

Delia v Wieder

2021 NY Slip Op 32989(U)

February 11, 2021

Supreme Court, Nassau County

Docket Number: Index No. 617091/18

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

MICHAEL DELIA and PAULA DELIA,

Plaintiffs,

-against-

ALAN WIEDER, M.D., MERCY MEDICAL CENTER,
JESSICA AMBROSE, P.A., LUKAS J. SHUTLER, M.D.
and ANTHONY BRUNO, M.D.,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 617091/18
Motion Seq. No.: 04
Motion Date: 09/08/2020

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion (Seq. No. 04), Affirmation and Exhibits	1
Affirmation in Opposition to Motion (Seq. No. 04) and Exhibit and Affidavits	2
Affirmation in Reply to Motion (Seq. No. 04)	3

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

Defendant Alan Wieder, M.D. ("Dr. Wieder") moves, (Seq. No. 04), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint as against him. Plaintiffs oppose the motion (Seq. No. 04).

In support of defendant Dr. Wieder's motion (Seq. No. 04), his counsel asserts, in pertinent part, that, "[i]n support of the present application, the moving defendant, DR. WIEDER, submits the expert affirmation of internal medical expert, Charles L. Bardes, M.D. ... and infectious disease expert, Dial Hewlett, M.D.... Dr. Bardes's and Dr. Hewlett's affirmations, in addition to the medical records and depositions taken in this case as well as the

expert affidavits submitted in support of another motion for summary judgment, all submitted in whole or in part to this affirmation, establish that defendant, DR. WIEDER, is entitled to judgment as a matter of law because the treatment and care rendered to plaintiff, MICHAEL DELIA (hereinafter, the 'plaintiff'), was within good and accepted standards of care at all times alleged in this lawsuit, which is July 7, 2016. Briefly, this matter involves an unfortunate case of the plaintiff developing Fournier's Gangrene, a markedly rare condition, characterized by its rapid advancement within hours. While it is well-apparent the plaintiff did not have Fournier's upon his presentation to the moving defendant, the plaintiff alleges DR. WIEDER improperly treated him when he referred the plaintiff to a specialist on an emergent basis. The following will demonstrate, and as supported by expert testimony, DR. WIEDER properly treated the plaintiff on the date alleged to be at issue by plaintiff, July 7, 2016, the plaintiff did not have Fournier's when he saw DR. WIEDER and there was simply nothing DR. WIEDER did or did not do that caused the plaintiff's alleged injuries." See Defendant Dr. Wieder's Affirmation in Support of Motion (Seq. No. 04) Exhibits A and B.

Counsel for defendant Dr. Wieder submits, in pertinent part, that, "[t]his matter concerns itself with a currently 63 year old man who had a history of prostate cancer which required a radical suprapubic prostatectomy in June 2000, performed by Dr. Katz at New York Presbyterian Hospital. Ever since that surgery, the plaintiff suffered from stress and urge urinary incontinence, requiring 5 pads per day. The plaintiff also had occasional urinary tract infections. Furthermore, he suffers from a longstanding history of high blood pressure, obesity, intermittent flank pain, renal colic, kidney stones and depression. The plaintiff has been seeing a primary care physician, Dr. Martin Bolic, since 2003 but testified (*sic*) he wanted to switch due to what he thought was 'insufficient care' from Dr. Bolic and started treating at Arsenio Medical Services with

Dr. Wieder – whom he saw for the first time in April, 2015.... All of the plaintiff's visits with Dr. Wieder before August, 2015 dealt with complaints of bilateral foot numbness and tingling.... The plaintiff visited Dr. Wieder on August 10, 2015 with complaints of bladder pressure and urinary urgency.... There was no burning or blood.... Dr. Wieder ordered a urinalysis culture which revealed a urinary tract infection with E Coli.... Dr. Wieder prescribed Cipro at 250 mg a day, two times a day for 7 days.... This treatment cleared up the infection as the plaintiff's subsequent visits did not include any continued urinary complaints.... This treatment is **not an issue** in this lawsuit as per the Bills of Particulars as the only date of negligence alleged against DR. WIEDER by plaintiff is the **office visit of July 7, 2016**.... About 7 months later on March 2, 2016 the plaintiff visited urologist, Dr. Jeff Schiff, with complaints of right flank pain.... The plaintiff had previously seen Dr. Schiff at Winthrop Urology in 2014 for right flank pain and for treatment of his urinary incontinence.... Dr. Schiff diagnosed the plaintiff with kidney stones and renal colic.... The plaintiff visited urologist, Dr. Anthony Bruno, on April 28, 2016, with complaints of right side back and flank pain.... Dr. Bruno checked for lower urinary tract symptoms but the plaintiff had no fever or chills, only flank pain.... He had no testicular masses, penile discharge or gross hematuria. Dr. Bruno ordered a CT scan, KUB and urinalysis, all of which were unremarkable.... In May, 2016 the plaintiff was also treating with physical medicine and rehabilitation physician Dr. Sam Yee for his right sided stabbing back pain which radiated into his feet.... Dr. Wieder testified as to having reviewed Dr. Yee's records.... In that regard, Dr. Wieder was aware that Dr. Yee ordered an EMG test and subsequently diagnosed the plaintiff with neuropathy in his legs. The plaintiff presented to Dr. Wieder on June 30, 2016 with complaints of right leg pain which involved his right buttock and groin down his leg.... Additionally, the plaintiff gave a history of having dysuria and urgency (but not frequency) for

one week but noted this resolved on its own days prior to the office visit. . . . As stated earlier, this visit is not at issue in this lawsuit. Dr. Wieder diagnosed the plaintiff with sciatica and had suspicions concerning a possible urinary tract infection, but noted the plaintiff did not exhibit the requisite symptomology for same. . . . Dr. Wieder prescribed a Medrol dose pack for the plaintiff's back pain and inflammation. . . . Dr. Wieder also prescribed Cipro 250mgs BID for seven days for a possible urinary tract infection, but instructed the plaintiff to wait to take the antibiotic until either the symptoms returned or the culture came back positive for a UTI and he contacted the plaintiff regarding the results. . . . The plaintiff first testified (*sic*) he was never informed (*sic*) he had to wait to take the Cipro until he experienced pain when urinating. Instead, he testified that he began taking it the day he picked it up. . . . However, Dr. Bruno's chart reveals the plaintiff only took three (3) doses of Cipro prior to July 7th. . . . Dr. Wieder received the urine culture results on July 3rd and found they showed some bacterial growth but not enough to be considered positive for a UTI. . . . Thus, Dr. Wieder did not call the plaintiff because there was no active urinary tract infection. . . . Rather, Dr. Wieder felt, based on the objective testing and lack of urinary complaints at the June 30, 2016 visit, the plaintiff had a possible past urinary tract infection that was in the process of clearing up on its own and that explained the urine test results. The plaintiff also never contacted him with any new complaints. This was a proper diagnosis by Dr. Wieder and it was a proper decision to not prescribe antibiotics for this as it was not a UTI based on the urine culture results as there were not enough colony forming to make the diagnosis. . . . Regardless, plaintiff is not making any allegations against Dr. Wieder for this visit. On July 5, the Inwood Fire Department Ambulance brought the plaintiff to Mercy Medical Center. . . . Once at Mercy, he complained he thought he was having an allergic reaction to Aleve that he had taken. . . . The complaints the plaintiff made to the ambulance (*sic*) were consistent

with the emergency room chart and were both sans urinary and scrotal complaints. The plaintiff returned to Dr. Wieder on July 7, 2016 at 3:57 p.m.... Overall, Dr. Wieder noted complaints of dysuria and hematuria. He examined the plaintiff's genitalia (*sic*) and noted blood at the tip of the penis and on the pad in the underwear.... He noted the testicles to be non-tender and normal in size and contour.... No erythema (redness), induration, foul odor, crepitus nor any other visible discolorations were present.... Dr. Wieder's impression was possible UTI, kidney stones, and, because of the blood in the urine, potentially cancer.... In any event, Dr. Wieder was evidently concerned that the plaintiff had blood in his urine and pad – so he ordered a complete blood count and a urine culture and sent him to his urologist, Dr. Bruno, immediately.... He also prescribed an antibiotic empirically for a suspected possible UTI; Levaquin 500 mg. every day for 7 days.... The blood tests and urine culture did not come back and were not seen by [Dr.] Wieder until July 11, 2016 as documented in the chart and as he testified.... The plaintiff arrived at Dr. Bruno's office at 4:51 p.m. the same day, July 7, 2016.... Dr. Bruno examined the plaintiff and noted some swelling of the scrotum, but no tenderness.... He also did not note any discoloration or crepitus in the area.... In light of the bleeding, Dr. Bruno performed a cystoscopy in order to evaluate any sources of bleeding as well as examine the bladder.... He found no kidney stones, blood or infections.... Dr. Bruno performed a urinalysis which revealed only trace blood and trace leukocytes.... Dr. Bruno attributed the scrotum swelling to the patient's discontinuance of his furosemide (diuretic).... Neither Dr. Wieder nor Dr. Bruno observed any discoloration of the plaintiff's penis or foul odors emanating from the greater genital area. The plaintiff presented to the Winthrop Emergency Department three days later on July 10, 2016.... As per the plaintiff's testimony, the swelling and pain increased over the span of the three days and became much worse.... He was noted to have a fever and his scrotum was

warm and discolored.... A CT scan performed at Winthrop revealed the presence of some gas pockets in the proximal penile shaft with some extension into the abdomen, compatible with potential Fournier's gangrene.... Fournier's gangrene is generally characterized as a very rare, markedly aggressive infectious process that affects the genitals.... The infection causes necrosis in a very short period of time, usually within hours of forming.... Unfortunately, this necrotizing fasciitis can only be identified once it becomes clinically evident which is when it reaches the skin. Fournier's gangrene does not exist for days.... The plaintiff was taken in for surgery by urologic surgeon, Dr. Toby Handler.... Intraoperatively, Dr. Handler noted in the left side of the scrotum near the penile shaft a purulent cavity was found with foul smelling pus.... Most significantly, **Dr. Handler found there was no blackened tissue and the fascia did not appear necrotic whatsoever – indicating this fast moving infection was just in its early stages.... Markedly, all tissues were pink and healthy....** See Defendant Dr. Wieder's Affirmation in Support of Motion (Seq. No. 04) Exhibits A, B, G, K, M and R-Y.

Counsel for defendant Dr. Wieder further asserts, in pertinent part, that, "[a]s is explained in the affirmations of Dr. Charles Bardes (internal medicine expert) and Dr. Dial Hewlett (infectious disease expert), the care and treatment rendered by Dr. Wieder did not depart from the accepted standards of medical care and treatment. It is the opinion of both Dr. Bardes and Dr. Hewlett that the care and treatment rendered by Dr. Wieder at all times comported with the standards of care and treatment and did not proximately cause the plaintiff's alleged injuries.... At the outset, it must be brought to this Honorable Court's attention that the date of the allegations in the Bill of Particulars is July 7, 2016.... The plaintiff is not alleging any malpractice with regard to his earlier presentations to Dr. Wieder. Nonetheless, as Dr. Bardes opines, Dr. Wieder exercised proper medical judgment at the June 30, 2016 visit and throughout

his entire care and treatment of the plaintiff.... Whereas plaintiff's counsel alleges (*sic*) Dr. Wieder failed to provide adequate and proper medical care and treatment to the plaintiff on July 7, 2016 when he purportedly presented with complaints of bright red urine, pain and scrotal edema for one [to] two days – both Dr. Bardes and Dr. Hewlett opine, this is not supported by the records or Dr. Wieder's exam findings.... In view of the plaintiff's symptomology, which included hematuria and dysuria, and his examination findings, Dr. Bardes and Dr. Hewlett agree Dr. Wieder made the proper and appropriate decision to refer the plaintiff to a urology specialist on an emergent basis.... Our experts opine that the differential diagnoses arrived at by Dr. Wieder were proper and it was also proper to prescribe empiric Levaquin at 500mg every day for 7 days as this is an appropriate antibiotic to prescribe for a suspected possible UTI.... Whereas plaintiff's counsel alleges that Dr. Wieder failed to obtain appropriate consultations, including an infectious disease specialist and/or sending the plaintiff to the emergency room to diagnose Fournier's gangrene – having been aware the plaintiff was treating with an (*sic*) urologist, both Dr. Bardes and Dr. Hewlett opine it was not a departure from the standard of care for Dr. Wieder to defer to that specific specialist directly.... Additionally, both our experts agree (*sic*) the plaintiff's condition, symptoms and exam findings on July 7, 2016 did not warrant a referral to an infectious disease doctor or sending the plaintiff to an ER for Fournier's gangrene because, as stated earlier, the plaintiff did not have Fournier's gangrene at this time.... As our experts opine, the plaintiff's presentation to Dr. Wieder on July 7, 2016 was not consistent with Fournier's gangrene and was consistent with a possible UTI, kidney stones or urinary cancer because of the blood in the urine.... Dr. Bardes and Dr. Hewlett agree that none of these conditions warrant a referral to an infectious disease doctor or a referral to an ER and such a referral at this time would not have led to a diagnosis of Fournier's gangrene because the

plaintiff did not have symptoms of it because he did not have it yet.... Both of our experts detailed that Dr. Wieder as well as Dr. Bruno specifically charted that the plaintiff's genitals were not discolored, did not have crepitus and were not emanating any foul odors – all vital characteristics of Fournier's gangrene." See Defendant Dr. Wieder's Affirmation in Support of Motion (Seq. No. 04) Exhibits A, B and K.

In opposition to defendant Dr. Wieder's motion (Seq. No. 04), plaintiffs' counsel asserts, in pertinent part, that, "[p]laintiff MICHAEL DELIA began suffering from more frequent urinary tract infections in 2015, about 15 years after a radical prostatectomy. Around that time, Mr. DELIA began to treat with Defendant Alan Wieder, M.D. as his primary care physician. On June 30, 2016, he presented to Dr. Wieder with complaints of pain in his lower back, swelling and pain in his testicles, redness in his scrotal area and painful urination in the few days prior to the presentation, but the symptoms of painful urination seemed to lessen by the time of the visit. According to the Plaintiff, Dr. Wieder did not perform a physical examination of Plaintiff on June 30, 2016, yet he did prescribe the antibiotic Cipro. The Plaintiff filed the prescription and took the Cipro as prescribed through July 5, 2016. However, he continued to have back pain, testicular pain and swelling in his scrotum and his symptoms worsened. Due to pain, he left work early on July 1, 2016. The pain in his testicles on July 2, 2016 caused him to put a pillow between his legs when lying down. He had difficulty moving and complained of weakness when attempting to get out of bed. The weakness and pain continued in his lower back and testicles through July 3, 2016 and July 4, 2016. By July 5, 2016, Plaintiff MICHAEL DELIA was unable to sleep or go to work. He described the pain in his lower back and scrotal area had increased to an 8 or 9 out of 10, and recounted that he had physical symptoms of 'sweating' and 'shaking'. He was taken to Defendant MERCY MEDICAL CENTER via ambulance on that date. Plaintiff

explained all of his symptoms to the ambulance emergency medical technicians, including the chills, terrible pain in his groin area, extreme weakness. He also mentioned that he thought he had taken Aleve. For reasons unknown to Plaintiff, the EMTs indicated that they believed his symptoms were due to a reaction to Aleve. Plaintiff repeated his symptoms to the medical providers at Defendant MERCY MEDICAL CENTER. After several hours, he was advised that his white blood cell count was elevated with no explanation of what that meant. He was discharged without the issue of his pain addressed and without any prescriptions. The next day, July 6, 2016, Plaintiff PAULA DELIA called Defendant DR. WIEDER and an appointment was scheduled for July 7, 2016. Plaintiff MICHAEL DELIA stayed in bed on July 6 and 7, 2016 until it was time to get ready for his appointment. Over these two days, Plaintiff remained bedridden and was unable to work due to weakness as well as significant pain in his lower back and scrotum. His scrotum was swollen and tender to the touch. Immediately prior to his appointment with Defendant DR. WIEDER on July 7, 2016, Plaintiff MICHAEL DELIA described being terrified to discover that his incontinence pad was soaked in blood. When Defendant DR. WIEDER saw Plaintiff at approximately 3:30 p.m., Plaintiff showed DR. WIEDER the bloody pad, explained that he was bleeding from his penis, that he testicles were swollen and painful, that he had back pain and had recently been to the emergency room on July 5, 2016. In response, DR. WIEDER advised Plaintiff MICHAEL DELIA to visit a urologist immediately. Mr. DELIA made an emergency appointment with Advanced Urology, where he had previously been a patient, for the same day. Plaintiff arrived at Advanced Urology at approximately 5:00 p.m., provided a urine sample and was taken into an examination room accompanied by his wife, who remained in the room with him until a procedure was performed. When Defendant DR. BRUNO arrived, Plaintiff showed him the pad full of blood and described his painful

symptoms. He advised Defendant DR. BRUNO that he had been experiencing back pain for weeks, and this his 'groin area' was swollen for days. Defendant DR. BRUNO performed a cystoscopy procedure and advised the Plaintiff that the procedure would determine the source of the bleeding. Subsequent to the procedure, Defendant DR. BRUNO informed Plaintiffs that Mr. DELIA's bladder was 'fine' and that he did not have a tumor. He advised Plaintiff to take his 'water pill' and walk around in order to alleviate his symptoms. Despite following Defendant DR. BRUNO's instructions as much as possible for the next two days, Plaintiff MICHAEL DELIA's symptoms of weakness and pain worsened. In addition, Plaintiff experienced severe chills and sweats. By Sunday, July 10, 2016, seeing no improvement and an increase in the severity of symptoms, Plaintiff PAULA DELIA brought Plaintiff MICHAEL DELIA to the emergency room of Winthrop University Hospital as Defendant DR. BRUNO's practice was affiliated with Winthrop. He was transported from his car to the emergency room by wheelchair with the assistance of a security guard. He was transferred to a bed almost immediately due to (*sic*) inability to sit upright in the wheelchair caused by weakness and pain. Plaintiff's temperature was recorded at 105 degrees. After a CT scan, Plaintiff MICHAEL DELIA was informed that he was very ill and required immediate surgery. Due to his grave condition and possible fatal outcome of surgery, Mr. DELIA's wife and daughter were told to say 'goodbye' to him. The emergency surgery was performed by Defendant DR. BRUNO'S coworker, Dr. Toby Handler. While Mr. DELIA survived the surgery, he was treated in the ICU. He and his family learned that his symptoms over the past weeks were due to an infection which resulted in Fournier's Gangrene, an infection of the scrotum and penis. Plaintiff underwent weeks of hyperbaric treatments, several wound debridement surgeries, painful wound dressing changes and follow up treatment at a wound care center for approximately a month subsequent to his

discharge. The physical damage to Plaintiff was devastating as he lost a portion of his penis. What remained of his penis was retracted into his scrotum. The retraction of his penis into his scrotum caused urine to pool in his scrotum when he urinated which would then be released when he stood up, soaking his clothes. Plaintiff was required to carry extra pants and underwear when he left his home. Due to the severe urinary incontinence, he carried an unpleasantly disarming odor which caused the Plaintiff great humiliation and ultimately cost him his job due to complaints from co-workers concerning the odor. Plaintiff continued to suffer from urinary tract infections and he was prescribed daily antibiotics to address the infections. The incontinence was more severe than previously and he went from using 1-2 pads a day to replacing the incontinence pad every few hours. Despite his best efforts, Plaintiff was unable to find other, permanent full-time employment due to his incontinence. Ultimately, he gained employment as a part-time aide in an elementary school. Since his hospitalization in July 2016, Plaintiff has endured years of continued medical treatment and surgeries due to the sequelae of the Fournier's Gangrene. The continued urinary tract infections, resulted in a second instance of Fournier's Gangrene in January 2019 which resulted in the complete loss of Plaintiff's penis, multiple painful surgical procedures and excruciating bladder spasms. Plaintiff was required to undergo multiple surgeries to build a permanent ostomy for urination as he no longer has a penis. He must cope with the unnatural, uncomfortable and dehumanizing circumstance of having a bag of urine attached to his body for the rest of his life. Over one year later, Plaintiff is still undergoing treatment and enduring procedures to correct damaged ureters, fistulas and painful adhesions/scar tissue." See Plaintiff Michael Delia's Affidavit in Opposition to Motion (Seq. No. 04).

Counsel for plaintiffs argues, in pertinent part, that, “[t]he Defendant in this matter has not provided sufficient evidence to satisfy the burden which the proponent of a summary judgment motion must meet. The Affirmations of Defendant’s experts do not establish *prima facie* entitlement to judgment as a matter of law as they have failed to demonstrate with evidence that Defendant DR. WIEDER acted within the acceptable standard of medical care. Moreover, the Affirmations of Defendant’s experts must be carefully scrutinized as they focus solely on whether or not Plaintiff was suffering from Fournier’s Gangrene on July 7, 2016. They fail to address the critical fact that if Defendant WIEDER had properly treated Plaintiff MICHAEL DELIA during the period of June 30, 2016 through July 7, 2016, including addressing his abnormal urine test results on July 1 and 3, 2016, investigating the cause of his symptoms and advising the urologist of Plaintiff’s symptoms, it is more likely than not that Mr. DELIA would not have developed Fournier’s Gangrene or the resultant devastating injuries. Nor do the Defendant’s experts address any of the other injuries and areas of malpractice alleged in Plaintiffs’ Verified Complaint and Verified Bill of Particulars.... Defendant’s counsel’s attempts to support their (*sic*) claims that there are no triable issues of fact herein by stating that Plaintiff MICHAEL DELIA did not have Fournier’s Gangrene on July 7, 2016 is (*sic*) insufficient to establish summary judgment. Defendant’s counsel ignores the crucial fact that Plaintiff would never have developed Fournier’s Gangrene if he had been appropriately treated by Defendant DR. WIEDER during the immediate time period leading up to July 7, 2016.... Additionally, Defendant’s counsel argues that DR. WIEDER acted within the accepted standards of medical care when he diagnosed Plaintiff as having ‘either a UTI, kidney stones or cancer’. However, that ‘diagnosis’ is nowhere in Defendant’s office visit note.... Thus, this gratuitous statement cannot be considered relevant.” *See* Plaintiff Michael Delia’s Affirmation in Opposition to

Motion (Seq. No. 04) Exhibit A; Defendant Dr. Wieder's Affirmation in Support of Motion (Seq. No. 04) Exhibits E, G and R.

Counsel for plaintiffs further contends, in pertinent part, that, "[d]efendant WIEDER's internal medicine expert, Dr. Charles Bardes, claims that Dr. WIEDER acted within the accepted standard of medical care and that his actions or inaction were not the cause of Plaintiff MICHAEL DELIA's injuries. Dr. Bardes opines that DR. WIEDER rendered good care to the Plaintiff.... He states that Defendant DR. WIEDER properly referred Plaintiff MICHAEL DELIA to a urologist and that no Fournier's Gangrene was present on July 7, 2016.... Dr. Bardes focuses on the referral and lack of the presence of Fournier's Gangrene on July 7, 2016, minimizes the impact of the negligent care provided by Defendant DR. WIEDER in the week leading up to the (*sic*) July 7, 2016, and dismisses the need for DR. WIEDER to contact Plaintiff's urologist to advise (*sic*) of his alleged, but undocumented, concerns on July 7, 2016. Additionally, Dr. Bardes makes an incredible assumption, completely unsupported by Defendant DR. WIEDER'S deposition testimony, that Defendant DR. WIEDER would not have acted differently if he had been in possession of the Plaintiff's Mercy Medical Center emergency department records from July 5, 2016.... Such an assumption, it is respectfully submitted, has no basis in fact and must be rejected. Defendant WIEDER's infectious disease expert, Dr. Dial Hewlett, Jr., also claims that Dr. WIEDER acted within the accepted standard of medical care and that his actions or inaction were not the cause of Plaintiff MICHAEL DELIA'S injuries. Dr. Hewlett opines that DR. WIEDER rendered good care to the Plaintiff.... He states that Defendant DR. WIEDER properly referred Plaintiff to a urologist and acted appropriately in changing Plaintiff's antibiotic. Dr. Hewlett also states that no Fournier's Gangrene was present on July 7, 2016.... Defendant WIEDER also relies on an Affirmation provided by Dr. Toby

Handler in support of Defendant DR. ANTHONY BRUNO'S motion to bolster his experts' opinions that Plaintiff MICHAEL DELIA did not have Fournier's Gangrene on July 7, 2016. Dr. Handler's Affirmation is scarcely probative as she conspicuously failed to disclose that her opinion is biased due to her financial relationship with Dr. Bruno as his partner in his urology practice at the time that she treated Plaintiff.... Moreover, her statements in her Affirmation that Plaintiff did not have Fournier's Gangrene are contradicted by the medical record, and apparently, Defendant DR. WIEDER'S own experts. Specifically, her own practice's records list Fournier's Gangrene as the diagnosis.... Plaintiff's internal medicine expert disputes virtually every allegation of Defendant's experts. He/she opines that there were multiple deviations by Defendant DR. WIEDER including: failing to contact Plaintiff MICHAEL DELIA's urologist on July 7, 2016 to advise Plaintiff's urologist of his symptoms of infection; failing to adequately review Plaintiff MICHAEL DELIA's symptoms during his July 7, 2016 office visit, including Plaintiff's complaints of scrotal swelling and presentation of infection symptoms; failing to appropriately treat and address Plaintiff MICHAEL DELIA's symptoms of infection, pain, and painful urination on June 30, 2016 and July 7, 2016; failing to appropriately log and document Plaintiff MICHAEL DELIA's symptoms of pain, including tenderness and localization; failing to address Plaintiff MICHAEL DELIA's abnormal urine test results received on or about July 1 and 3, 2016, including but not limited to the presence of gram negative rods and moderate leukocytes indicating the presence of infection; failing to appropriately follow up with Plaintiff MICHAEL DELIA regarding the abnormal urine culture results received on or about July 1 and 3, 2016; failing to diagnose Plaintiff MICHAEL DELIA's infection; failing to examine Plaintiff MICHAEL DELIA's scrotum on July 7, 2016 despite Plaintiff's documented complaint of scrotal swelling; failing to prescribe appropriate medications to treat Plaintiff's infection; and

failing to timely investigate, diagnose and adequately treat Plaintiff MICHAEL DELIA's symptoms of infection during the period (*sic*) June 30, 2016 through July 7, 2016. Plaintiff's internal medicine expert further opines, in direct opposition to the statements made by Defendant's experts, that if DR. WIEDER had acted within the accepted standards of medical care and had investigated the cause of Plaintiff's ongoing symptoms, Mr. DELIA's infection would have been treated and it is more likely that not that he would not have developed Fournier's Gangrene." See Plaintiff Michael Delia's Affirmation in Opposition to Motion (Seq. No. 04) Exhibit A; Defendant Dr. Wieder's Affirmation in Support of Motion (Seq. No. 04) Exhibits A, B and T.

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-Händ 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).

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions. *See Romano v. Persky*, 117 A.D.3d 814, 985 N.Y.S.2d 633 (2d Dept. 2014); *Shehebar v. Boro Park Obstetrics & Gynecology, P.C.*, 106 A.D.3d 715, 964 N.Y.S.2d 239 (2d Dept. 2013); *Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013); *Hayden v. Gordon*, 91 A.D.3d 819, 937 N.Y.S.2d 299 (2d Dept. 2012); *Wexelbaum v. Jean*, 80 A.D.3d 756, 915 N.Y.S.2d 161 (2d Dept. 2011); *McKenzie v. Clarke*, 77 A.D.3d 637, 908 N.Y.S.2d 370 (2d Dept. 2010); *Roca v. Perel*, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008); *Graham v. Mitchell*, 37 A.D.3d 408, 829 N.Y.S.2d 628 (2d Dept. 2007); *Feinberg v. Feit*, 23 A.D.3d 517, 806 N.Y.S.2d 661 (2d Dept. 2005). “Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury.” *DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012).

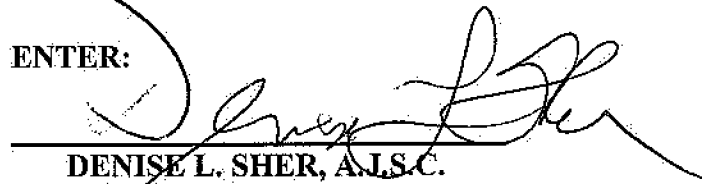
The Court notes that there are opposing opinions of defendant Dr. Wieder's medical experts and plaintiffs' medical expert concerning the allegations of medical malpractice. The Court, therefore, finds that summary judgment is not appropriate in the instant matter with respect to plaintiffs' medical malpractice claims.

Therefore, based upon the above, defendant Dr. Wieder's motion (Seq. No. 04), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint as against him, is hereby **DENIED**.

The parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on April 13, 2021, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:


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

Dated: Mineola, New York
February 11, 2021

ENTERED
Feb 16 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE