NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK, IAS PART 11

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DEBRA LAAN,

INDEX NO. 805365/14

Plaintiff,

-against-

ERIC SCHWEIGER, M.D., SCHWEIGER DERMATOLOGY, PLLC, and MICHAEL WOLFELD, M.D.,

Defendants.

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JOAN A. MADDEN, J.:

In this action alleging lack of informed consent and medical malpractice arising out of cosmetic procedure, defendant Michael Wolfeld, M.D. ("Dr. Wolfeld") moves for summary judgment dismissing the complaint against him (motion sequence no. 006). Defendants Eric Schweiger, M.D. ("Dr. Schweiger") and Schweiger Dermatology PLLC (together "the Schweiger defendants") separately move for summary judgment dismissing the complaint against them (motion sequence no. 007).[1] Plaintiff Debra Laan ("plaintiff" or "Ms. Laan") opposes both motions.

Background

This action arises out of Cellulaze procedure performed on May 24, 2012, on the then 48 year-old plaintiff to remedy cellulite on her legs and buttocks. Dr. Schweiger is the owner of Schweiger Dermatology PLLC, and Dr. Wolfeld rents space at Dr. Schweiger's office. Plaintiff alleges that as result of defendants' malpractice, the skin on her buttocks and thigh areas became loose, uneven and lumpy, with a worse cellulite problem than she had before the procedure, and that she was not warned of the risks of the procedure or its alternatives.

At his deposition Dr. Schweiger described Cellulaze as a procedure in which a laser

[1]Motion sequence nos. 006 and 007 are consolidated for disposition.

sends heat to the area where applied and lyses fat cells, removes fibrous bands and strengthens the dermis (Schweiger EBT at 26). The amount of heat applied to an area is measured in joules, and the physician determines based on how much heat has been applied if that heat was sufficient for the purpose (Id. at 27-30). Dr. Schweiger testified that he began to perform Cellulaze in May 2012, and the only training he recalled receiving was attending a session in early 2012 with another physician in which he observed the Cellulaze procedure being performed (Id. at 18-20). Dr. Schweiger testified that on the date the procedure was performed on plaintiff and "multiple other patients," there was nurse trainer present from the manufacturer of Cellulaze wand to "make sure" the company's "standard of care" was followed (Id at 22). He also testified that on the date at issue Dr. Wolfeld was present (Id at 23).

Dr. Wolfeld also testified that he was present on the date that plaintiff's procedure was performed (Wolfeld EBT at 22). At that time, Dr. Wolfeld had not been previously trained to perform the Cellulaze procedure (Wolfeld EBT at 18; 22-24). Dr. Wolfeld testified that he worked on multiple patients that day, but that he did not believe he participated in every patient, and that he and Dr. Schweiger did not work simultaneously on the patients but worked on one after the other (Id at 25, 28-29, 30-31). He further testified that by working on the patient he meant he "utilized the wand and performed the treatment, which is placing the wand beneath the skin to treat cellulite and the skin with the wand," and that as far as he could recall, he performed the work at the direction of the nurse representative from the company, but did not recall if Dr. Schweiger gave him direction (Id at 29). Dr. Wolfeld did not recall performing the procedure on plaintiff (Id at 39).

Plaintiff testified that she went to Dr. Schweiger's office on or about May 7, 2012

because she had moderate cellulite that she wished to get rid of. (Plaintiff's EBT at 230). The cellulite was located on the back of her legs, near the upper thighs (Id). Plaintiff testified that Dr. Schweiger did not discuss the procedure with her in detail (Id at 234, 243). She also testified that after the first office visit, Dr. Schweiger told her that he had a promotion for the Cellulaze procedure and, therefore, it would be available at a lower price (Id at 237).

On the day of the procedure, plaintiff was given a "Cellulaze Consent Form" which was signed by plaintiff on May 24, 2012. The form states, inter alia, that "I request and authorize Dr. Schweiger/Schweiger Dermatology LLP to perform a cellulite reduction procedure using Cellulaze laser system [and that]..[t]he nature and effects of the procedure, the risks, ramifications, complications involves have been fully explained to me by the physician or designated person and I understand them."

According to plaintiff, she first saw the informed consent form on the day of the procedure as she was being called into the back of the office to the procedure room, and that everything took place "in a rush," and a girl at the desk by the door to the back of the office had her sign it quickly before plaintiff was ushered into the back. (Id. 238-239). Plaintiff testified that did not have the time to read the complete form and was only able to look at the last paragraph (Id at 239). Plaintiff testified that she was unaware there were risks to the Cellulaze procedure and that Dr. Schweiger never informed her of any or discuss alternative treatments. (Id. at 240, 244-245). Dr. Schweiger testified that plaintiff was given the consent form on the day of the treatment, after she was already in the examination room, and that it may not have been given by him, but by an assistant (Schweiger EBT at 49-50).

Plaintiff testified that she was told right before the procedure that there were going to be

people observing the procedure (Plaintiff EBT at 249-250). Plaintiff was not told Dr. Wolfeld would be doing anything during the procedure (Id. at 250). According to plaintiff, on the day of the Cellulaze procedure, Dr. Schweiger started the procedure, and then Dr. Schweiger asked a man who later she came to know was Dr. Wolfeld to take over for a while, and then Schweiger resumed control and completed the procedure (Id at 247-248, 251). Plaintiff later testified that she was not introduced to Dr. Wolfeld before the procedure but that she saw "a man come in" in the middle of the procedure who performed work on her (Id at 252-253). Dr. Schweiger testified that Dr. Wolfeld was the only other male physician present on the training day at issue, although he did not recall whether Dr. Wolfeld was present at the time of plaintiff's procedure (Schweiger EBT at 68-70).

Plaintiff was seen by an assistant in Dr. Schweiger's office on May 31, 2012 to remove stiches (Plaintiff EBT at 262-263). The medical record from that date indicates that plaintiff saw a physician's assistant that she reported that she felt okay and that there was not too much discomfort; it was explained that it takes several months to see the final result (Plaintiff's medical records from Schweiger Dermatology LLP). Plaintiff went back to Dr. Schweiger's office on October 22, 2012, and she testified that at that visit, she pointed out discoloration to Dr. Schweiger and that the cellulite was not gone and had in fact become worse, and that she was upset by the way the back of her legs looked, and that Dr. Schweiger gave her a refund for the procedure (Plaintiff EBT at 266-267).

Plaintiff underwent a revision procedure on December 29, 2012, performed by Dr. Raffy Karamanoukian, which addressed the issues with plaintiff's buttocks but not with her thighs since she did not have enough funds for this treatment (Plaintiff's EBT at 274-275).

In 2013, Dr. Jamie Heskett treated the back of plaintiff's legs, which plaintiff described as using "a syringe on the backs of her legs approximately 10 times over a couple of months in an attempt to smooth out the back of her legs" (Plaintiff EBT at 41, 151,152).

Schweiger Defendants' Motion

The Schweiger defendants move for summary judgment, arguing that the Cellulaze procedure performed by Dr. Schweiger conformed with the accepted standard of medical care, and that such treatment did not proximately cause plaintiff's injuries. They also assert that record, including the consent form signed by plaintiff, demonstrated that she was aware of the risks and alternatives of the Cellulaze procedure.

In support of their motion, the Schweiger defendants submit the affirmation of Deborah Marciano, D.O., a physician licensed to practice medicine in New York State, who states that while she was board certified in pediatrics from 1999 to 2014 and was in private practice as a pediatrician from 1999-2010, for the last ten years her practice has been limited to aesthetic medicine/cosmetic surgery, and that she has specific training in the use of Cellulaze and has performed the procedure. Upon reviewing the relevant medical records, the bills of particulars, and deposition transcripts, Dr. Marciano opines, to a reasonable degree of medical certainty that "all the laser treatment that was provided to Ms. Laan by Dr. Schweiger was appropriate and within the accepted standard of care" (Marciano Aff. ¶ 19). Dr. Marciano states that:

> the procedure log which had been provided by the manufacturer was completed by the Cynosure clinical nurse Wanda Cummings in order to document the treatment performed. Within this log, Nurse Cummings documented that the laser device was set to the appropriate temperature and the appropriate amount of joules were applied to the designated areas which she had pre-marked on Ms. Laan's bilateral thighs and buttocks. Nurse Cummings indicated to Dr. Schweiger after the procedure that

> everything went well and as it was supposed to go...[F]ollowing the procedure, Dr. Schweiger noted that the procedure was performed successfully and without complication and there was no significant blood loss or burns from the laser.

(Id ¶'s 7,8).

She also states that procedure "was done in the presence of and under the supervision of Wanda Cummings, a clinical nurse that was provided by Cynosure, the manufacturing company of the Cellulaze laser. Nurse Cummings was there to train the physicians at Schweiger Dermatology, PLLC in the use of the Cellulaze laser, including Dr. Schweiger, and to ensure that the standard of care that had been set out by Cynosure for the Cellulaze treatment was met." (Id ¶ 15).

As for causation, Dr. Marciano opines the treatment provided by Dr. Schweiger was "not a proximate cause of her alleged injuries" (Id ¶ 19). In this connection, she opines that based on the record "there is no way to determine whether the current condition of Ms. Laan's posterior thighs and buttocks has been affected by the procedures performed by Dr Karamanoukian or Dr. Heskett." (Id ¶ 17) She further opines that "while Cellulaze treatment may result in improvement in the appearance of cellulite, any such improvement is not permanent. The cellulite that plaintiff claims to have now is due to the fact that she is prone to cellulite and is unrelated to the Cellulaze treatment performed by Dr. Schweiger" (Id ¶ 18).

As for the claim for lack of informed consent, she opines that:

> The informed consent that was provided to [plaintiff] prior to her treatment on May 24, 2012, clearly states that imperfections might ensue from the treatment and that the operative result may not live up to her desired expectations. Further, it was explained to her that possible adverse effects may occur such as skin contour irregularities, skin discoloration, purpura and asymmetry, among

> others. By signing the consent form prior to the procedure, Ms. Laan acknowledged and agreed to undergo the Cellulaze treatment despite the fact that these possible risks existed.

The Schweiger defendants also rely on the letter report dated December 21, 2018, from Dr. Paul Striker, a physician licensed to practice in New York, who conducted an independent medical examination of the plaintiff on behalf of defendants, and states that based on this examination and his review of the relevant medical records that Dr. Schweiger "did not deviate from the standard of care in this community or any other, and the treatment did not exacerbate or complicate the progression of [plaintiff's] inherent and diffuse cellulite predisposition."

Dr. Wolfeld also moves for summary judgment, arguing that there is no direct evidence that he participated in the care and treatment of plaintiff, and that plaintiff's testimony in this regard is speculative, noting that multiple patients were treated on the date at issue, and that two other physicians, Dr. Schweiger and Dr. Shah (an employee of Schweiger Dermatology) participated in the training, and there are no notes or other records showing that he treated plaintiff, or that he participated in any follow up visits with plaintiff. In support of this argument, Dr. Wolfeld submits his own affidavit in which he states, inter alia, that "I did see the patients participating in Cellulaze training day prior to the procedures and I do not recall if they were all female. There were several patients, three to five, participating in training day" (Wolfeld Aff ¶ 5). He further states that "[w]hile I participated in the Cellulaze training day, along with a Dr. Shah, Dr. Schweiger and a nurse representative from Cynosure, I did not participate in the Cellulaze training for every patient and may have participated in the Cellulaze treatment for one or more patients (Id). He further states that "[t]he records of Schweiger Dermatology pertaining to Debra Laan... do not refresh my recollection if I participated in Ms. Laan's treatment on May

24, 2012." (Id ¶ 8). Dr. Wolfeld also points to Dr. Schweiger's testimony that plaintiff was his patient, and that any other physicians present would have been acting in an assistant capacity. In addition, he notes that he is not an employee of Schweiger Dermatology LLP, but, instead, rents office space from the practice.

Dr. Wolfeld alternatively argues that summary judgment is warranted as there is no evidence that even if he participated in plaintiff' treatment, that he departed from the standard of care or that any departure was a substantial factor in causing plaintiff's injuries, and submits an affidavit of Dr. Marciano in support of this argument. Dr. Marciano opines that "the medical records and deposition testimony fail to show that Dr. Wolfeld participated in the care and treatment of [plaintiff and that] even had Dr. Wolfeld participated in her care and treatment, said care and treatment provided to [plaintiff] was done within accepted medical practice" (Marciano Aff. ¶ 28). Moreover, she states that "[t]he medical record and deposition testimony unequivocally show that [plaintiff] was the patient of Dr. Schweiger, that he recommended the Cellulaze treatment, that Dr, Schweiger was the primary physician during the procedure..." (Id ¶ 21).

She also opines that the care and treatment provided to plaintiff was proper, stating that:

> The ThermaGuide Temp Settings and Joules delivered during the procedure to the different aspects of Ms. Laan's anatomy within the record of Schweiger Dermatology were well within accepted medical practices. Additionally, the number of squares, bulging fat areas, fibrous septae areas and three skin were within normal limits. There is no indication within the record that excessive application of Cellulaze energy was applied during the course of the entire procedure. In fact, it is noted that post-operatively there were no burns present from the laser.

(Id ¶ 20).

Dr. Marciano further opines that "there is no evidence to show that Dr. Wolfeld caused

and/or contributed to any alleged damages claimed to have been suffered by [plaintiff]. (Id).

As for the claim of lack of informed consent, she opines that given that Dr. Wolfeld "would have participated [in the procedure] as a trainee only [and] that [plaintiff] was Dr. Schweiger's patient only and that a proper informed consent had been obtained by Dr. Schweiger and/or the staff of Schweiger Dermatology, it would have been within accepted medical practices for Dr. Wolfeld to have no involvement in obtaining said informed consent." (Id ¶ 19).

Plaintiff opposes the motion, arguing that defendants have not met their prima facie burden on their summary judgment motion since their expert, Dr. Marciano lacks the qualifications to render an opinion as she does not have adequate credentials, and failed to disclose her disciplinary history, including that she was placed on three years probation after being charged by the New York State Department of Health State Board for Professional Medical Conduct with committing "negligence on more than one occasion," including failing "to follow accepted infection control procedures" and failing "to perform fat grafting procedures in an appropriate manner." (See Plaintiff's Opposition, Exhibit 3).

Plaintiff alternatively argues that even if defendants made a prima facie showing that she has controverted this showing based on the affidavit of her expert, whose identity is redacted, and is a board certified plastic surgeon, who is currently licensed to practice medicine in Louisiana and Florida, has performed the Cellulaze procedure, and offers the opinions to a reasonable degree of medical certainty.

Upon review of the relevant medical records, deposition transcripts the affidavits of Dr. Marciano, plaintiff's expert opines that:

> In patients such as Plaintiff, in order to achieve a positive clinical outcome, it is often required to perform multiple procedures and/or undertake a multi-disciplinary approach and/or employ ancillary modalities of treatment. Despite this fact, there is no evidence such an approach was ever discussed with Plaintiff, nor was the possibility of the Cellulaze failing to achieve the desired result in one procedure discussed with Plaintiff. The failure to perform a sufficient procedure, coupled with the failure to fully advise Plaintiff of the possible need to do multiple procedures and the possibility of failure of the procedure, represents a departure from the standard of care. Indeed, Schweiger conceded that he did an insufficient procedure on Plaintiff in his admission that the photographs submitted show Plaintiff's cellulite to be roughly the same as it was prior to the procedure. The photographs of Plaintiff show variably irregular fatty herniations between shallow to deep depressions of the thighs, buttocks and abdomen. There also appears to be mattress like undulation of cellulite, consistent with spongy, fatty deposits. While some of this may be attributed to normal variations, the quantity and patterns of cellulite indicate that Defendants failed to complete the procedure on Plaintiff. The failure to do so represents a deviation and departure from the standard of care. As a result of the failure to complete the procedure, Plaintiff's skin in the treated area is bumpy and uneven.

(Id ¶ 20).

As for the claim of lack of informed consent, plaintiff's expert opines that:

> Defendants' failed to obtain proper informed consent for the Cellulaze procedure. Based on Plaintiff's testimony, and in no way contradicted by that of Defendants, the risks, benefits and alternatives to the procedure were not fully discussed with her by Defendants. Indeed, the possibility of requiring additional procedures and/or ancillary modalities of treatment to achieve the desired result appears never to have been discussed. This is particularly important with respect to a patient such as Plaintiff who could not afford to undergo multiple procedures. The Cellulaze Consent Form presented by Defendants and executed by Plaintiff does not speak to the need to possibly undergo multiple procedures and/or employ ancillary modalities of treatment.

(Id ¶ 21).

With regard to Dr. Marciano's opinion, plaintiff's expert states that she makes "fundamental misstatements in her affidavits," including that the nurse provided "supervision" to the physicians in the care and treatment of their patients.

As for Dr. Wolfeld's argument that there is no direct evidence of his involvement in

plaintiff's treatment, plaintiff asserts that although she did not know Dr. Wolfeld's name at the time the procedure was performed, the record shows that in addition to Dr. Schweiger, a male physician performed the procedure on her, and that Dr. Wolfeld was the only male physician in the room (other than Dr. Schweiger) on the date and time of her treatment.

In reply, the Schweiger defendants and Dr. Wolfeld variously argue that plaintiff's expert improperly raises new theories of liability not discernable from the bills of particulars and complaint, including that multiple procedures might be required and that defendants failed to inform plaintiff of this fact, and that such new allegations should not be considered as they were raised for the first time in opposition to summary judgment, citing Abalola v. Flower Hosp, 44 AD3d 522 (1st Dept 2007). In addition they argue that plaintiff's expert's opinion does not raise a triable issue of fact as it is based on vague allegations that the procedure performed was insufficient, that the expert fails to controvert their showing as to lack of causation, or as to lack of informed consent, and that Dr. Marciano is well qualified to render an expert opinion and any disciplinary issues do not preclude the court from considering her opinions.

Discussion

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing "that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged." Roques v. Nobel, 73 AD3d 204, 206 (1st Dep't 2010). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the Bill of Particulars. Id The expert opinion relied on by defendant must be based on the facts in the

record or those personally known to the expert. Defense expert opinion should specify "in what way" a patient's treatment was proper and "elucidate the standard of care." Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dep't 2010). A defendant's expert opinion must also "explain what defendant did and why." Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dep't 2003]).

Once a defendant makes a prima facie showing, the burden shifts to plaintiff "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 NY2d 320, 324-325 (1986). Specifically, in a medical malpractice action, this requires that a plaintiff opposing a defendant's summary judgment motion "submit evidentiary facts or materials to rebut the prima facie showing by the defendant physician that he was not negligent in treating plaintiff so as to demonstrate the existence of a triable issue of fact… General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice, are insufficient to defeat defendant['s]… summary judgment motion." Id.

In addition, a plaintiff's expert's opinion "must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered." Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1st Dep't 2007) (internal citations and quotations omitted). If "the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation… the opinion should be given no probative force and is insufficient to withstand summary judgment." Diaz v. Downtown Hospital, 99 N.Y2d 542, 544 (2002). On the other hand, "where there are conflicting expert affidavits, issues of fact and credibility are raised that cannot be resolved on summary

judgment." Cregan v. Sachs, 63 AD3d 101, 109 (1st Dept 2009)(internal citations and questions omitted).

As a preliminary matter, contrary to plaintiff's argument, the court may consider Dr. Marciano's opinion since any issues regarding her qualifications and disciplinary record affect the weight of her opinion as opposed to its admissibility See e.g., Joswick by Joswick v Lenox Hill Hosp , 161 AD2d 352 (1st Dept 1990)(a physician need not be a specialist in a particular field to qualify as an expert as long as the physician possession the requisite knowledge and the weight of the expert's opinion should be resolved at trial); Williams v. Halpern, 25 AD3d 467 (1st Dept 2006)(pathologist's prior immoral acts and license supervision affected his credibility but did not preclude him from testifying as expert); Howard v. Stranger, 122 AD3d 1121(3d Dept 2014), lv dismissed, 24 NY3d, 1210 (2015) (holding that the fact that expert doctor's license was under a stayed suspension at the time he submitted his affidavit does not render the affidavit inadmissible for the purpose of summary judgment motion).

With respect to the medical malpractice claim, Dr. Marciano's opinion that defendants did not depart from the standard of care in performing the Cellulaze procedure, as evidenced by the recordings in the procedure log and the absence of complications from the procedure, and that any complaints by plaintiff as to the results of the procedure were not the result of any departures by defendants is sufficient to meet defendants' burden.

However, to the extent Dr. Marciano opines that Dr. Wolfeld did not owe a duty to plaintiff as she was a patient of Dr. Schweiger, the court notes that while "whether a duty of care is owed in the first instance 'is a question for the court, and generally not an appropriate subject for expert opinion,'...[t]he nature of the duty ... is a different issue. The law generally permits the

medical profession to establish what the standard is ...[and] [o]nce the existence of a duty has been established, resort to an expert is usually necessary." Cregan v. Sachs, 63 AD3d at 109 (internal citations and quotations omitted). At the same time, "[i]n certain circumstances, the doctor's general duty of care may be limited to those medical functions undertaken by the physician and relied on by the patient." Id at 100 (internal citation and quotation omitted). Here, while Dr. Wolfeld points to evidence that he did not participate in the Cellulaze procedure performed on plaintiff, insofar as it can be shown that Dr. Wolfeld was involved in the procedure, he would owe a duty of care to plaintiff.

As to whether plaintiffs have controverted defendants' showing with respect to the medical malpractice claim, first, with regard to whether Dr. Wolfeld performed the procedure on plaintiff, the record, including plaintiff's deposition testimony, raises triable issue of fact in this regard. In addition, the court finds that plaintiff's expert has controverted defendants' showing with respect to the malpractice claim based on the expert's opinion that defendants deviated from the standard of care in performing the Cellulaze procedure by performing the procedure insufficiently and not in conjunction with a plan to perform additional procedures if necessary, and that this departure was a substantial factor in causing her injuries.

As for the claim of lack of informed consent, under Public Health Law § 2805–d(1),"[l]ack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable ... dental ... practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation. To prevail on a claim for lack of informed consent "it must ... be established that a a

reasonably prudent person in the patient's position would not have undergone the treatment ... if [she] had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought" (Public Health Law § 2805–d[3]).

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that a plaintiff was informed of any foreseeable risks, benefits, or alternatives of the treatment rendered. Koi Hou Chan v. Yeung, 66 AD3d 642, 643 (2d Dept 2009); see also, Smith v. Cattani, 2 AD3d 259, 260 (1st Dept 2003)(defendant entitled to summary judgment where "documentary evidence establishes that before each of plaintiff's seven surgeries, defendant notified him of the reasonably foreseeable risks and benefits of the surgery, as well as alternatives to the proposed treatment").

Here, assuming *arguendo* that the relevant consent form and defendants' experts' opinion that plaintiff was adequately informed of the risks and alternatives of the procedure are sufficient to meet defendants' burden with respect to this claim, to controvert this showing, the plaintiff must demonstrate that (1) the defendant doctor failed to fully apprise her of the reasonably foreseeable risks of the procedure, (2) a reasonable person in plaintiff's position, fully informed, would have opted against the procedure. Orphan v. Pilnik, 15 NY3d 907, 908 (2010), citing Public Health Law § 2805–d (1)(3); see Eppel v. Fredericks, 203 AD2d 152 (1st Dept 1994). "Expert medical testimony is required to prove the insufficiency of the information disclosed to the plaintiff." Orphan v. Pilnik, 15 NY3d at 908.

Here, plaintiff has met this burden based on her testimony indicating that Dr. Schweiger did not inform her of the risks and alternatives of the Cellulaze procedure, and plaintiff's expert's opinion that the risks, benefits and alternatives to the procedure were not fully discussed with

plaintiff by defendants, including the possibility that additional procedures/treatment would be required to achieve the desired result, and that this was particularly important as plaintiff could not afford to undergo multiple procedures. As for Dr. Wolfeld, based on evidence that he performed the procedure on plaintiff, it cannot be said, as a matter of law, that he did not owe her a duty to obtain informed consent to the procedure.

Next, contrary to defendants' argument, plaintiff's expert did not raise a new theory of liability in opposition to the summary judgment that should not be considered, including that the Cellulaze procedure was insufficient as plaintiff would need multiple procedures/treatments to obtain the desired result, and that defendants failed to inform her of this fact. While the bills of particulars do not specifically allege that multiple procedures/treatment were required to treat plaintiff, they contain allegations as to the defendants' failure to properly perform Cellulaze procedure and to inform plaintiff of the alternatives and benefits of the procedure so as to provide her with the ability to make a reasonable evaluation of the procedure, and such allegations are sufficient to avoid prejudice and surprise to defendants. See DB by Arlene B. v. Montefiore Medical Center, 162 AD3d 478, 479 (1st Dept 2018)(rejecting defendants' assertion that plaintiff's theory that his injuries were caused by hypoxia ischemia brought about by intercranial pressure should not be considered where theory, holding that although his cause of ischemia was not specified, the allegations in bill of particulars were sufficient to avoid surprise and prejudice to defendants); Schwartzberg v Huntington Hospital Center, 163 AD3d 736, 737 (2d Dept 2018)(expert's opinion that defendant departed from the standard of care by failing to order diagnostic tests and to make a referral to specialist on an emergent basis was sufficiently alleged in pleadings indicating that patient suffered a stroke two days after her appointment with the

defendant physician during which the tests were not ordered or the referral made).

Finally, as summary judgment is being denied, the court need not reach plaintiff's argument that such denial is appropriate as a spoliation sanction based on the Schweiger defendants' alleged negligence in losing Dr. Schweiger's schedule for the date of plaintiff's procedure when the practice moved its office.

Conclusion

In view of the above, it is

ORDERED that Dr. Wolfeld's motion for summary judgment (motion sequence 006) is denied; and it is further

ORDERED that the Schweiger defendants' motion for summary judgment (motion sequence 007) is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351, 60 Centre Street, on November 21, 2019 at 11:00 am.

DATED: October 1, 2019

J.S.C.

HON. JOAN A. MADDEN
J.S.C.