Rozbruch, who he claimed was not directly affiliated with the IMP defendants, but was instead affiliated with Centurion Anesthesia. In this respect, he asserted that he, Pezzino, and Fackelman did not determine the anesthesia that would be given to the plaintiff, nor did any of them administer

As Levine described it, immediately before the commencement of the procedure, Rozbruch began to administer anesthesia to the plaintiff and, in the first attempt, he placed a 22-gauge IV needle into the patient's right hand, but noticed an immediate infiltration and thereupon removed the needle. He asserted that Rozbruch then proceeded to administer Propofol and Clindamycin through an IV line in the antecubital fossa region of the plaintiff's right arm, but noticed that, while the plaintiff nonetheless was not going to sleep, there was some swelling in the area of the insertion, and discontinued that IV drip. According to Levine,

Rozbruch then made a third attempt with a 24-gauge IV needle, this time again making an insertion into the plaintiff's right hand that successfully anesthetized the plaintiff. Levine asserted that he then was able to perform the procedure without incident.

Levine acknowledged that, immediately subsequent to the completion of the procedure, the plaintiff complained of "some pain in his hand," by which point Levine asserted that he had himself become aware of the IV infiltration, and asserted that the plaintiff had in fact exhibited symptoms consistent with an IV infiltration. Nonetheless, Levine opined that, at that juncture, there were no visible signs that warranted a direct referral to the hospital. He attested that he then examined the plaintiff, and "recalled that there was an IV infiltration that needed to be moved, and that may have required multiple sticks in order get the IV-line in." Levine asserted that he observed swelling in the plaintiff's hand, and pressed on the dorsum thereof, which he characterized as "a little bit tender, as if fluid had infiltrated under his skin outside of a vein." Nonetheless, Levine concluded that there was nothing about the plaintiff's presentation at that time that was indicative of anything other than infiltrated saline solution. Moreover, according to Levine, the plaintiff did not present to either Pezzino or Fackelman with any indications of anything other than this right-hand infiltration, of which they already were aware.

Levine additionally explained that, after he let the plaintiff wait for an appropriate period of time, the plaintiff was permitted to go home with his mother, who was his driver and chaperone. He asserted that, within approximately 30 minutes of the plaintiff's discharge, the plaintiff called Levine's office with complaints of a color change and increasing pain in his hand, upon which the plaintiff was advised to return to the office immediately. Levine attested that the plaintiff thereafter returned approximately 30 minutes after that telephone call, and was examined by Rozbruch, who referred the plaintiff directly to the St. Francis Hospital emergency department. As Levine interpreted the relevant chart, St. Francis medical personnel evaluated the plaintiff, and diagnosed him with right radial artery thrombosis, consisting of three blood clots. He further asserted that, at approximately 10:00 p.m. on April 13, 2021, the plaintiff

was brought to the St. Francis operating room, at which time vascular surgeon Patrick DiPippo, M.D., performed three thrombectomies to remove the clots from the plaintiff's right arm.

Levine opined that he did not depart from good and accepted standards of practice in failing to recognize or be aware that the plaintiff had been administered the antibiotic Clindamycin by insertion into his radial artery, as opposed to his vein. As he explained it, between the time that the anesthesia and antibiotic combination had been administered, and the time when the plaintiff made complaints of postoperative pain, the plaintiff manifested only signs and symptoms consistent with the infiltration in his right hand that had occurred during Rozbruch's first attempt at administering anesthesia. Levine averred that he had observed no discoloration or signs of vascular compromise in the plaintiff's hand or fingers that could result from administering Clindamycin into an artery into the right antecubital fossa region. Similarly, he concluded that neither Pezzino nor Fackelman departed from accepted standards of practice in their evaluations of the plaintiff, since the plaintiff did not evince any signs or symptoms of the vascular compromise that would be found later in the day. Levine further asserted that neither he nor anyone in his office failed timely to diagnose the plaintiff with any vascular compromise prior to the plaintiff's discharge, since there were no outward symptoms that would have allowed him or his medical assistants to make that diagnosis. He also explicitly rejected the plaintiff's claim that he or his medical assistants caused or contributed to the plaintiff's condition by delaying treatment after Rozbruch administered Clindamycin into the plaintiff's radial artery. In this respect, Levine concluded that the one-hour delay in treatment "made no difference" to the plaintiff's "subsequent course," and that the time that it took for the plaintiff to go home and return to Levine's office "did not impact his progression or worsen any vascular compromise," particularly in light of the fact that medical personnel at St. Francis thereafter took approximately nine hours to evaluate, diagnose, and transfer the plaintiff to an operating room.

In any event, Levine explained that, at the time when the plaintiff initially was in his office, he was not made aware that Rozbruch had administered Clindamycin intra-arterially, as

opposed to intravenously, but only that there had been infiltration of saline solution, and he reiterated that the plaintiff manifested no signs of any possible vascular compromise or tissue damage before leaving the office; rather, Levine averred that it was only upon the plaintiff's return that he demonstrated a change in presentation that warranted referral to the hospital. Levine conceded that, after he had completed the procedure, the plaintiff did make some complaints of pain in his hand that were consistent with that infiltration, but did not demonstrate any signs or symptoms of anything more than that. Hence, Levine concluded that neither he nor his medical assistants failed to appreciate anything in the plaintiff's presentation that warranted referral to the hospital before the plaintiff's initial discharge from Levine's office.

In opposition to the IMP defendants' motion, the plaintiff submitted a counterstatement of material facts, a memorandum of law, and an attorney's affirmation, in which counsel expressly declined to oppose the motion to the extent that it sought summary judgment dismissing the complaint insofar as asserted against Levine, Pezzino, and Fackelman, and insofar as the plaintiff sought to hold AUC vicariously liable for those defendants' purported negligence. As counsel phrased it,

> "[a]lthough there is an articulable theory of negligence against these individual defendants, it appears that the negligence associated with their delay in diagnosing Plaintiff's condition was most likely not a contributing factor to his injuries. Thus, it is unlikely that Plaintiff would be able to prove medical causation."

The IMP defendants made a prima facie showing of their entitlement to judgment as a matter of law in connection with all of the plaintiff's claims involving Levine, Pezzino, and Fackelman. Since, the plaintiff did not raise a triable issue of fact in opposition thereto, summary judgment must be awarded to those individuals, and to AUC to the extent that the plaintiff sought to hold AUC vicariously liable for the purported negligence of those individuals.

The plaintiff's counsel nonetheless argued that, inasmuch as Rozbruch did not move for summary judgment, and that the IMP defendants did not adduce facts in support of their motion establishing that Rozbruch *was not* AUC's actual or ostensible employee, AUC may still be held

vicariously liable for Rozbruch's malpractice, and summary judgment thus should not be awarded to AUC dismissing so much of the complaint insofar as asserted against it as was premised on its vicarious liability for Rozbruch's malpractice. With respect to this issue, the plaintiff submitted a written consent to the administration of anesthesia set forth on a Centurion Anesthesia form that he had executed on April 13, 2021. Notwithstanding the contents of this document, counsel argued that "there is clearly a genuine issue of material fact as to whether Dr. Rozbruch qualifies as an agent of Advanced Urology." Counsel referred to the plaintiff's deposition testimony, in which the plaintiff averred that he had never spoken to Rozbruch prior to meeting the latter at the AUC preoperative room on the morning of April 13, 2021, that Rozbruch was not involved, in any capacity, in the plaintiff's care prior to that date, and that the plaintiff was unaware that Rozbruch would be his anesthesiologist for the subject procedure prior to entering the preoperative room. Based on the plaintiff's deposition testimony describing the entirety of his conversations with Rozbruch, both before the procedure and upon the plaintiff's return to the AUC offices, in which the plaintiff never attested that Rozbruch's relationship with AUC was ever discussed, counsel contended that the plaintiff could have reasonably believed that Rozbruch was an agent or ostensible employee of AUC. Counsel further noted that both Levine and Rozbruch testified that it was not part of their custom or practice to share information concerning such a relationship with patients such as the plaintiff.

In reply, the IMP defendants submitted an attorney's affirmation, in which she accepted the plaintiff's concession that summary judgment should be awarded to Levine, Pezzino, and Fackelman, as well as to AUC to the extent that the plaintiff had sought to hold AUC vicariously liable for the purported malpractice of Levine, Pezzino, and Fackelman. Counsel further conceded, however, that "[t]he moving papers made no arguments on any possible apparent agency for the Co-Defendant Rozbruch, an anesthesiologist, so that issue is not before the court. It is acknowledged that said claim at least exists."

"'In general, under the doctrine of respondeat superior, a hospital [or private medical practice] may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself'" (*Valerio v Liberty Behavioral Mgt. Corp*., 188 AD3d 948, 949 [2d Dept 2020], quoting *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *see Hill v St. Clare's Hosp*., 67 NY2d 72, 79 [1986]; *Dupree v Westchester County Health Care Corp*., 164 AD3d 1211, 1213 [2d Dept 2018]). However, "'vicarious liability for the medical malpractice of an independent physician may be imposed under a theory of apparent or ostensible agency'" (*Valerio v Liberty Behavioral Mgt. Corp*., 188 AD3d at 949, quoting *Keesler v Small*, 140 AD3d 1021, 1022 [2d Dept 2016]; *see Hill v St. Clare's Hosp*., 67 NY2d at 79).

> "'In order to create such apparent agency, there must be words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal. The third party must reasonably rely on the appearance of authority, based on some misleading words or conduct by the principal, not the agent. Moreover, the third party must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill'"

(*Keesler v Small*, 140 AD3d at 1022, quoting *Dragotta v Southampton Hosp*., 39 AD3d 697, 698 [2d Dept 2007]; *see Valerio v Liberty Behavioral Mgt. Corp*., 188 AD3d at 949; *Loaiza v Lam*, 107 AD3d 951, 952 [2d Dept 2013]). "'In evaluating whether a doctor is the apparent agent of a hospital, a court should consider all attendant circumstances to determine whether the patient could properly have believed that the physician was provided by the hospital'" (*Valerio v Liberty Behavioral Mgt. Corp*., 188 AD3d at 949, quoting *Loaiza v Lam*, 107 AD3d at 952-953).

Additionally, "[a]n exception to this general rule exists where a plaintiff seeks to hold a hospital [or private medical practice] vicariously liable for the alleged malpractice of an attending physician who is not its employee where a patient comes to the [hospital] seeking treatment . . . [but] not from a particular physician of the patient's choosing" (*Muslim v Horizon Med. Group,*

P.C., 118 AD3d 681, 683 [2d Dept 2014] [internal quotation marks omitted]; *see Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 949). Stated another way,

> "'a hospital may be held vicariously liable, based on the principle of agency by estoppel, for the acts of an independent physician where the physician was provided by the hospital or was otherwise acting on the hospital's behalf, and the patient reasonably believed that the physician was acting at the hospital's behest'"

(*Malcolm v Mount Vernon Hosp.*, 309 AD2d 704, 705 [1st Dept 2003], quoting *Sarivola v Brookdale Hosp. & Medical Ctr.*, 204 AD2d 245, 245-246 [1st Dept 1994] [citation omitted]). "'Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee, and that the exception to the general rule did not apply'" (*Valerio v Liberty Behavioral Mgt. Corp.*, 188 AD3d at 949-950, quoting *Muslim v Horizon Med. Group, P.C.*, 118 AD3d at 683 [some internal quotation marks omitted]). In *Sklarova v Coopersmith* (180 AD3d 510, 510 [1st Dept 2020]), for example, although the plaintiff there retained a particular surgeon to perform a shoulder procedure, that surgeon did not choose the anesthesiologist who would assist with the surgery that was performed at the defendant hospital. It turned out that the hospital did not employ or control the anesthesiologist who ultimately was assigned to the procedure. The Appellate Division, First Department, still reinstated the plaintiff's claims against the hospital, concluding that there were triable issues of fact as to whether the anesthesiologist was negligent, and whether the doctrine of ostensible agency rendered the hospital vicariously liable for the anesthesiologist's conduct.

"[A] defendant who employs an independent contractor to perform services that the defendant has undertaken to perform, is liable for the negligence of the independent contractor" (*Mduba v Benedictine Hosp.,* 52 AD2d 450, 453 [3d Dept 1976]). Hence, a

> "defendant hospital, having held itself out to the public as an institution furnishing doctors, staff and facilities . . . , was under a duty to perform those services and is liable for the negligent performance of those services by the doctors and staff it hired *and furnished* to [a patient]. Certainly, the person who avails himself of

> hospital facilities has a right to expect satisfactory treatment from any personnel *who are furnished* by the hospital"

(*id*. [emphasis added]; *see A.A. v St. Barnabas Hosp*., 176 AD3d 582, 583 [1st Dept 2019]; *Malcolm v Mount Vernon Hosp*., 309 AD2d at 705-706). The court notes that *Mduba,* which arose in the context of emergency treatment, has not been limited by the courts to emergency treatment (*see A.A. v St. Barnabas Hosp*., 176 AD3d at 583; *Schacherbauer v University Assoc. in Obstetrics & Gynecology, P.C*, 56 AD3d 751, 752 [2d Dept 2008]; *Galina v Lewis*, 2020 NY Slip Op 32276[U], *5, 2020 NY Misc LEXIS 3262, *10-11 [Sup Ct, N.Y. County, Jul. 1, 2020]).

Inasmuch as the IMP defendants conceded that they did not make a prima facie showing that AUC cannot be held vicariously liable for Rozbruch's alleged malpractice, the award of summary judgment to AUC is limited to claims that it may be held vicariously liable for the purported negligence of Levine, Pezzino, and Fackelman.

Accordingly, it is,

ORDERED that the motion of the defendants Michael A. Levine, M.D., Advanced Urology Centers of New York, a division of Integrated Medical Professionals, PLLC, Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn M. Corcoran, M.A., for summary judgment dismissing the complaint insofar as asserted against them is granted to the extent that summary judgment is awarded (a) to the defendants Michael A. Levine, M.D., Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn M. Corcoran, M.A., dismissing the complaint insofar as asserted against them and (b) to the defendant Advanced Urology Centers of New York, a division of Integrated Medical Professionals, PLLC, dismissing so much of the complaint insofar as asserted against it as was premised upon allegations that it was vicariously liable for the alleged wrongdoing of the defendants Michael A. Levine, M.D., Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn M. Corcoran, M.A., the complaint is dismissed insofar as asserted against the defendants Michael A. Levine, M.D., Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn

M. Corcoran, M.A., and so much of the complaint insofar as asserted against the defendant Advanced Urology Centers of New York, a division of Integrated Medical Professionals, PLLC, as was premised upon allegations that it was vicariously liable for the alleged wrongdoing of the defendants Michael A. Levine, M.D., Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn M. Corcoran, M.A., is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendants Michael A. Levine, M.D., Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn M. Corcoran; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Michael A. Levine, M.D., Cristina E. Pezzino, M.A., and Lynn M. Fackelman, M.A., also known as Lynn M. Corcoran; 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 June 2, 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.

5/11/2026
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