Gittler v Pinsky
2021 NY Slip Op 32970(U)
May 4, 2021
Supreme Court, Nassau County
Docket Number: Index No. 603576/19
Judge: Denise L. Sher

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ANDRICE GITTLER and JEREMY GITTLER,

Plaintiffs,

-against-

STEVEN H. PINSKY, M.D., ROCKVILLE ANESTHESIA GROUP, LLP, PERRY ROBERT STEVENS, M.D., SOUNDVIEW MEDICAL GROUP PLLC, MERCY MEDICAL CENTER, CATHOLIC HEALTH SYSTEM OF LONG ISLAND, INC. and NORTH SHORE UNIVERSITY HOSPITAL,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 603576/19
Motion Seq. No.: 02
Motion Date: 11/20/2020

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	1
Affirmation in Opposition to Motion (Seq. No. 02) and Exhibits	2
Affirmation in Reply to Motion (Seq. No. 02) and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant North Shore University Hospital ("NSUH") moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint, with prejudice, as against it, or, in the alternative, moves, pursuant to CPLR § 3212(e), for an order granting it partial summary judgment. Plaintiffs oppose the motion (Seq. No. 02).

In support of the motion (Seq. No. 02), counsel for defendant NSUH asserts, in pertinent part, that, "[t]his action involves care rendered to plaintiff Andrice Gittler by multiple medical

providers and facilities during the period of January 3, 2016 – January 27, 2016, alleging failure to timely diagnose a hip joint infection, septic arthritis of the hip. The claims against the defendant North Shore University Hospital (NSUH) are limited to one date, Ms. Gittler's January 3, 2016 North Shore University Hospital Emergency Department (NSUH ED) presentation. Plaintiff asserts three causes of action sounding in medical malpractice, lack of informed consent, and lack of consortium.... The care provided at NSUH ED on January 3, 2016 was fully in conformance with accepted standards of emergency medicine practice and medical care as detailed by emergency medicine expert Dr. Mark Silberman.... Dr. Silberman details the role of the emergency department, and explains that following evaluations by multiple medical providers at NSUH ED, which included obtaining a history and review of systems from the patient, and performance of examinations relating to her presenting complaint of hip pain, the NSUH medical providers utilized appropriate medical decision making in rendering a diagnosis of musculoskeletal pain with instruction to continue outpatient work-up for her complaints of hip pain in accordance with accepted standards of emergency medicine care. Dr. Silberman details no care or treatment beyond what was provided was clinically indicated or required in the emergency department setting, and outpatient follow-up evaluation of her hip pain was in conformance with standards of care. Emergency medicine expert Dr. Silberman and orthopedic surgery expert Dr. Douglas Unis ... detail that Ms. Gittler had an atypical presentation of a rare condition in a middle-aged female, septic arthritis of the hip. These experts explain that while the NSUH physicians appropriately considered all potential etiologies for Ms. Glitter's complaint of hip pain, Ms. Gittler did not have discernible risk factors and did not have signs or symptoms associated with septic arthritis of the hip at the time of her January 3, 2016 NSUH ED presentation. Given the absence of risk factors and the lack of any signs or symptoms suggestive

of infection, the medical experts set forth that no further, other or different work-up for septic arthritis of the hip was indicated during the January 3, 2016 NSUH ED presentation. The evidence demonstrates that following the January 3, 2016 NSUH ED visit, Ms. Gittler was evaluated by numerous other medical providers, each of whom performed independent assessments and formulated independent diagnoses and treatment recommendations, and did not rely on the NSUH ED care. Despite these further independent medical evaluations, which included performance of blood work and imaging studies, it was not until eleven days later that a diagnosis of septic hip joint was made. Medical experts Dr. Silberman and Dr. Unis detail the unusual presentation of Ms. Gittler's condition, highlighting that even the orthopedic consultant 10 days later at Mercy Medical Center did not suspect septic arthritis of the hip as Ms. Gittler remained without the discernable risk factors, signs or symptoms associated with this condition. These experts set forth that any claim that NSUH departed from accepted standards of care by failing to diagnose Ms. Gittler's very unusual presentation of an uncommon, rare condition in a middle-aged woman, is without merit. Furthermore, there are no deviations from accepted standards of care that caused injury to Ms. Gittler. Emergency medicine expert Dr. Silberman explains that there is simply no evidence that additional testing at NSUH would have resulted in a diagnosis on January 3rd, as multiple follow up consultations and diagnostic imaging over the next 10 days were unrevealing. Additionally, orthopedic expert Dr. Unis explains that (*sic*) diagnosis 10 days earlier would not have changed Ms. Gittler's course, prognosis or outcome. Dr. Unis details that the medical records demonstrate that Mrs. Gittler had an unusually low virulent, slow growing infection, present for weeks prior to the NSUH presentation. The expert explains that Ms. Gittler would have undergone the very same procedures and treatment, and would have had an identical outcome, had diagnosis been made on January 3rd instead of January

14th. As demonstrated through two medical experts, the allegations asserted against North Shore University Hospital are entirely without merit.... North Shore University Hospital adhered to accepted standards of emergency medicine and medical care during Ms. Gittler's January 3, 2016 presentation, and there were no deviations from accepted standards of medical care that caused injury. Additionally, all claims of lack of informed consent must be dismissed as there were no invasive procedures performed by the moving defendant. Furthermore, as dismissal of the claim on behalf of Ms. Gittler is warranted, the derivative cause of action on behalf of Ms. Gittler's husband, plaintiff Jeremy Gittler, cannot stand. For these reasons, summary judgment in its entirety is warranted." *See* Defendant NSUH's Affirmation in Support Exhibits A and B.

Counsel for defendant NSUH further submits, in pertinent part, that, "Dr. Silberman affirms, to a reasonable degree of medical certainty, that NSUH ED undertook an evaluation and assessment in conformance with accepted standards of emergency medicine and medical care, including taking a history from the patient and performing examinations, and coming to a reasonable and appropriate diagnosis of musculoskeletal pain, with instructions for continued outpatient evaluation and assessment, on January 3, 2016.... Dr. Silberman details that (*sic*) emergency medicine standard of care does not mandate or require providers to rule out every possible diagnosis in an emergency department setting.... The expert explains that the differential diagnosis for hip pain is extremely broad and includes many etiologies including trauma, primary musculoskeletal pain (strains/sprains), rheumatological disease, malignant disease, blood clots, neurological disease, and infectious processes.... While each of these diagnoses were considered by the NSUH emergency department physicians, Dr. Silberman explains that the NSUH providers appropriately utilized their medical training, experience,

expertise, and judgment in coming to a diagnosis of primary musculoskeletal pain based upon the patient's history and examination pertinent positive and negative findings, in conformance with accepted standards of care.... Further, as the patient was four months postpartum, musculoskeletal pain from childbirth or holding and carrying a baby was a reasonable explanation for her complaints.... The expert highlights that the diagnosis made by the NSUH ED providers on January 3, 2016 of musculoskeletal pain was reasonable, appropriate, and in conformance with standards of care.... The experts detail that Ms. Gittler did not present to NSUH ED on January 3, 2016 with risk factors, signs or symptoms that would have (*sic*) suggestive of septic arthritis of the hip.... The experts explain that infection, and particularly septic arthritis of the hip, was properly extremely low on the differential based on Ms. Gittler's lack of risk factors and the absence of any suggestive signs and symptoms.... The patient was not of advanced age, had no pre-existing joint disease, no recent joint surgery or injection, no skin or soft tissue infection, denied intravenous drug use, no indwelling catheters, and denied having no (*sic*) immunosuppression conditions such as diabetes or cancer.... Further, Ms. Gittler did not have the cardinal signs of septic arthritis of the hip include (*sic*) fever, swelling, warmth/redness, and restricted movement in the joint on her examination.... Given the absence of risk factors and the lack of any symptoms suggestive of infection, emergency medicine expert Dr. Silberman sets forth that no further or other work-up or testing for infection was clinically indicated or required.... The expert details that blood work, imaging studies including x-ray, MRI, CT, and ultrasound, invasive procedures such as arthrocentesis and or consultations including with orthopedic surgery and infections diseases, were not clinically warranted at the January 3, 2016 NSUH ED presentation given the lack of risk factors, signs or symptoms of a hip infection.... Emergency Medicine expert Dr. Silberman explains that the evaluation on

January 3, 2016 revealed Ms. Gittler did not have signs, symptoms or risk factors of a serious, emergency medical condition; rather, work-up as an outpatient was appropriate and in conformance with accepted standards of care.... The experts explains (*sic*) Ms. Gittler understood these directions, and commenced (*sic*) outpatient evaluation with her primary care provider who referred her to a neurologist the very next day.... Again, as Dr. Silberman explains it is not within (*sic*) standard of care to rule out every possible diagnosis in an emergency department setting, and in this clinical scenario, outpatient evaluation was recommended in accordance with standards of care.... Accordingly, based upon the expert affirmation of emergency medicine expert Dr. Silberman, the treatment provided to plaintiff Andrice Gittler by NSUH on January 3, 2016 adhered and was in conformance with the accepted standards of medical and emergency medicine care." *See id.*

Counsel for defendant NSUH also asserts, in pertinent part, that, "[t]he medical experts detail that while blood work and imaging of the hip during the NSUH ED presentation was not clinically indicted or warranted, nonetheless, performance of these tests would not have resulted in earlier diagnosis of septic arthritis of the right hip.... Dr. Silberman details (*sic*) Ms. Gittler had a normal while blood cell count and negative blood cultures through the time of diagnosis on January 14th, despite no antibiotic therapy.... As such, performance of blood work during the NSUH ED presentation of January 3rd, 2016 would have been unrevealing as this imaging performed 10 days later at Mercy was read as normal with no acute findings.... To say that labs or imaging on January 3, 2016 at NDUH would have led to (*sic*) earlier diagnosis is contrary to the medical records.... Orthopedic Surgery expert Dr. Douglas Unis opines to a reasonable degree of medical certainty that the alleged departures of defendant NSUH are not casually connected to plaintiff Andrice Gittler's claimed injuries.... Dr. Unis affirms that nothing NSUH

did or allegedly failed to do caused or contributed to Ms. Gittler's outcome or prognosis.... Dr. Unis explains (*sic*) diagnosis of septic arthritis of the hip 10 days earlier would not have changed Ms. Gittler's management, treatment, outcome or prognosis.... The expert explains that Ms. Gittler had a low virulent, slow growing infection, that colonized in her right hip causing cartilage damage at least several weeks prior to her NSUH ED presentation on January 3, 2016 based upon the characteristics of Ms. Gittler's infectious process and the radiologic imaging and intraoperative findings.... Dr. Unis affirms that Ms. Gittler would have undergone the very same procedures and treatments had the diagnosis been made on January 3rd, as she did when it was made following presentation to Mercy on January 13th.... Further, Dr. Unis details Ms. Gittler's cartilage damage had already been ongoing for an extended time prior to the NSUH presentation, therefore diagnosis 10 days earlier on January 3rd would not have spared Ms. Gittler from development of osteoarthritis.... As there is a complete absence of proximate cause, summary judgment is warranted." *See* Defendant NSUH's Affirmation in Support Exhibits A-B and N-Q.

In opposition to defendant NSUH's motion (Seq. No. 02), counsel for plaintiffs asserts, in pertinent part, that, "[a]t the outset, Plaintiffs do not oppose that branch of Defendants' motion seeking to dismiss the informed consent claims. It is submitted that the Defendants' motion for summary judgment should be otherwise denied under the circumstances of this case since:
(1) The Defendants have failed to establish their *prima facie* entitlement to summary judgment, as the expert affirmation and other physician averments submitted in support are conclusory, fail to address the totality of the evidence, and fail to address Plaintiffs' pertinent allegations;
(2) even assuming Defendants met their initial motion burden, Plaintiffs have raised issues of fact by proffering expert physician affirmations which, upon addressing all of the relevant evidence and facts, identify multiple departures as to NORTH SHORE UNIVERSITY

HOSPITAL ... that were a (*sic*) proximate cause (*sic*) of the injuries suffered by Plaintiffs; and (3) At a minimum, the conflicting expert opinions present material issues of fact that should be resolved by a jury at trial. In short, as avowed by Plaintiffs' experts, had the Defendant[s] not deviated from standards of care, Mrs. Gittler's condition could have been properly managed, her infection would not have been remotely as severe, no surgery would have been required, and her resulting pain and suffering would have been avoided."

In support of the opposition, counsel for plaintiffs submits the expert affirmation of Ira Mehlman, M.D. ("Dr. Mehlman"). *See* Plaintiffs' Affirmation in Opposition Exhibit A. Dr. Mehlman asserts, in pertinent part, that, "[i]t is my opinion, within a reasonable degree of medical certainty, that the defendant[s], North Shore University Hospital, ..., departed from acceptable standards of medical care in the treatment of the plaintiff ANDRICE GITTLER in failing to recognize the clear signs and symptoms of an infection and to, in compliance with mandatory standards of care, timely, entertain this very serious possibility in their 'differential diagnoses' and properly and appropriately evaluate and treat for same. Furthermore, it is my opinion within a reasonable degree of medical certainty, that the deviations of the defendant[s], proximately caused the injuries suffered by ANDRICE GITTLER including the need for surgery and extended hospital stay, need for intravenous medication, pain, and anguish, and future probable likely sequelae. In sum, based upon the review of the records, it is my opinion that defendant[s] deviated from standards of care in missing an opportunity to diagnose plaintiff as suffering from, inter alia Staphylococcus aureus infection, Staphylococcal arthritis of the right hip, right septic hip, and treat ANDRICE GITTLER, at an early stage when appropriate treatment would in all probability (*sic*) been curative with full recovery and no risk of future complications from delayed untimely diagnosis and treatment. It is my opinion, within a

reasonable degree of certainty, that when Mrs. Gittler presented to defendant[s], she presented with clinical signs and symptoms which required further investigation and the mandatory inclusion in the differential diagnosis of deep seated infection which required further testing, and immediate consideration and treatment." *See id.*

Dr. Mehlman further asserts, in pertinent part, that, "[b]ased on all the evidence available, it is my opinion within a reasonable degree of medical certainty, that the Defendant[s] in this case negligently failed to consider the possibility of an ongoing right hip infection in the days that led up to Mrs. Gittler's presentation to Mercy Hospital, despite the fact that her complaints were clearly in her right hip. Based on the testimony of Mrs. Gittler, she had severe, and worsening unrelenting pain in the right hip, a deep seated joint in the days prior to her presentation to North Shore Hospital,... Benign musculoskeletal pains generally are improving after 72 hours (3 days), 'bad' pains continue (*sic*) are not relieved by usual remedies, are getting worse, are constant, sever, unrelenting, and longer than 3 days – in fact worsening over many days. It is egregious to not evaluate what she was actually in fact complaining about – the right hip!... The doctors at North Shore University Hospital ED, … failed to meet the standards of care and denied Mrs. Gittler the best possible outcome and denied her complete early timely diagnosis and treatment which would have decreased her right hip bone and cartilage destruction giving her a much better outcome and no future potential problems secondary to delay in definitive treatment and further cartilage and bone infection and destruction from prolonged untreated infection. It must also be noted that it is well known that treating patients with undiagnosed infections with steroids such as dexamethasone and prednisone can aggravate and potentially worsen the untreated infection. Patients returning a *second time* for unimproving or

worsening medical problems require a good thorough complete evaluation to rule out life and/or limb threatening problems."

Dr. Mehlman also submits, in pertinent part, that, "[i]n my medical opinion from fifty years of evaluating such patients, and familiarity with the medical literature regarding these issues, within a reasonable degree of medical certainty, it is not at all rare or unusual for patients with such serious infections to present afebrile or to present with a normal or even low white blood cell count. Patients presenting with SIRS (systemic inflammatory response syndrome) from a bacterial infection even with sepsis often have a pulses (*sic*) greater than 90 bmp, and can have high, normal or low WBCs and be afebrile or even have low temperatures, well described in the literature and from my experience with such cases. When Mrs. Gittler presented to North Shore ED her pules (*sic*) was 113 bpm, which was elevated for a woman her age. The doctors at North Shore should have investigated further, such as ordering MRI imaging of the right hip, some basic laboratory blood tests given her symptoms and severe unrelenting right hip pain. It is also my medical opinion, within a reasonable degree of medical certainty, that since Mrs. Gittler's pains were present for more than three days, and in fact, worsening, and not relieved by the typical treatment of rest and ibuprofen or anti-inflammatories, the differential diagnosis of infection should have been considered – including deep seated infection in that right hip – the standard of care for such patients.... Typically, with infections in deep seated joints (such as spine, hip, shoulder) it can be difficult to determine 'warmth, swelling, or redness', as there may be 3-4 inches of body 'tissues' in the way, which is why proper imaging is critical. Unexplained, persistent, or worsening deep joint pain, unrelenting and even worsening, even at rest, without a known cause or understood mechanism would be indicative of possible deep seated joint infection. It must be investigated and a differential diagnosis of infection or space

occupying lesion such as a tumor must be considered. Direct appropriate imaging such as an MRI of the affected area must be done – in this case it is clear the right hip was repeatedly remarked as the site of pain – it is a clear deviation from standards of care to have not had a right hip infection at the top of the differential diagnoses, by likelihood and by acuity because such infections demand early timely diagnosis and treatment to insure best and safest outcomes. The defendants should have ordered an MRI of Mrs. Gittler's hip, the area that was symptomatic and the c-reactive protein and sed rate should have been tested along with the above other concerns. Not at all unusual, and well known clinically and in the medical literature, patients may present with serious infections even life-threatening, without a fever, possibly even hypothermic, with a normal white blood cell count or even a low WBC, and such lab tests may be relatively normal and non-contributory or non-diagnostic, but regardless they are the standard of care when serious infectious conditions including deep seated joint infections are rightfully included in the differential diagnosis as ***should have been*** when patient Gittler presented on January 3, 2016, and each day afterwards. With persisting unexplained unrelenting pain in the right hip, the same pain present prior to January 3rd when patient Gittler presented to North Shore ED and subsequently to Drs. Stevens and Pinsky, with the same otherwise non-contributory history and symptoms, without fever or elevated WBC count, when these doctors, although repeatedly noting the ***chief complaint of right hip pain***, none of them ordered imaging of the right hip area with imaging of either a CAT scan or MRI (best), never ordered the CBS and sedimentation rate and/or C reactive protein, which in my opinion would have led to the timely diagnosis of her right hip infection early and timely when she presented. The defendant[s] (*sic*) experts would have one believe this was an unusual case but it was not, the patients (*sic*) complaint of right hip pain is consistently present throughout ***all*** the encounters, even the radiologist Dr. Vidya

Malhortra noted the right hip symptoms in his reading/report for the spine MRI, and even Dr. Stevens (January 4th) in his assessment remarked to 'consider right hip etiology,' all as I noted above, BUT none of these 'care-givers' did… and hip infections are the most acute diagnosis, the most destructive diagnosis which should be in (*sic*) at the top of the 'differential diagnosis' for such a patient as patient Gittler, because 'time=tissue' and failure to diagnosis (*sic*) timely places the patient at increased risk of even sepsis and death and certainly as noted of progressive cartilage and bone destruction if diagnosis is not made and treatment with antibiotics initiated timely. These deep seated infections occur, are clearly not rare, and when appropriately searched for by ***'thinking of them'*** as when the right hip joint effusion was noted on January 13th when ***incidentally*** the effusion was noted on an abdominal CAT scan… (again the wrong x ray (*sic*) but close enough to the right hip that it detected the right hip effusion) which would have been clear on a CAT scan or even better an MRI of the hip January 3, 4, or onward if it had been performed, as it should have been – namely, the standard of care in this patient. Then it became inescapable that the diagnosis of probable right hip infection would explain what was right in front of these doctors, but they ignored … at patient Gittler's expense and well-being…. This case was not rare, not difficult to diagnose, it just needs to be appropriately logically entertained in a patient with persistent, unresolving right hip pain on every visit, pain even at rest…. ***Of important note, when the C-reactive protein and sedimentation rate were finally ordered on 1/13/2016, they were respectively 14.70 and 85 – very elevated, and both consistent with deep seated infection. It is my strong opinion they would have been likewise elevated January 3rd and the other days, had they been appropriately done, in such a case – the standard of care….*** For the above stated reasons, I find within a reasonable degree of medical certainty that the defendant[s], North Shore University Hospital …, departed from proper and

accepted medical practice in [their] care and treatment of Mrs. Gittler, and [their] deviations denied her the best outcome, (*sic*) prolonged pain, and almost certainly will lead to long term sequelae because of prolonged and worsening bone and cartilage destruction from delays of timely diagnosis and definitive treatment – namely, standard of care." *See id.*

Also in support of the opposition, counsel for plaintiffs submits the expert affirmation of John Schaefer, M.D. ("Dr. Schaefer"). *See* Plaintiffs' Affirmation in Opposition Exhibit B. Dr. Schaefer asserts, in pertinent part, that, "[i]t is my opinion within a reasonable degree of medical certainty, that the deviations of the defendant[s] proximately caused the injuries suffered by ANDRICE GITTLER including the need for surgery and extended hospital stay, need for intravenous medication, pain, and anguish, and future probable likely sequelae. As detailed below, it is my opinion within a reasonable degree of medical certainty that the Defendant[s] in this action, departed from accepted standards of care causing Mrs. Gittler's injuries. In sum, based upon the review of the records, when Mrs. Gittler presented to the defendant[s], she presented with clinical signs and symptoms which required further investigation and the mandatory inclusion in the differential diagnosis of deep seated infection which required further testing, and immediate consideration and treatment. The defendant[s] deviated from standards of care in missing an opportunity to diagnose plaintiff as suffering from, inter alia Staphylococcus aureus, Staphylococcal arthritis of the right hip, right septic hip, and treat ANDRICE GITTLER, at an early stage when appropriate treatment would in all probability been curative with full recovery and no risk of future complications from delayed untimely diagnosis and treatment." *See id.*

In reply to the opposition, counsel for defendant NSUH contends, in pertinent part, that, "[p]laintiffs' experts (*sic*) submissions are fatally flawed and of no probative value as they:

1) rely on facts contradicted and not supported by the evidence (medical records and deposition testimony); 2) fraught with mere speculation and unsubstantiated conclusions; 3) fails (*sic*) to address specific assertions made by NSUH through Drs. Silberman and Unis on both standard of care and proximate causation; 4) overlooks (*sic*) critical portions of the facts; and 5) opines (*sic*) outside the experts' areas of expertise on proximate causation. Furthermore, plaintiffs' emergency medicine expert *agrees* that (*sic*) standard of care was met during Ms. Gittler's first medical presentation at (*sic*) with complaints of typical musculoskeletal hip pain!" *See* Defendant NSUH's Affirmation in Reply Exhibit R; Defendant NSUH's Affirmation in Support Exhibits A and B; Plaintiffs' Affirmation in Opposition Exhibit A.

Counsel for defendant NSUH further asserts, in pertinent part, that, "[t]her is (*sic*) *no* conflicting expert opinions to warrant a jury determination regarding the cause of action alleging medical malpractice insofar as asserted against NSUH. [citation omitted]. Plaintiffs' expert submissions are of NO probative value as they are contrary to the evidence, overlook critical evidence, speculative, conclusory, fail to address specific assertions made by NSUH (*sic*) experts on both standard of care and proximate causation, opines (*sic*) outside the experts' areas of expertise on proximate causation, and agrees (*sic*) standard of care was met. In fact, a close examination of plaintiffs' papers will reveal that the experts *never* detail a single departure from accepted standards of care as to NSUH; rather, NSUH is lumped into overly broad, conclusory paragraphs with the other defendants at the conclusion of the expert's opinion which is of no probative value and insufficient to create a triable issue of fact. Further, proximate causation is lacking in this medical malpractice case."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient

evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not

its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

"'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries.'" *Leigh v. Kyle*, 143 A.D.3d 779, 39 N.Y.S.3d 45 (2d Dept. 2016) *quoting Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011).

"A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff's injuries." *Michel v. Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 5 N.Y.S.3d 162 (2d Dept. 2015) *lv denied* 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015). *See also Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014); *Berthen v. Bania*, 121 A.D.3d 732, 994 N.Y.S.2d 359 (2d Dept. 2014); *Trauring v. Gendal*, 121 A.D.3d 1097, 995 N.Y.S.2d 182 (2d Dept. 2014); *Stukas v Streiter*, *supra* at 23; *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012). Expert evidence is required when evaluating the "performance of functions that are an integral part of the process of rendering medical treatment ... to a patient." *D'Elia v. Menorah Home and Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). *See also Koster v. Davenport*, 142 A.D.3d 966, 37 N.Y.S.3d 323 (2d Dept. 2016) *lv to appeal denied* 28 N.Y.3d 911, 47 N.Y.S.3d 227 (2016). Additionally, the

conclusions reached by the defendant and his or her expert(s) must be supported by evidence in the record. *See Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013).

"Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met the prima facie burden." *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012).

"Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant's departure was a substantial factor in causing the plaintiff's injury." *Semel v. Guzman*, 84 A.D.3d 1054, 924 N.Y.S.2d 414 (2d Dept. 2011) *citing Johnson v. Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881, 800 N.Y.S.2d 609 (2d Dept. 2005); *Goldberg v. Horowitz*, 21 A.D.3d 802, 73 A.D.3d 691, 901 N.Y.S.2d 95 (2d Dept. 2010). *See also Skelly–Hand v. Lizardi*, 111 A.D.3d 1187, 975 N.Y.S.2d 514 (2d Dept. 2013). A plaintiff is not required to eliminate all other possible causes. *See Skelly–Hand v. Lizardi*, *supra* at 1189. "'The plaintiff's evidence may be deemed legally sufficient even if [her] expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased [the] injury.'" *Alicea v. Ligouri*, 54 A.D.3d 784, 864 N.Y.S.2d 462 (2d Dept. 2008) *quoting Flaherty v. Fromberg*, 46 A.D.3d 743, 849 N.Y.S.2d 278 (2d Dept. 2007) *citing Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d Dept. 2003); *Wong v. Tang*, 2 A.D.3d 840, 769 N.Y.S.2d 381 (2d Dept. 2003); *Jump v. Facelle*, 275 A.D.2d 345, 712

N.Y.S.2d 162 (2d Dept. 2000) *lv denied* 95 N.Y.2d 931, 721 N.Y.S.2d 607 (2000) *lv denied* 98 N.Y.2d 612, 749 N.Y.S.2d 3 (2002).

"'While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field ... the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable.'" *Behar v. Coren*, 21 A.D.3d 1045, 803 N.Y.S.2d 629 (2d Dept. 2005) *lv denied* 6 N.Y.3d 705, 812 N.Y.S.2d 34 (2006) *quoting Postlethwaite v. United Health Servs. Hosps.*, 5 A.D.3d 892, 773 N.Y.S.2d 480 (2d Dept. 2004). "Thus, where, a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered." *Behar v. Coren, supra* at 1047. "'[G]eneral allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat a defendant's motion for summary judgment.'" *Bendel v. Rajpal*, 101 A.D.3d 662, 955 N.Y.S.2d 187 (2d Dept. 2012) *quoting Bezerman v. Bailine*, 95 A.D.3d 1153, 945 N.Y.S.2d 166 (2d Dept. 2012). *See also Savage v. Quinn*, 91 A.D.3d 748, 937 N.Y.S.2d 265 (2d Dept. 2012); *Myers v. Ferrara*, 56 A.D.3d 78, 864 N.Y.S.2d 517 (2d Dept. 2008) *citing Alvarez v. Prospect Hosp., supra* at 325; *Thompson v. Orner*, 36 A.D.3d 791, 828 N.Y.S.2d 509 (2d Dept. 2007); *DiMitri v. Monsouri*, 302 A.D.2d 420, 754 N.Y.S.2d 674 (2d Dept. 2003). A plaintiff's expert's statement which "fail[s] to respond to relevant issues raised by the defendants' experts" does not suffice to establish the existence of a material issue of fact. *See Ahmed v. Pannone*, 116 A.D.3d 802, 984 N.Y.S.2d 104 (2d Dept. 2014) *lv dismissed* 25 N.Y.3d 964, 8 N.Y.S.3d 261 (2015) *rearg denied* 26 N.Y.3d 944, 17 N.Y.S.3d 61 (2015); *Brinkley v. Nassau Health Care Corp.*, 120 A.D.3d 1287, 993 N.Y.S.2d 73 (2d Dept. 2014). Furthermore, an expert's opinion which is conclusory

and fails to set forth his or her rationale, methodology and reasons therefore also fails to establish an issue of fact. *See Rivers v. Birnbaum*, 102 A.D.3d 26, 953 N.Y.S.2d 232 (2d Dept. 2012); *Dunn v. Khan*, 62 A.D.3d 828, 880 N.Y.S.2d 653 (2d Dept. 2009).

Based upon the above, the Court finds the Expert Affirmations of Dr. Mehlman and Dr. Schaefer, offered in support of plaintiffs' opposition, are deficient in many respects, as outlined in defendant NSUH's reply arguments and in its expert physician's Further Affirmation in Support and in Reply. *See* Defendant NSUH's Affirmation in Reply Exhibit R. The Court would further note that Dr. Mehlman's affirmation states that he retired from the Army Medical Corps in 1992 and does not otherwise indicate he was practicing medicine in New York in 2016, or anywhere for that matter. Dr. Schaefer's affirmation states that he is a Virginia licensed physician, and does not indicate he has ever practiced medicine in New York.

Accordingly, defendant NSUH's motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint, with prejudice, is hereby **GRANTED**. And it is further

ORDERED that defendant NSUH shall be removed from the caption of this action.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 4, 2021