

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

Index No.:
Date Purchased:

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JACOB SMITH,

Plaintiff,

Plaintiff designates Erie County as the place of venue. The basis of venue is defendants' address.

-against-

SUMMONS

AMAR ATWAL, M.D., JAY S. ZIMMERMAN, O.D.,
AMAR ATWAL, M.D., P.C., ATWAL EYE CARE and
BUFFALO EYE CARE ASSOCIATES,

Defendants' office is located at 3095 Harlem Road, Cheektowaga, New York, 14223

Defendants.

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To the above named Defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for relief demanded in the complaint.

Dated: Chappaqua, New York
November 20, 2015

LAW OFFICE OF TODD J. KROUNER



By: TODD J. KROUNER
Attorneys for Plaintiff
93 North Greeley Avenue
Chappaqua, New York 10514
(914) 238-5800

Defendants' Address:

To: Amar Atwal, M.D.
3095 Harlem Road
Cheektowaga, New York, 14223

Jay S. Zimmerman, O.D.
3095 Harlem Road
Cheektowaga, New York, 14223

Amar Atwal, M.D., P.C.
3095 Harlem Road
Cheektowaga, New York, 14223

Atwal Eye Care
3095 Harlem Road
Cheektowaga, New York, 14223

Buffalo Eye Care Associates
3095 Harlem Road
Cheektowaga, New York, 14223

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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JACOB SMITH,

Plaintiff,

-against-

AMAR ATWAL, M.D., JAY S. ZIMMERMAN, O.D.,
AMAR ATWAL, M.D., P.C., ATWAL EYE CARE and
BUFFALO EYE CARE ASSOCIATES,

Defendants.
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Index No. _____

**VERIFIED
COMPLAINT**

Plaintiff, JACOB SMITH (“Plaintiff JACOB SMITH” or the “Plaintiff”), as and for his Verified Complaint, by his attorneys, LAW OFFICE OF TODD J. KROUNER, respectfully alleges, upon information and belief, at all times relevant to this action, as follows:

INTRODUCTION

1. This is a case involving medical malpractice, where defendants performed surgery which never should have been performed. On or about May 30, 2013, Defendant AMAR ATWAL, M.D. (“DR. ATWAL”) performed elective LASIK eye surgery on Plaintiff JACOB SMITH. However, because of the condition of Plaintiff’s eyes, he was not a suitable candidate for elective LASIK eye surgery. Plaintiff had a pre-existing corneal disease known as forme fruste keratoconus, which was and still is a contraindication to elective LASIK eye surgery. As a result of the elective LASIK eye surgery, Plaintiff JACOB SMITH developed post-LASIK ectasia.

2. Generally, individuals who are diagnosed with post-LASIK ectasia suffer from a host of problems related to diminished visual acuity and diminished quality of vision, including, without limitation, halos, blurry vision, glare, ghosting, starbursts, double vision, light

sensitivity, contrast sensitivity, loss of depth perception, difficulty driving, especially at night, headaches, dry eyes and foreign body sensation.

3. To treat the post-LASIK ectasia, Plaintiff JACOB SMITH is scheduled to undergo collagen cross linking surgery (“CXL”), in the hope of preserving whatever vision remains in his eyes. CXL is an experimental surgical procedure, which is not currently approved for use in the United States by the United States Food and Drug Administration (“FDA”). If the CXL experimental procedure is not effective in saving Plaintiff JACOB SMITH’s vision, he may have to undergo further vision-threatening cornea transplant surgery.

**AS FOR A FIRST CAUSE OF ACTION ON BEHALF OF PLAINTIFF JACOB SMITH
FOR MEDICAL MALPRACTICE**

4. Plaintiff currently resides at 44 Church Street, Hamburg, New York 14075.

5. DR. ATWAL, was and is a physician, duly licensed to practice medicine in the State of New York, and represented himself to the public as a skilled and trained physician duly qualified to render medical services.

6. DR. ATWAL was or represented himself to be a physician specializing in the field of ophthalmology, and corneal or refractive surgery in particular.

7. DR. ATWAL held himself out to the public, and more particularly to the Plaintiff herein, as possessing the proper degree of learning and skill, and he undertook to use reasonable care and diligence in the treatment of the Plaintiff.

8. DR. ATWAL currently maintains an office for the practice of medicine at 3095 Harlem Road, Cheektowaga, New York 14223.

9. Defendant JAY S. ZIMMERMAN, O.D. (“DR. ZIMMERMAN”) was and is an optometrist licensed to practice optometry in the State of New York.

10. DR. ZIMMERMAN currently practices at ATWAL EYE CARE (“ATWAL EYE”), and BUFFALO EYE CARE ASSOCIATES (“BUFFALO EYE”), located at 3095 Harlem Road, Cheektowaga, New York 14223.

11. Defendant DR.AMAR ATWAL, M.D., P.C. (the “PROFESSIONAL CORPORATION”), was a professional corporation existing under the laws of the State of New York, with its principal place of business at 3095 Harlem Road, Cheektowaga, New York 14223.

12. DR. ATWAL maintained an office for the practice of medicine at ATWAL EYE, located at 3095 Harlem Road, Cheektowaga, New York 14223.

13. DR. ATWAL maintained an office for the practice of medicine at BUFFALO EYE, located at 3095 Harlem Road, Cheektowaga, New York 14223.

14. DR. ATWAL was the sole shareholder of the PROFESSIONAL CORPORATION.

15. DR. ATWAL was an employee of the PROFESSIONAL CORPORATION.

16. DR. ATWAL was an agent of the PROFESSIONAL CORPORATION.

17. DR. ATWAL was an employee of ATWAL EYE.

18. DR. ATWAL was an employee of BUFFALO EYE.

19. DR. ATWAL was an independent contractor of ATWAL EYE.

20. DR. ATWAL was an independent contractor of BUFFALO EYE.

21. DR. ATWAL was an agent of ATWAL EYE.

22. DR. ATWAL was an agent of BUFFALO EYE.

23. DR. ZIMMERMAN was an employee and/or an independent contractor of ATWAL EYE.

24. DR. ZIMMERMAN was an employee and/or an independent contractor of BUFFALO EYE.

25. PROFESSIONAL CORPORATION was a partner of ATWAL EYE.

26. PROFESSIONAL CORPORATION was a partner of BUFFALO EYE.

27. PROFESSIONAL CORPORATION was an employee of ATWAL EYE.

28. PROFESSIONAL CORPORATION was an employee of BUFFALO EYE.

29. PROFESSIONAL CORPORATION was an agent of ATWAL EYE.

30. PROFESSIONAL CORPORATION was an agent of BUFFALO EYE.

31. Plaintiff JACOB SMITH was a patient, and under the care and treatment, of DR. ATWAL, on a continuous basis, from on or about May 14, 2013, through and including August 3, 2015.

32. Plaintiff JACOB SMITH was a patient, and under the care and treatment, of DR. ZIMMERMAN, on a continuous basis, from on or about May 14, 2013, through and including August 3, 2015.

33. Plaintiff JACOB SMITH was a patient, and under the care and treatment, of the PROFESSIONAL CORPORATION, on a continuous basis, from on or about May 14, 2013, through and including August 3, 2015.

34. Plaintiff JACOB SMITH was a patient at, and under the care and treatment of ATWAL EYE, on a continuous basis, from on or about May 14, 2013, through and including August 3, 2015.

35. Plaintiff JACOB SMITH was a patient at, and under the care and treatment of BUFFALO EYE, on a continuous basis, from on or about May 14, 2013, through and including August 3, 2015.

36. While Plaintiff JACOB SMITH was a patient at, and under the care and treatment of the PROFESSIONAL CORPORATION, ATWAL EYE and/or BUFFALO EYE, on or about May 14, 2013, he came under the care and treatment of DR. ATWAL.

37. While Plaintiff JACOB SMITH was a patient at, and under the care and treatment of the PROFESSIONAL CORPORATION, ATWAL EYE and/or BUFFALO EYE, on or about May 14, 2013, he came under the care and treatment of DR. ZIMMERMAN for the purpose of undergoing refractive surgery on his eyes known as LASIK surgery.

38. On or about May 14, 2013, DR. ZIMMERMAN told Plaintiff JACOB SMITH that he was a suitable candidate for an elective LASIK eye surgery, when, in fact, he was not.

39. On or about May 14, 2013, DR. ATWAL told Plaintiff JACOB SMITH that he was a suitable candidate for an elective LASIK eye surgery, when, in fact, he was not.

40. Plaintiff JACOB SMITH's pre-surgical eye examination revealed clear signs of corneal disease known as form fruste keratoconus, which was and still is a contraindication to elective LASIK eye surgery.

41. DR. ATWAL missed or ignored these warning signs of corneal disease and proceeded to recommend that the patient have elective LASIK eye surgery.

42. DR. ZIMMERMAN missed or ignored these warning signs of corneal disease and proceeded to recommend that the patient have elective LASIK eye surgery.

43. On or about May 30, 2013, DR. ATWAL performed the contraindicated elective LASIK eye surgery upon both of Plaintiff JACOB SMITH's eyes.

44. As a result, Plaintiff JACOB SMITH developed post-LASIK ectasia.

45. Defendants, each of them, their agents, servants and/or employees were negligent in rendering medical care and treatment to the Plaintiff, and owed him the duty to use a reasonable degree of learning and skill, the duty to use reasonable care and diligence in the exercising of that learning and skill, the duty to employ approved methods in general use and the duty to use their best judgment in the care and treatment of the Plaintiff.

46. DR. ATWAL, including without limitation his agents, servants and/or employees, was negligent in the services rendered for and on behalf of the Plaintiff in failing to use reasonable care; in failing to heed Plaintiff's condition; in departing from accepted standards in the procedures and treatment performed; in failing to follow appropriate practice; in failing to properly examine the Plaintiff; in failing to employ adequate diagnostic procedures and tests to determine the nature and severity of Plaintiff's conditions; in failing to properly treat Plaintiff's eyes; in failing to determine that the Plaintiff was not a suitable candidate for LASIK surgery; recommending elective LASIK eye surgery; in performing elective LASIK eye surgery on the Plaintiff's right and left eyes when said procedure was contraindicated; in failing to diagnose ectasia; in failing to offer treatment for ectasia; and was otherwise negligent in his treatment of the Plaintiff.

47. DR. ZIMMERMAN, including without limitation his agents, servants and/or employees, was negligent in the services rendered for and on behalf of the Plaintiff in failing to use reasonable care; in failing to heed Plaintiff's condition; in departing from accepted standards

in the procedures and treatment performed; in failing to follow appropriate practice; in failing to properly examine the Plaintiff; in failing to employ adequate diagnostic procedures and tests to determine the nature and severity of Plaintiff's conditions; in failing to properly treat Plaintiff's eyes; in failing to determine that the Plaintiff was not a suitable candidate for elective LASIK eye surgery; in recommending elective LASIK eye surgery; and was otherwise negligent in his treatment of the Plaintiff.

48. PROFESSIONAL CORPORATION, its agents, servants and/or employees were negligent and careless by failing, neglecting and omitting to take, use and employ reasonable and proper steps and procedures and practices for the health, safety and welfare of the Plaintiff thereby causing and contributing to the condition suffered by the Plaintiff; failing to supervise the activities of agents, servants, and/or employees; failing to employ agents, servants and/or employees who possess the requisite knowledge and experience to treat and care for conditions demonstrated by the Plaintiff; in violating the applicable laws, rules, regulations, guidelines, policies and protocols; in deviating and departing from the usual and accepted standards of medical, hospital and surgical care and treatment; in failing to comply with proper procedures and/or written protocols and/or guidelines in effect at the PROFESSIONAL CORPORATION; in failing and neglecting to adhere to and comply with the accepted and approved standards of practices, procedures and techniques prevailing in the locality and community; in failing to timely and properly monitor, supervise and/or oversee the activities of its agents, servants, medical staff, employees and/or independent contractors with respect to the care and treatment rendered to the Plaintiff herein during his presentations to the PROFESSIONAL CORPORATION; in failing to disclose to the Plaintiff all of the facts that a reasonable facility,

under similar circumstances, would explain or disclose to a patient including a failure to disclose the risks and benefits of the treatment and procedures performed, the alternatives thereto and the risks and benefits relating to the alternatives; in failing, neglecting and omitting to timely, properly and/or adequately counsel its physicians and other employees with respect to the proper and appropriate standard of care and treatment to be rendered to patients presenting with complaints similar to those that plaintiff presented with; in failing to have efficient and/or sufficient personnel; in failing to fulfill its duty to properly investigate the skill, qualifications, character and/or background of the physicians applying for staff privileges, as well as other staff members, personnel and/or employees practicing at the defendant facilities; in improperly granting the defendant privileges at the PROFESSIONAL CORPORATION; in failing to conduct continuous assessments of the competence of the defendant physician, personnel and/or independent contractor; in failing to employ qualified, trained and supervised physicians and non-physicians staff; in failing to properly train and/or supervise its personnel and/or independent contractors, including interns, residents, registered nurses, licensed practical nurses, nurses' aides and physicians; in failing to have adequate institutional policies; in failing to maintain adequate facilities; in deviating and departing from the accepted standards of hospital and medical care and treatment; in negligently hiring, training, retaining and supervising DR. ATWAL and DR. ZIMMERMAN; and in failing to report adverse incidents and unexpected outcomes concerning elective LASIK eye surgery, as required, to the FDA. Plaintiff relies upon the theories of vicarious liability and *respondeat superior*.

49. ATWAL EYE, its agents, servants and/or employees were negligent and careless by failing, neglecting and omitting to take, use and employ reasonable and proper steps and

procedures and practices for the health, safety and welfare of the Plaintiff thereby causing and contributing to the condition suffered by the Plaintiff; failing to supervise the activities of agents, servants, and/or employees; failing to employ agents, servants and/or employees who possess the requisite knowledge and experience to treat and care for conditions demonstrated by the Plaintiff; in violating the applicable laws, rules, regulations, guidelines, policies and protocols; in deviating and departing from the usual and accepted standards of medical, hospital and surgical care and treatment; in failing to comply with proper procedures and/or written protocols and/or guidelines in effect at ATWAL EYE; in failing and neglecting to adhere to and comply with the accepted and approved standards of practices, procedures and techniques prevailing in the locality and community; in failing to timely and properly monitor, supervise and/or oversee the activities of its agents, servants, medical staff, employees and/or independent contractors with respect to the care and treatment rendered to the Plaintiff herein during his presentations to ATWAL EYE; in failing to disclose to the Plaintiff all of the facts that a reasonable facility, under similar circumstances, would explain or disclose to a patient including a failure to disclose the risks and benefits of the treatment and procedures performed, the alternatives thereto and the risks and benefits relating to the alternatives; in failing, neglecting and omitting to timely, properly and/or adequately counsel its physicians and other employees with respect to the proper and appropriate standard of care and treatment to be rendered to patients presenting with complaints similar to those that Plaintiff presented with; in failing to have efficient and/or sufficient personnel; in failing to fulfill its duty to properly investigate the skill, qualifications, character and/or background of the physicians applying for staff privileges as well as other staff members, personnel and/or employees practicing at the defendant facilities; in improperly

granting the defendant privileges at ATWAL EYE; in failing to conduct continuous assessments of the competence of the defendant physician, personnel and/or independent contractor; in failing to employ qualified, trained and supervised physicians and non-physicians staff; in failing to properly train and/or supervise its personnel and/or independent contractors, including interns, residents, registered nurses, licensed practical nurses, nurses' aides and physicians; in failing to have adequate institutional policies; in failing to maintain adequate facilities; in deviating and departing from the accepted standards of hospital and medical care and treatment; in negligently hiring, training, retaining and supervising DR. ATWAL and DR. ZIMMERMAN; and in failing to report adverse incidents and unexpected outcomes concerning elective LASIK eye surgery, as required, to the FDA. Plaintiff relies upon the theories of vicarious liability and *respondeat superior*.

50. BUFFALO EYE, its agents, servants and/or employees were negligent and careless by failing, neglecting and omitting to take, use and employ reasonable and proper steps and procedures and practices for the health, safety and welfare of the plaintiff thereby causing and contributing to the condition suffered by the Plaintiff; failing to supervise the activities of agents, servants, and/or employees; failing to employ agents, servants and/or employees who possess the requisite knowledge and experience to treat and care for conditions demonstrated by the Plaintiff; in violating the applicable laws, rules, regulations, guidelines, policies and protocols; in deviating and departing from the usual and accepted standards of medical, hospital and surgical care and treatment; in failing to comply with proper procedures and/or written protocols and/or guidelines in effect at BUFFALO EYE; in failing and neglecting to adhere to and comply with the accepted and approved standards of practices, procedures and techniques

prevailing in the locality and community; in failing to timely and properly monitor, supervise and/or oversee the activities of its agents, servants, medical staff, employees and/or independent contractors with respect to the care and treatment rendered to the Plaintiff herein during his presentations to BUFFALO EYE; in failing to disclose to the Plaintiff all of the facts that a reasonable facility, under similar circumstances, would explain or disclose to a patient including a failure to disclose the risks and benefits of the treatment and procedures performed, the alternatives thereto and the risks and benefits relating to the alternatives; in failing, neglecting and omitting to timely, properly and/or adequately counsel its physicians and other employees with respect to the proper and appropriate standard of care and treatment to be rendered to patients presenting with complaints similar to those that the Plaintiff presented with; in failing to have efficient and/or sufficient personnel; in failing to fulfill its duty to properly investigate the skill, qualifications, character and/or background of the physicians applying for staff privileges as well as other staff members, personnel and/or employees practicing at the defendant facilities; in improperly granting the defendant privileges at BUFFALO EYE; in failing to conduct continuous assessments of the competence of the defendant physician, personnel and/or independent contractor; in failing to employ qualified, trained and supervised physicians and non-physicians staff; in failing to properly train and/or supervise its personnel and/or independent contractors, including interns, residents, registered nurses, licensed practical nurses, nurses' aides and physicians; in failing to have adequate institutional policies; in failing to maintain adequate facilities; in deviating and departing from the accepted standards of hospital and medical care and treatment; in negligently hiring, training, retaining and supervising DR. ATWAL and DR. ZIMMERMAN; and in failing to report adverse incidents and unexpected

outcomes concerning elective LASIK eye surgery, as required, to the FDA. Plaintiff relies upon the theories of vicarious liability and *respondeat superior*.

51. As a direct and proximate result of the foregoing, Plaintiff JACOB SMITH sustained severe, serious and permanent personal injuries to his right and left eyes, and was and still is caused to suffer pain, discomfort, partial permanent visual disabilities, mental and emotional shock, and was and still is permanently damaged thereby.

52. As a direct and proximate result of the foregoing, Plaintiff JACOB SMITH sustained injuries and damages, including without limitation, conscious pain and suffering, loss of capacity to work and labor, lost income, and medical expenses, which would not have been incurred if Defendants had exercised a reasonable degree of care and skill.

53. The said occurrence and resulting injuries and disabilities to the Plaintiff were caused wholly and solely by reason of the carelessness, negligence and malpractice of the Defendants, their agents, servants and/or employees as set forth above with no fault or lack of care on the part of the Plaintiff herein contributing thereto.

54. The limited liability provisions of the C.P.L.R. § 1601 do not apply pursuant to one or more of the exceptions of the C.P.L.R. § 1602.

55. The amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction.

**AS AND FOR A SECOND CAUSE OF ACTION
ON BEHALF OF PLAINTIFF JACOB SMITH
FOR LACK OF INFORMED CONSENT**

56. Plaintiff re-alleges and incorporates paragraphs 1 through 55, above.

57. Defendants, their agents, servants and/or employees failed to disclose all of the information that reasonably prudent medical practitioners, under similar circumstances, would explain or disclose to a patient including a failure to disclose the risks and benefits of the procedures performed, the alternatives thereto and the risks and benefits relating to the alternatives, and they otherwise failed to properly, adequately, thoroughly and fully inform the plaintiff herein.

58. A reasonably prudent person in the Plaintiff's position would not have undergone the procedures performed if he had been fully informed, and that lack of informed consent is a proximate cause of the injuries suffered herein for which recovery is sought.

59. The treatment rendered by the Defendants herein was not emergent treatment, an emergency procedure or emergency surgery.

60. As a result of Defendants' breach of duty of informed consent, Plaintiff JACOB SMITH sustained damages.

WHEREFORE, Plaintiff demands judgment against the defendants on the cause of action for medical malpractice in such sums as a jury may find fair, reasonable and just, all together with interest, costs and disbursements of this action.

Dated: Chappaqua, New York
November 20, 2015

LAW OFFICE OF TODD J. KROUNER



By: TODD J. KROUNER
Attorneys for Plaintiff
93 North Greeley Avenue
Chappaqua, New York 10514
(914) 238-5800

To: Amar Atwal, M.D.
3095 Harlem Road
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3095 Harlem Road
Cheektowaga, New York, 14223

ATTORNEY VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

TODD J. KROUNER, being duly sworn, deposes and says:

That he is an attorney at the Law Office of Todd J. Krouner with an office at 93 North Greeley Avenue, Chappaqua, New York 10514, attorney for plaintiff in the within action; that deponent has read and knows the contents of the foregoing Verified Complaint and the same is true to the knowledge of the deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, she believes it to be true. Deponent further says that the reason this verification is made by deponent and not by plaintiff is that the said plaintiff is not within the county wherein deponent maintains his offices.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.


TODD. J. KROUNER

Sworn to before me this
20th day of November, 2015



Notary Public

JULIA MONTGOMERY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01M06320147
Qualified in Westchester County
My Commission Expires March 02, 2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

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JACOB SMITH,

Plaintiff,

-against-

AMAR ATWAL, M.D., JAY S. ZIMMERMAN, O.D.,
AMAR ATWAL, M.D., P.C., ATWAL EYE CARE and
BUFFALO EYE CARE ASSOCIATES,

Defendants.
-----X

**CERTIFICATE OF
MERRIT**

The undersigned, an attorney admitted to practice in the courts of New York State,
shows:

Affirmant is the attorney of record for plaintiff in the above-captioned action and states:

1. I have reviewed the facts of this case.
2. I have consulted with at least one physician, duly licensed to practice, whom I reasonably believe is knowledgeable in the relevant issues involved in this particular action.
3. I have concluded on the basis of said review and consultation that there is a reasonable basis for the commencement of this action.

Dated: Chappaqua, New York
November 20, 2015



Todd J. Krouner