

**Solow v Goldman**

2020 NY Slip Op 31221(U)

May 6, 2020

Supreme Court, Kings County

Docket Number: 513629/15

Judge: Bernard J. Graham

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 36 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6<sup>th</sup> day of May 2020.

P R E S E N T:

HON. BERNARD J. GRAHAM

Justice.

-----X

IRIS JACKSON SOLOW

Plaintiff,

- against -

Index No.513629/15

ALAN P. GOLDMAN, M.D., SHAPIRO, GOLDMAN,  
TAWIL AND DUBROFF,

Defendants.

-----X

The following papers numbered 1 to 6 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1-3
Opposing Affidavits (Affirmations)_____	_____4,5
Reply Affidavits (Affirmations)_____	_____6
_____Affidavit (Affirmation)_____	
Other Papers_____	

Upon the foregoing papers, defendants Alan P. Goldman, M.D. (Dr. Goldman), and Shapiro, Goldman, Tawil and Dubroff (collectively, defendants) move for an order, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint of plaintiff Iris Jackson Solow (plaintiff).

***Background and Procedural History***

On February 10, 2012, plaintiff presented to Dr. Goldman with complaints of left ankle pain. Dr. Goldman was part of a practice with three other physicians: Drs. Shapiro, Tawil and Dubroff, known as Brighton Beach Medical Group (BBMG). Plaintiff also complained of pain in her back due to scoliosis and was concerned about cellulitis. She informed Dr. Goldman that she had prior admissions at Gracie Square, a psychiatric hospital, and relayed that her current medications were 2.5 tabs of 2 milligrams (mg) of Xanax<sup>1</sup> a day, 15 mg of Restoril at bedtime and an occasional Oxycontin. She stated that she preferred Xanax for sleep and for all other psychiatric purposes. Dr. Goldman examined plaintiff and found her ankle to be bruised and swollen. In addition, he found that she was experiencing minor breathing difficulty. Dr. Goldman prescribed an ankle brace, 2.5 tabs of 2 mg of Xanax and Proventil HFA (an inhaler). He also gave her referrals for a colonoscopy and a mammography. Dr. Goldman testified that he believed that plaintiff was under the care of a psychiatrist. Plaintiff returned to the practice on April 10, 2012, for an echocardiogram which revealed mitral valve prolapse. She saw Dr. Goldman again on April 16, 2012, complaining of anxiety and tension. Plaintiff informed Dr. Goldman that she had recently returned from visiting an ex-boyfriend in Florida, and that while there, she fell and dislocated her shoulder and broke some teeth. Dr. Goldman recommended she continue using the ankle brace and inhaler, and he continued her Xanax prescription and added 50 mg of Losartan/Cozaar, a blood pressure medication, and Percocet (Oxycontin) for pain.

Plaintiff next treated with Dr. Goldman on May 13, 2012, reporting that she had

---

<sup>1</sup>Xanax is a benzodiazepine used to treat anxiety and panic disorder.

been injured after being pushed into a plate glass door at a veterinarian's office. She claimed headaches, dizziness, nausea, neck pain, anxiety, depression and tension. X-rays of plaintiff's skull, ankle and foot were performed and no fracture or destructive changes were seen. Dr. Goldman referred her for an MRI of her head, to rule out brain damage, and for an MRI of her ankle and a mammogram. On June 3, 2012, plaintiff visited Dr. Goldman and presented with complaints of anxiety, depression and tension. A physical examination was performed followed by an abdominal sonogram as plaintiff presented with abdominal distension. Dr. Goldman prescribed plaintiff 20 milligrams of Celexa, an anti-depressant medication on this date, in addition to the renewal of her other prescribed medications.

Approximately six months later, on January 16, 2013, plaintiff returned to Dr. Goldman's office. She informed him that she had spent time in the Regency Nursing Home after being displaced as a result of Hurricane Sandy, and that she had been discharged the day prior. He examined her and noted a significant weight loss of 25 pounds which was attributable to plaintiff having developed C.difficile while at Regency. It appears that Dr. Goldman prescribed Xanax, Percocet and Restoril on that date. Plaintiff returned on March 4, 2013 and was treated by Dr. Goldman. He examined her at which time the plaintiff reported that she had not been taking the Xanax every day because she would have run out. She also indicated that she had finished her course of treatment for C.difficile. Dr. Goldman renewed plaintiff's prescriptions for Xanax, Restoril, Proventil-HFA, and Losartan on that date.

On April 8, 2013, plaintiff treated with Dr. Goldman's colleague, Dr. Jerome

Dubroff. Dr. Dubroff noted plaintiff's extensive medical history, as per Dr. Goldman's March 4, 2013 notes including a history of severe anxiety, and that she was treating with a psychiatrist named Dr. Arkan. Dr. Dubroff prescribed a 7-day supply of Xanax, Restoril 15 mg at bedtime, Proventil-HFA, 2 inhalations four times a day as needed, and Cozaar 50 mg day.

Plaintiff next treated with Dr. Goldman on May 6, 2013. On that date, a physical examination was performed and it was revealed that plaintiff's blood pressure was 140/100. Plaintiff then left the examining room and suffered a seizure while still in Dr. Goldman's office which caused her to fall onto the floor. An ambulance was called and plaintiff was transported to Coney Island Hospital (CIH), where she suffered two more seizures while in the emergency department. Plaintiff underwent C1-C4 posterior stabilization on May 9, 2013 and remained in CIH until May 29, 2013. It appears that plaintiff agreed to start Xanax detoxification while at CIH.

Plaintiff subsequently commenced this medical malpractice action with the service of the summons and complaint on or about November 6, 2015. Issue was joined by service of a verified answer as to Drs. Shapiro, Goldman, Tawil and Dubroff on or about December 18, 2015. Plaintiff filed a Note of Issue and Certificate of Readiness on or about July 30, 2018. Defendants moved to vacate the Note of Issue or, in the alternative, sought an extension of time to file summary judgment motions. On December 11, 2018, this motion was resolved pursuant to a Central Compliance Part Order, which denied the request to vacate the Note of Issue and, *inter alia*, extended the time to file summary judgment motions to June 15, 2019. A "so ordered" stipulation from this court further

extended the deadline for summary judgment motions to July 26, 2019. Thus, the instant motion, filed on or about July 25, 2019, is timely.

*Discussion*

Plaintiff alleges in her bill of particulars that defendants were negligent in the improper prescription of Xanax, and for failing to properly monitor and assess her Xanax use, failing to consult with appropriate qualified specialists with regard to prescribing medications to plaintiff, and failing to appreciate the side effects plaintiff exhibited. In addition, plaintiff claims that defendants failed to appreciate the danger posed to her as a result of the risk of falling in an office with marble, slippery floors. Plaintiff also claims that defendants never informed her of the risks, complications and consequences of prescribing her Xanax.

Defendants move for summary judgment dismissing plaintiff's complaint arguing that they did not depart from good and accepted medical practices in their care and treatment of plaintiff. Defendants further argue that plaintiff's claims of lack of informed consent and negligence related to the slippery condition of the flooring should be dismissed. In support of the motion, defendants submit the expert affidavit of Dr. Brian T. Moynihan (Dr. Moynihan), who is duly licensed to practice medicine in the State of New York and Board Certified in Family Practice. He affirms that he reviewed all of the pertinent medical and legal records in this action, including plaintiff's medical records from her visits with defendants, as well as from her treatment at CIH, bill of particulars, the transcripts of all deposition testimony, and the records from Walgreens Pharmacy pertaining to the period of May 7, 2012 through July 28, 2017.

Dr. Moynihan opines, to a reasonable degree of medical certainty, that based upon his review of these materials, Dr. Goldman's care and treatment of plaintiff did not deviate from accepted standards of care. He further opines that the injuries alleged by plaintiff were not proximately caused by anything Dr. Goldman did or failed to do. Specifically, Dr. Moynihan opines that it was appropriate for Dr. Goldman, in his capacity as an internal medicine physician, to prescribe Xanax to plaintiff for a medical purpose. In this regard, he notes that in view of her longstanding use of the drug, Dr. Goldman prescribed it to prevent withdrawal in accord with good and accepted medical practice. Dr. Moynihan states that, in his experience in the field of internal medicine, most benzodiazepines are prescribed by non-psychiatrists. He opines that Dr. Goldman's

only acceptable treatment option was to medically manage plaintiff's Xanax use. He further opines that the dosage Dr. Goldman prescribed of 5 mg a day was within the standard of care due to the tolerance she would have developed as a result of her nine-year history of using the drug.

Dr. Moynihan further opines that Dr. Goldman's duty was to ensure that plaintiff was under the care of a psychiatrist which he maintains that Dr. Goldman did by asking plaintiff if she was, and noting in her chart that she answered in the affirmative. He opines that the standard of care did not require Dr. Goldman to personally consult with plaintiff's psychiatrist. He contends that had Dr. Goldman spoken to plaintiff's psychiatrist, or obtained her psychiatric records, he would not have changed his course of treatment in medically managing plaintiff's Xanax prescription. Dr. Moynihan opines that Dr. Goldman was not required to assess the level of plaintiff's anxiety and/or depression as that was outside the scope of his practice, and he was only prescribing Xanax to prevent withdrawal.

In addition, Dr. Moynihan opines that, based upon plaintiff's long term use of Xanax, Dr. Goldman was not required to obtain informed consent from plaintiff related to prescribing it to her, and was not required to discuss the risks and benefits as he was not the initial prescribing physician and was merely continuing her prescription. He further opines that Dr. Goldman appropriately prescribed other medications to plaintiff, including Percocet to treat her shoulder injury and Celexa for her depression, and that the prescribed dosages were appropriate. Finally, Dr. Moynihan opines that plaintiff's

seizure on May 6, 2013, was not causally related to any act or omission of Dr. Goldman as the CIH records are unclear as to whether the seizure was caused by benzodiazepine withdrawal or as a result of Serotonin Syndrome. He explains that Serotonin Syndrome occurs when medications are taken that cause high levels of serotonin to accumulate in your body which can happen when a person is taking one or more Selective Serotonin Reuptake Inhibitors (SSRIs). Dr. Moynihan notes that plaintiff was taking Celexa and Trazadone, both of which are SSRIs. In addition, he notes that plaintiff was prescribed Trazadone and Citralopram by non-party Drs. Arkin and Sayegh, and thus if her seizure was caused by Serotonin Syndrome, it was due to medications prescribed by these non-parties. He further notes that plaintiff's records from Walgreens Pharmacy indicate that plaintiff had filled three prescriptions for Xanax in the month prior to her seizure, one from Dr. Goldman, one from Dr. Dubroff and one from non-party Dr. Nitkin. Thus, he claims there is no evidence that Dr. Goldman withheld benzodiazepines from plaintiff. Dr. Moynihan concludes that there is no objective medical evidence to substantiate plaintiff's claim that the improper prescription of Xanax by Dr. Goldman was the proximate cause of her injuries.

With regard to that branch of defendants' motion seeking dismissal of plaintiff's claim that they failed to appreciate the risk of danger to her in maintaining their floors in a slippery condition, defendants argue that, absent proof of a reason for a fall other than an inherently slippery floor condition, no claim of negligence can be maintained.

Plaintiff opposes defendants' motion arguing that all of the purportedly evidentiary

medical records submitted by defendants in support of their motion, and relied upon by their expert, are neither certified, nor authenticated, which is a fatal defect requiring denial of their motion. In this regard, plaintiff points out that the CIH records are uncertified, and that defendants did not even certify their own BBMG records. Plaintiff notes that Dr. Goldman testified that the original BBMG records were sent to their malpractice carrier, which then sent a copy to defense counsel, who provided it to BBMG prior to Dr. Goldman's deposition. Thus, plaintiff contends that the defendants did not even authenticate their own records.

Plaintiff further argues that questions of fact exist regarding defendants' negligence sufficient to defeat their summary judgment motion. In this regard, plaintiff notes that defendants' expert affirmation contains conclusory assertions that lacks foundational facts. Plaintiff submits an affidavit from Dr. Ira Mehlman, duly licensed to practice medicine in the State of New York and Board Certified in Internal Medicine and Endocrinology/Metabolism. Dr. Mehlman affirms that he reviewed all of the pertinent medical and legal records in this action including all of plaintiff's BBMG and CIH medical records, as well as the records from Kings Highway and Gracie Square Hospital, pharmacy records, bill of particulars, the transcripts of all deposition testimony and the Orders to Show Cause related to plaintiff's involuntary commitments to psychiatric facilities. Dr. Mehlman opines, to a reasonable degree of medical certainty, that based upon his review of these materials, Dr. Goldman's care and treatment of plaintiff departed from good and accepted standards of practice and that he substantially deviated from the

accepted standards of care. He notes that defendants' expert failed to review several pertinent records including the Kings Highway, Gracie Square and Coney Island Hospital outpatient records prior to rendering his opinion.

Specifically, Dr. Mehlman opines that Dr. Goldman and his colleagues departed from the standard of care by failing to obtain plaintiff's psychiatric medical records, or at least establishing contact with her psychiatrist. He notes that had they done so, they would have become aware of plaintiff's profound mental illness and learned that she was not to be trusted with Xanax, based upon her prior addiction and overdose on this drug. In this regard, he points out that the Gracie Square records contain notes regarding: plaintiff's history of abusing Xanax, a suicide attempt with Xanax, and the decision by her treating psychiatrists to discontinue prescribing Xanax and switch her to Klonopin and Temazepam. He notes that while Klonopin and Temazepam are also benzodiazepines, they differ in the manner in which they affect a patient. Thus, Dr. Mehlman opines that Dr. Goldman failed to properly assess and diagnose plaintiff resulting in his negligently prescribing Xanax to her. Moreover, Dr. Mehlman notes that this failure to consult with her psychiatrist had the effect of restarting plaintiff's Xanax addiction. He contends that the consequence of plaintiff being prescribed Xanax by defendants was entirely predictable in that she abused it, causing her to increase her consumption and then, when she ran out of medication, to suffer a withdrawal seizure. He opines that this seizure caused plaintiff to fall, hit her head and break her neck, requiring fusion surgery. Dr. Mehlman opines that plaintiff's seizure and consequent

injuries were the direct result of Dr. Goldman's undertaking to treat a severely mentally and emotionally compromised patient.

Dr. Mehlman contends that it was not enough for Dr. Goldman to simply note that plaintiff was under the care of a psychiatrist. As an internist, he should have coordinated his care with, and taken direction from, her psychiatrist. Dr. Mehlman notes that plaintiff's BBMG intake form indicates that she had admissions to Gracie Square in July and August 2011. He opines that it was a gross departure for Dr. Goldman to treat plaintiff's anxiety with Xanax without first confirming with her psychiatrist that it was safe to do so. Dr. Mehlman contends that defendants' expert's assertion that Dr. Goldman only prescribed Xanax for the medical purpose of preventing Xanax withdrawal cannot stand as plaintiff had not actually been taking Xanax when she first began treating with Dr. Goldman. He maintains that Dr. Goldman would have known this had he contacted plaintiff's psychiatrist to confirm whether Xanax was currently prescribed for her and at what dosage. Dr. Mehlman notes that seizures from Xanax withdrawal are not usually a risk unless, as here, the patient is receiving over 4 mg a day.

Dr. Mehlman contends that defendants' expert's assertion that Dr. Goldman only treated plaintiff medically and did not assess her for her anxiety is belied by Dr. Goldman's own testimony that if he prescribed Xanax it was because he was impressed with her level of anxiety. Further, Dr. Mehlman points out that Dr. Goldman prescribed Celexa after diagnosing plaintiff as suffering from depression. Moreover, Dr. Mehlman opines that the dosage of Xanax prescribed by Dr. Goldman constituted a departure from

the standard of care. In this regard, he notes that the starting dosage for treating anxiety with Xanax is 0.25-0.50 mg, 3 to 4 times a day, with the dose being increased every 3-4 days for a maximum dosage of 4 mg a day. Thus, he opines that his prescribing of 5 mg a day from the start to treat plaintiff's anxiety was a departure from the accepted standards of care.

Dr. Mehlman further opines that the prescribing of a controlled medication, such as Xanax, without first confirming the propriety of the prescription, is a departure from the accepted standards of care. Here, he notes that it was even more egregious inasmuch as Dr. Goldman testified that he was somewhat suspicious of plaintiff's motives. In this regard, Dr. Goldman stated "I have this note here that says she prefers Xanax for sleep and for other psychiatric purposes, so since she was specifically asking for Xanax it's a concern." Dr. Mehlman further points out that Dr. Goldman's own records indicate that he requested the records from Grace Square Hospital (although it appears this request was never followed up on as he never received the records). When asked about this notation in plaintiff's chart, Dr. Goldman testified that "it appears from this note that the patient wanted me to prescribe Xanax for her and she contended she was taking it and I wanted to be able to ascertain that was correct." Dr. Mehlman points to defendants' expert's statement that "had Dr. Goldman spoken to plaintiff's psychiatrist and or obtained her records, this would not have changed his course of treatment" and contends this is refuted by Dr. Goldman's own testimony.

Dr. Mehlman further opines that it was a departure for Dr. Goldman to treat

plaintiff's anxiety without having an understanding of her primary psychiatric diagnoses of bi-polar disease, severe depression, and benzodiazepine abuse, with an additional component of anxiety. He notes that Dr. Goldman's own testimony is replete with acknowledgment of the benefit of obtaining a patient's prior records, and thus he opines that the failure to obtain plaintiff's records related to her psychiatric treatment was a gross departure. Dr. Mehlman points out that Dr. Goldman requested, and received, records from Kings Highway pulmonologist, Dr. Alwaya, who had previously treated plaintiff for pneumonia. These records included the records of a consult with Dr. Newhouse, a cardiologist from Mount Sinai-Brooklyn, which occurred on or about November 11, 2011. Dr. Newhouse's notes indicate that plaintiff reported a history of depression, but not anxiety, and did not list Xanax as a medicine she takes daily. It also stated that plaintiff reported some addiction to Xanax but that she had given it up over the past few months. Thus, these records were part of plaintiff's BBMG file, which indicates that Dr. Goldman either failed to read it or chose to disregard plaintiff's prior Xanax addiction.

Dr. Mehlman opines that Dr. Dubroff also failed to comply with the standard of care by continuing the prescription for plaintiff of a medication that she should not have been taking, which he opines contributed to the seizure she ultimately suffered.

Dr. Mehlman notes that the record reveals that on the date of plaintiff's fall, she had stopped taking Xanax due to a lack of supply and was at Dr. Goldman's office seeking a refill. The CIH record indicates that she had an empty Xanax bottle in her

possession when she was taken to CIH. Thus, he opines that plaintiff's increased rate of consumption and the consequent exhaustion of her supply, led to inadvertent, sudden cessation, which resulted in her suffering a seizure.

Finally, Dr. Mehlman contends that the assertion by Dr. Moynihan that Serotonin Syndrome was considered to be the cause of plaintiff's seizure is misleading as the CIH records indicate that the seizure was caused by Xanax or Xanax withdrawal. He notes that Serotonin Syndrome is only mentioned in a May 15, 2013 note in the CIH record which states that plaintiff "had stabilization of C1-4 on 5/09/13, then developed symptoms of Serotonin Syndrome which abated when citalopram was stopped . . ." Thus, he opines that Dr. Moynihan's proposal of Serotonin Syndrome as a cause of plaintiff's seizure is an intentional distortion of the CIH record and a contrived defense.

The court notes that plaintiff raises no opposition to that branch of defendant's motion seeking dismissal of her claim sounding in negligence related to the slippery condition of the flooring in defendants' office.

In reply, defendants argue that they have made a prima facie showing of their entitlement to summary judgment dismissing plaintiff's claims through the submission of Dr. Moynihan's affirmation. Defendants maintain that Dr. Moynihan's affirmation states that he relied on the relevant records to render his opinion. Thus, they contend there is no merit to plaintiff's claim that his affirmation is conclusory. Defendants further assert that plaintiff has failed to meet her burden of proof in opposition to the motion as she fails to demonstrate that any act or omission by defendants was the proximate cause of any injury

alleged in the pleadings.

In addition, defendants argue that plaintiff's complaint must be dismissed as it is time-barred based upon the statute of limitations. In this regard, defendants contend that plaintiff commenced her action on November 6, 2015, and her complaint alleged malpractice from February 9, 2012 through May 7, 2013. Thus, defendants contend that given the two and a half year statute of limitations for medical malpractice actions, any claims for negligence occurring prior to May 6, 2013, are time-barred. Defendants further maintain that plaintiff failed to oppose that branch of their motion pertaining to her claim that the slippery condition of the floor posed a dangerous risk.

“To prevail on a motion for summary judgment in a medical malpractice action, the defendant must ‘make a prima facie showing either that there was no departure from accepted medical practice, or that any departure was not a proximate cause of the patient’s injuries’” (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826-827 [2016], quoting *Matos v Khan*, 119 AD3d 909, 910 [2014]; see *Wagner v Parker*, 172 AD3d 954,954 [2019]; *Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2017]). “In order to sustain this burden, the defendant is only required to address and rebut the specific allegations of malpractice set forth in the plaintiff’s complaint and bill of particulars” (*Schuck v Stony Brook Surgical Assoc.*, 140 AD3d 725, 726 [2016], citing *Seiden v Sonstein*, 127 AD3d 1158, 1160 [2015]; *Bhim v Dourmashkin*, 123 AD3d 862, 865 [2014]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2010]). A defendant claiming that treatment did not depart from accepted standards, must provide an expert

opinion that is detailed, specific and factual in nature (*see Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2008]). The opinion must be based on facts within the record or personally known to the expert (*see Roques v Noble*, 73 AD3d 204, 207 [2010]).

“In opposition, a plaintiff then must submit material or evidentiary facts to rebut the defendant’s prima facie showing that he or she was not negligent in treating the plaintiff” (*Dolan v Halpern*, 73 AD3d 1117, 1118-1119 [2010], quoting *Langan v St. Vincent’s Hosp. of N.Y.*, 64 AD3d 632, 633 [2009] [internal quotation marks and citations omitted]). “[P]laintiff need only raise a triable issue of fact regarding ‘the element or elements on which the defendant has made its prima facie showing’” (*McCarthy*, 139 AD3d at 826 quoting *Mitchell v Grace Plaza of Great Neck, Inc.*, 115 AD3d 819, 819 [2014]; *see Wagner*, 172 AD3d at 954). However, a plaintiff’s expert’s affidavit that is conclusory or speculative is insufficient to raise a triable issue of fact in opposition to a defendant’s prima facie showing where the expert fails to set forth any basis for his or her opinion and fails to address the specific assertions made by defendant’s expert (*see Rivers v Birnbaum*, 102 AD3d 26, 45-46 [2012]; *see generally Senatore v Epstein*, 128 AD3d 794, 795 [2015]; *Bendel v Rajpal*, 101 AD3d 662, 663 [2012]). Summary judgment may not be awarded in a medical malpractice action where the parties offer conflicting expert opinions, which present a credibility question requiring a jury’s resolution (*see Loaiza v Lam*, 107 AD3d 951, 953 [2013]; *Dandrea v Hertz*, 23 AD3d 332, 333 [2005]).

Finally, in a medical malpractice action, a plaintiff seeking to establish proximate cause, “must demonstrate ‘sufficient evidence from which a reasonable person might

conclude that it was more probable than not that the defendant's deviation was a substantial factor in causing the injury” (*Daniele v Pain Mgt. Ctr. of Long Is.*, 168 AD3d 672, 675 [2019], quoting *Flaherty v Fromberg*, 46 AD3d 743, 745[2007], *Johnson v Jamaica Hosp. Med. Ctr.*, 21 AD3d 881, 883[2005]; see *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852, 678 NYS2d 503 [1998]). “[T]he plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his 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 his [or her] injury” (*Daniele*, 168 AD3d at 675, quoting *Flaherty*, 46 AD3d at 745; see *D.Y. v Catskill Regional Med. Ctr.*, 156 AD3d 1003, 1005[ 2017]; *Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 AD3d 538, 545 [2017]; *Clune v Moore*, 142 AD3d 1330, 1332 [2016]; *Alicea v Ligouri*, 54 AD3d 784, 786 [2008]).

“A cause of action predicated on a lack of informed consent is meant to redress a failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical . . . practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation” (*Dyckes v Stabile*, 153 AD3d 783, 785 [2017], quoting *Kleinman v North Shore Univ. Hosp.*, 148 AD3d 693, 694 [2017][internal quotation marks omitted]; see Public Health Law § 2805-d [1]; *Figueroa-Burgos v Bieniewicz*, 135 AD3d 810 [2016]; *Tsimbler v Fell*,

123 AD3d 1009, 1010 [2014]; *Walker v Saint Vincent Catholic Med. Ctrs.*, 114 AD3d 669, 670 [2014]). “To establish a cause of action to recover damages for malpractice based on lack of informed consent, a plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury” (*Dyckes v Stabile*, 153 AD3d 783, 785 [2017]; *see Figueroa-Burgos v Bieniewicz*, 135 AD3d 810,811 [2016]; *Tsimbler v Fell*, 123 AD3d 1009, 1010 [2014]; *Walker v Saint Vincent Catholic Med. Ctrs.*, 114 AD3d 669, 670 [2014]).

As an initial matter, the court finds no merit to plaintiff’s argument that defendants’ motion should be denied on the ground that all of the purportedly evidentiary medical records submitted by defendants, and relied upon by their expert, are neither certified nor authenticated. Here, the plaintiff does not challenge the accuracy or veracity of the uncertified records. In fact, she and her expert relied upon the same records in her opposition to defendants’ motion (*see Tomeo v Beccia*, 127 AD3d 1071, 1073 [2015]; *Carlton v St. Barnabas Hosp.*, 91 AD3d 561 [2012]; *see also Ward v Lincoln Elec. Co.*, 116 AD3d 558 [2014]). Accordingly, the court will address the merits of defendants’ motion.

### *Informed Consent*

Public Health Law § 2805-d provides that “[l]ack of informed consent means the failure of the *person* providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation” (emphasis added). Defendants’ expert opined that the standard of care did not require Dr. Goldman to obtain informed consent from plaintiff prior to prescribing Xanax because she had been taking it on a long term basis prior to treating with him. In addition, he points to plaintiff’s testimony that her prior primary care physician, Dr. Roumi, discussed the risks of Xanax with her. However, there is nothing in plaintiff’s BBMG chart indicating that she specifically conveyed this information to Dr. Goldman prior to his prescribing Xanax to her. Moreover, Dr. Goldman testified that he had no recollection of whether he advised plaintiff regarding the risks of sudden stoppage of Xanax (Goldman tr at 103, lines 17-20). Accordingly, the court finds that defendants’ expert’s opinion that the standard of care did not require Dr. Goldman to obtain informed consent under these circumstances is conclusory and fails to establish defendants’ entitlement to dismissal of plaintiff’s lack of informed consent claim (*see Halloran v Kiri*, 173 AD3d 509, 511 [2019] [holding that appellant’s experts’

opinion that decedent knew of the consequences of combining her prescriptions with alcohol and illicit drugs and that she was fully advised of the dangers of opioids were conclusory and not supported by the record). Accordingly that branch of defendants' motion seeking dismissal of this claim is denied.

### ***Medical Malpractice***

Here, with regard to plaintiff's claims sounding in medical malpractice, the court finds that defendant's expert's opinion is filled with conclusions and assumptions of fact not supported by the record. Moreover, the expert completely disregards significant portions of Dr. Goldman's own deposition testimony. In this regard, Dr. Goldman testified that he was initially concerned about plaintiff's preference for Xanax for sleep and all other purposes (Goldman tr at 76, lines 5-12); that it was the usual custom and practice at BBMG to ascertain a list of all the patient's prior treating physicians (*id.* at 87, lines 19-24); that it was his intent to coordinate care with her psychiatrist (*id.* at 99, lines 23-25); that he did not know if her psychiatrist was also prescribing her medication at the same time that he was prescribing various medications (*id.* at 134, lines 10-16); and that his awareness that a psychiatrist is also treating his patient would generally affect his course of treatment. Dr. Goldman specifically testified that "generally, if the psychiatrist is - - if the psychiatrist is prescribing medicine I wouldn't prescribe them, if I am prescribing the medicine the psychiatrist wouldn't prescribe them" (*id.* at 174, lines 4-8).

Importantly, Dr. Goldman's testimony also reveals that he was not merely medically managing plaintiff's Xanax use but also making assessments regarding her anxiety and depression levels, which were clearly outside his area of expertise.

Dr. Moynihan's opinion that Dr. Goldman would not have altered his course of treatment had he spoken to plaintiff's psychiatrist, or reviewed the records of her treating psychiatrists, is not only conclusory but inconceivable. To opine that a doctor, upon learning that a patient had a history of addiction to Xanax and had previously overdosed on it causing her treating psychiatrists to refuse to prescribe this medication, would still prescribe Xanax does not refute a claim of medical malpractice, but rather lends substantial support for such a claim. Similarly, Dr. Moynihan's opinion regarding the propriety of the dosage of Xanax prescribed by Dr. Goldman is conclusory. The record reveals that Dr. Goldman had no basis for prescribing such a high dosage other than the word of a patient that he was concerned was exhibiting drug seeking behavior. Moreover, Dr. Moynihan's opinion that it was not a departure for Dr. Goldman to prescribe this quantity of Xanax because he was medically managing it, and that withdrawal could result in seizures, disregards Dr. Goldman's testimony that he was assessing plaintiff's level of anxiety and depression when prescribing Xanax and the anti-depressant medication, Celexa.

Accordingly, defendants' submissions fail to eliminate all triable issues of fact as to whether they deviated from accepted standards of care in treating the plaintiff, and whether any deviation on their part was a proximate cause of the plaintiff's injuries (*see*

*Pullman v Silverman*, 28 NY3d 1060, 1063 [2016] [holding that defendant's expert proffered only conclusory assertions unsupported by any medical research that defendant's actions in prescribing two drugs concurrently did not proximately cause plaintiff's injuries]; *Stiso v Berlin*, 176 AD3d 888, 890-891 [2019]; *Ortiz v Chendrasekhar*, 154 AD3d 867, 869 [2017] [holding that defendants' submissions failed to eliminate all triable issues of fact regarding whether their care deviated for good and accepted practice and proximately caused plaintiff's injuries]; *see also Reif v Nagy*, 175 AD3d 107, 126-27 [2019] [holding that expert's failure to base his opinion on all relevant record evidence rendered the opinion insufficient]; *Montilla v St. Luke's-Roosevelt Hosp.*, 147 AD3d 404, 407 [2017]).

Even if defendants had established prima facie entitlement to judgment in their favor as a matter of law, the plaintiff raised a triable issue of fact, through her expert's sworn opinion, regarding defendants' negligence (*see Reustle v Petraco*, 155 AD3d 658, 660 [2017]; *Gray v Wyckoff Hgts. Med. Ctr.*, 155 AD3d 616, 618 [2017]; *Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 404 [2010]; *DaRonco v White Plains Hosp. Ctr.*, 215 AD2d 339 [1995]).

The court notes that the First Department recently addressed a similar set of facts in *Halloran v Kiri* (173 AD3d 509, 510-511 [2019]), which is instructive here. *Halloran* involved allegations that plaintiff's decedent suffered a drug overdose and died in part because the defendant doctor negligently prescribed excessive doses of opioid-based controlled substances, as well as Xanax, without taking a proper medical history or

discovering her pre-existing addiction to prescription and illicit drugs. The First Department affirmed the lower court's determination that the defendant doctor failed to carry his burden of demonstrating that his conduct comported with the applicable standard of care where he "failed to adequately explain why he did not obtain Decedent's complete prior medical records and history despite acknowledging that she was on medication for approximately five years prior, why the prescriptions that he wrote for Decedent comported with the applicable standard of care, why he felt it was appropriate to write a prescription for Xanax even though decedent had yet to consult with a psychiatrist, or why he maintained the dosages for Decedent throughout the course of treatment . . ." The court further stated that the argument that the defendant doctor's "acts or omissions could not qualify as a proximate cause as a matter of law because decedent used illicit drugs or evinced drug seeking behavior before . . . treatment [with defendant doctor] misses the point. Plaintiff's theory of liability is that [the defendant doctor's] . . . prescription of high-dose opioid pain killers for more than a year, despite the fact that her medical records showed drug use and drug seeking behavior, escalated, enhanced, or encouraged that behavior. . . ." (*id.* at 510).

The *Halloran* court further noted that "[a] determination that proximate cause must be decided by a jury in this case does not set any requirement that every doctor in the state has to become its own detective agency prior to administering a prescription for pain medication. Causation will be determined in connection with whether . . . [defendant doctor's] treatment of decedent fell below the applicable standard of care." (*id.* at 511).

Finally the *Halloran* court held that whether or not the doctor should have, at some point during the fourteen months he was treating the decedent, obtained her medical records or consulted with her other treating physicians to create a treatment plan, presented an issue for the jury.

Additionally, the court finds no merit to defendants' argument that any claims for medical malpractice that occurred on or before May 6, 2013, must be dismissed as time-barred, as defendants failed to address this issue in their original motion papers and only raised it for the first time in their reply (*see Lopez v Cobra Logistics, Inc.*, 130 AD3d 880, 881 [2015]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 211 [2010]). Moreover, the court notes that the continuous treatment doctrine would apply as plaintiff continued to treat with Dr. Goldman on and off from February 10, 2012 through May 6, 2013 for the same condition which gave rise to the act or omission (*see McDermott v Torre*, 56 NY2d 399, 406 [1982]; *Gray v Wyckoff Hgts. Med. Ctr.*, 155 AD3d 616, 617 [2017]).

With regard to that branch of defendants' motion seeking dismissal of plaintiff's negligence claim based upon the alleged slippery condition of the floor at BBMG, "[i]n the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be shiny or slippery does not support a cause of action to recover damages for negligence, nor does it give rise to an inference of negligence" (*Khaimova v Osnat Corp.*, 21 AD3d 401, 402 [2005]; *see Tomol v Sbarro, Inc.*, 306 AD2d 461 [2003]; *Miles v Staten Theatre Group*, 302 AD2d 373 [2003]; *Cribbs v ISS Intl. Serv. Sys.*, 300 AD2d 339, 340 [2002]; *Becker v Cortlandt Colonial Rest.*, 273 AD2d 425 [2000]).

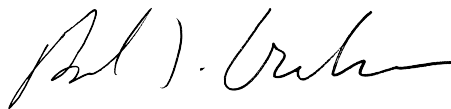
Based on the foregoing, that branch of defendant's motion seeking dismissal of this claim is granted.

*Conclusion*

Those branches of defendants' motion seeking summary judgment dismissing plaintiff's medical malpractice and lack of informed consent claims are denied. That branch of defendants' motion seeking dismissal of plaintiff's negligence claim related to the slippery condition of the floor is granted.

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.