

Gentile v Goldstein
2020 NY Slip Op 32274(U)
May 15, 2020
Supreme Court, New York County
Docket Number: 805289/16
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 805289/16

KERRY GENTILE and SALVATORE AIDONE,

Plaintiffs,

-against-

JONATHAN DAVID GOLDSTEIN, M.D.,
MADONNA PHYSICIAN SERVICES, P.C.,
MADONNA PRENATAL SERVICES, IRA
J. SPECTOR, M.D., STEVEN A. KLEIN, M.D.,
P.C., GYNECOLOGICAL SPECIALISTS OF
LONG ISLAND, LLC, MICHAEL H. POLCINO, M.D.,
MICHAEL H. POLCINO, M.D., P.C., FRANK J. PARASMO
JR., M.D., and FRANK J. PARASMO JR., M.D., P.C.,

Defendants,

----- X

JOAN A. MADDEN, J.:

In this action alleging medical malpractice, defendants Michael H. Polcino, M.D. (“Dr. Polcino”) and Michael H. Polcino, M.D. P.C. (together “the Polcino defendants”) move for summary judgment dismissing the complaint and any cross claims against them (motion seq. no. 004). Defendants Frank J. Parasmó, Jr., M.D. (“Dr. Parasmó”) and Frank J. Parasmó, Jr., M.D., P.C. (together “the Parasmó defendants”) separately move for summary judgment (motion seq no 005).¹ Plaintiffs oppose the motions.

Background

This action involves allegations of negligence and malpractice in connection with the care rendered to plaintiff Kerry Gentile (“Ms. Gentile”) during her pregnancy with her son G.A., who was born with Cooley’s anemia, the most severe form of beta thalassemia.² Plaintiff Salvatore

¹Motion sequence nos. 004 and 005 are consolidated for disposition.

²Beta thalassemia is a blood disorder in which the body has a problem producing a component of hemoglobin, called beta globin, which is the protein in red blood cells that carries oxygen

Aidone (“Mr. Aidone”) is G.A.’s father. The pregnancy was confirmed by a blood test taken at the office of Ms. Gentile’s primary care provider, Dr. Parasmio, where Ms. Gentile was employed in an administrative capacity. Ms. Gentile’s medical history included that she was a carrier of the thalassemia trait. In order for a child to have beta thalassemia both parents must be carriers of the trait.

During Ms. Gentile’s first prenatal visit with her Obstetrician Gynecologist, Dr. Polcino, on January 4, 2014, Dr. Polcino was provided the test results from Dr. Parasmio confirming her pregnancy and that she was a carrier of thalassemia. Dr. Polcino referred Ms. Gentile to maternal fetal medicine physician, defendant Jonathan David Goldstein, M.D. (“Dr. Goldstein”) who was affiliated with defendant Madonna Physician Services, P.C.³ Dr. Polcino testified that “I sent [Ms. Gentile] to Dr. Goldstein because of the thalassemia problem and he would advise what was needed.” (Polcino EBT at 29). When asked whether he considered sending the couple to a geneticist, Dr. Polcino responded, “[b]ecause the patient went to Dr. Goldstein—he has geneticists at his center and so if that was necessary, he would be sending them to a geneticist.” (Id).

Mr. Aidone had bloodwork drawn for a hemoglobin electrophoresis, a test used to determine whether someone is a carrier for the thalassemia trait, at Dr. Parasmio’s office on

throughout the body. This can result in severe anemia, requiring regular and frequent blood transfusions, which in turn can cause excess iron to build up in the organs (heart, liver and endocrine glands), permanently damaging the organs, thus requiring regular chelation therapy. (Plaintiffs’ Expert Aff ¶ 16).

³Defendants David Jonathan Goldstein, M.D., Madonna Physician Services, P.C. d/b/a Madonna Perinatal Services, P.C., and Ira J. Spector, M.D. & Steven Klein, M.D., P.C. (together “the Goldstein defendants”) cross moved for summary judgment dismissing the complaint and all cross claims against them. Plaintiff opposed the cross motion and cross moved for summary judgment against the Goldstein defendants. Both cross motions were withdrawn before the oral argument.

January 8, 2014. Mr. Aidone testified that he did not see Dr. Parasmo for an appointment before the blood work was done; that he was not a patient of Dr. Parasmo; he did not see anyone at Dr. Parasmo's office after the blood was drawn; and that he first learned of the results of the blood test when he saw Dr. Goldstein (Id at 49-52).

While it is unclear from the record, according to Dr. Parasmo, he did not give Ms. Gentile authorization for Mr. Aidone to have blood drawn at his office. (Parasmo EBT at 52). He also testified that in order for someone to have blood drawn at the office an individual would either have to be seen by him or have their blood ordered by him, which was not the case with Mr. Aidone. (Id at 55).

On January 9, 2014, the two-page results of Mr. Aidone's hemoglobin electrophoresis were received by Dr. Parasmo's office (Plaintiff's Opposition, Exhibit F). Those results included the following pertinent values:

RBC 6.78 H (normal :4.40-6.10)

MCV 61 L (normal:75-100)

MCH 19.9 L (normal:26.0-32.0) RDW 17.6 H (normal : 11.2-14.8)

Hemoglobin A 94.3 L (normal>95)

Hemoglobin A.2 4.7 H (normal :0.9-3.3)

The second page of the blood results includes the following footnote for Hemoglobin A2: "*** Beta-Thalassemia Trait may be seen with Hgb A2 values in the range of 3.5-6.35.**" The record contains two versions of the identical blood test results, one dated January 9, 2014 and second one dated January 10, 2014. The January 10 version of the test results has the word "Normal" handwritten on the first page.

Dr. Parasmo testified that he first learned that Mr. Aidone's blood was drawn when the results arrived at his office on January 9, 2014. According to Dr. Parasmo, after he received the report, he "looked at it quickly" and told Ms. Gentile "it was not normal." (Id at 98). Dr. Parasmo testified that although the test results indicated that Mr. Aidone was a carrier for thalassemia, as "he's not a patient of mine, [and Ms. Gentile] told me she was taking him to a hematologist... I did nothing about it. I didn't even discuss it with her, warn her, because she didn't have permission to know anything about this." (Id at 99).

Dr. Parasmo testified that although he saw the January 9 version of the blood test results, he did not become aware of the January 10 version, which he found after this action was commenced in his office chart for Mr. Aidone.⁴ (Id. at 82). Both documents are the same except for the date and the way they are printed (Id at 97). He also testified that he did not write the word "Normal" on the first page of the January 10 version, and did not recognize the handwriting (Parasmo EBT at 107). Ms. Gentile testified, however, that she recognized the handwritten "Normal" as Dr. Parasmo's. (Gentile EBT at 72).

On January 11, 2014, plaintiffs returned to Dr. Polcino's office, and Dr. Policino took Ms. Gentile's medical history, which was positive for anemia and thalassemia, and Dr. Polcino wrote next to COMMENTS/COUNSELING:["+ Patient thalasemmia (sic) & Boyfriend +"] (Dr. Policino Medical Records at 52).

Dr. Goldstein reviewed the results of Mr. Aidone's blood test during his January 18, 2014 consultation with Ms. Gentile and Mr. Aidone. Dr. Goldstein determined that Mr. Aidone was

⁴After the birth of G.A. in August 2014, Dr. Parasmo performed a department of transportation commercial fitness exam for Mr. Aidone and subsequently evaluated him for certain other medical complaints in 2015.

not a carrier of beta thalassemia and that routine antepartum care was to be continued. In a letter to Dr. Polcino dated January 18, 2014, Dr. Goldstein wrote, “[t]he father of the baby, Salvatore Idone (sic) had a hemoglobin electrophoresis performed which demonstrated a normal pattern with only slightly increased Hemoglobin A2. There were normal amounts of hemoglobin F and per his medical physician, he was ruled out for beta thalassemia.” At his deposition, when asked what he meant by [Mr. Aidone’s] medical physician ruled out beta thalassemia, Dr. Goldstein testified that “I do remember seeing normal written on the lab.”(Goldstein EBT at 30). Dr. Goldstein also testified that he did not know who Mr. Aidone’s physician was and he did not speak to Dr. Parasmio at any time in connection with the treatment of plaintiffs, or know whether he was qualified to interpret blood tests (Id at 33). When asked what the word “Normal” on the test results meant to him, Dr. Goldstein testified that “I had formed my own opinion independent of that, and then after speaking to the couple and hearing that they had been told one thing, that they were told it was normal,⁵ seeing being normal, I concurred with the general consensus.” (Id). When asked what effect the word “Normal” had on his determination that Mr. Adione was not a carrier of beta thalassemia, Dr. Goldstein testified that “[i]t reaffirmed my clinical judgment.” (Id at 35).

Ms. Gentile testified that after reviewing the blood work, Dr. Goldstein told her that Mr. Aidone “didn’t have the thalassemia trait and that we would have no chance of having a kid with beta thalassemia major and I was not sold on it so I had asked for an amnio and he told me I

⁵This testimony conflicts with that of plaintiffs who both testified that Dr. Parasmio did not speak to them about the blood results nor do they claim in this action that Dr. Parasmio told them the results were normal.

wasn't a candidate for an amnio and that insurance wouldn't pay for it because I don't meet the credentials." (Gentile EBT at 85-86). She also testified that after being told by Dr. Goldstein that she was not a candidate for amniocentesis, she did not take further steps to see whether she was a candidate for such testing, "because [Dr. Goldstein] would have been the one to order it and if I wasn't a candidate, then it would never be approved by insurance." (Id at 88).

On January 25, 2014, Ms. Gentile had a routine pregnancy visit to Dr. Polcino's office and had a first trimester ultrasound. With regard to Mr. Aidone's hemoglobin electrophoresis results and the January 18, 2014 letter sent to him by Dr. Goldstein, Ms. Gentile testified that "the only comment [Dr. Polcino] ever made about [Mr. Aidone's] blood work was that he couldn't read it." (Gentile EBT at 91). Dr. Polcino testified that he did not see the hemoglobin electrophoresis results and relied on Dr. Goldstein's letter (Polcino EBT at 45).

Ms. Gentile testified that after Dr. Goldstein ruled out Mr. Aidone as a carrier, "we told [Dr. Polcino] about not having been able to have an amnio and [Dr. Polcino] told us we didn't meet the criteria" (Gentile EBT at 92). According to Dr. Polcino, however, Ms. Gentile did not tell him she wanted amniocentesis (or chorionic villi sampling), and that he did not consider ordering either test. (Polcino EBT at 76, 77). In this regard, Dr. Polcino testified "first of all--I wouldn't know what tests to order and second, Dr. Goldstein had advised that we should continue this as a normal pregnancy and was reassured of routine antepartum care going forward." (Id at 77). He also testified that if Ms. Gentile had requested amniocentesis, "I would have sent her to Dr. Goldstein [for]... genetic counseling," and that he would have also sent Ms. Gentile to "Dr. Goldstein and his team," if she had requested chorionic villi sampling (Id at 77-78). Ms. Gentile continued to treat with Dr. Polcino for the remainder of her pregnancy. Shortly

after his birth on August 15, 2014, G.A. was diagnosed with beta thalassemia.

Plaintiffs allege that the hemoglobin electrophoresis results were misinterpreted, additional genetic testing should have been performed, and that they were deprived of the opportunity to terminate the pregnancy. With regard to Dr. Polcino, plaintiffs allege that he departed from the standard of care by refusing to perform amniocentesis or chorionic villi sampling on Ms. Gentile and/or by failing to refer her to a physician willing to perform these tests, and that these departures were the proximate causes of Ms. Gentile and Mr. Aidone's lack of knowledge of their fetus' beta thalassemia diagnosis which deprived them of the opportunity to terminate the pregnancy. As for Michael Polcino, M.D., P.C., plaintiffs allege it is vicariously liable for Dr. Polcino's negligent acts and omissions.

With respect to Dr. Parasmio, plaintiffs allege that he deviated from the standard of care when he wrote "normal" on the blood test results, and the writing the word "normal" was a proximate cause of plaintiffs' lack of knowledge failure of their fetus' beta thalassemia diagnosis which deprived them of the opportunity to terminate the pregnancy. As for Frank J. Parasmio, M.D., P.C., plaintiffs allege it is vicariously liable for Dr. Parasmio's negligent acts and omissions.

The Polcino defendants move for summary judgment, arguing, *inter alia*, that Dr. Polcino did not have a duty to further investigate Mr. Aidone's thalassemia carrier status or its potential impact on the management of Ms. Gentile's pregnancy since he properly referred plaintiffs to maternal fetal medicine specialists, that is Dr. Goldstein and Madonna Physician Services, and it was appropriate and within the standard of care to rely on Dr. Goldstein's determination as to the Mr. Aidone's thalassemia carrier status and its potential impact on the fetus, and whether further

testing was needed.

In support of their position, the Polcino defendants submit the affirmation of Dr. Victor Klein, who is board certified in Obstetrics & Gynecology, Maternal Fetal Medicine and Clinical Genetics. Upon review of the legal papers, the records of treatment and the depositions of the parties, Dr. Klein opines with a reasonable degree medical certainty, that “the standard of care required Dr. Polcino, as the patient’s Obstetrician Gynecologist to ensure that Mr. Aidone’s [thalassemia] carrier status and its potential impact on the fetus was evaluated by a specialist in Maternal-Fetal Medicine.” He further opines that “Dr. Polcino’s immediate referral of Ms. Gentile to Dr. Goldstein for evaluation of her pregnancy was appropriate and within the standard of care [and that] it was appropriate and within the standard of care for Dr. Polcino, as an Obstetrician Gynecologist, to rely on the Maternal Fetal Medicine physician, who had special training and expertise in the diagnosis and management of hemoglobinopathies, to determine Mr. Aidone’s carrier status, its impact upon the fetus, and indications for further genetic testing.” In addition, he opines that plaintiffs’ allegations that “Dr. Polcino failed to properly and adequately investigate the patient’s history, appreciate the results of the tests performed and correlate and/or evaluate the findings and history obtained are ... unsupported as it was proper and within the standard of care for Dr. Polcino to rely on Dr. Goldstein’s findings and recommendations for routine antepartum care.”

As for plaintiffs’ allegations that Dr. Polcino failed to timely and properly perform all available testing including amniocentesis, and chorionic villi sampling, and failed to heed Ms. Gentile’s concerns and deprived her of an opportunity to terminate the pregnancy, Dr. Klein states that “[t]he records of not only Dr. Polcino but also Dr. Goldstein are silent as to any

indication from [Ms. Gentile] that she wished to terminate the pregnancy in the event the child carried the thalassemia trait or that she requested additional genetic testing other than what was done.” In addition, Dr. Klein opines that:

In light of Dr. Goldstein's consultation letter dated January 18, 2014, additional genetic testing was not indicated. Further, in light of his assessment that Mr. Aidone was not a carrier, Dr. Goldstein determined that invasive testing such as amniocentesis, chorionic villi sampling, additional carrier screening, additional genetic testing, additional fetal blood test, and placental aspiration test was not required as it was his position that the fetus was not at risk for having Beta thalassemia. It was appropriate and within the standard of care for Dr. Polcino to rely on Dr. Goldstein's determination and recommendation for routine antepartum care.

As for the Parasmo defendants, they move for summary judgment, arguing that there was no physician-patient relationship between Dr. Parasmo and Mr. Aidone during the period of alleged negligence in January 2014, and that, in any event, any action or inaction by Dr. Parasmo was not a proximate cause of plaintiffs’ alleged injuries.

In support of their motion, the Parasmo defendants submit the expert affirmation of Brian Moynihan, D.O., who is licensed to practice medicine in New York State and is board certified by the American Osteopathic Board of Family physicians. Dr. Moynihan states that he is “familiar with the diagnosis of beta thalassemia, a blood disorder that reduces one's ability to produce hemoglobin and can cause oxygen deprivation [and has]... diagnosed and treated patients who have developed said disorder over the course of my career.” Dr. Moynihan opines based on his review of the relevant legal and medical records, that “a patient-physician relationship did not exist as between Dr. Parasmo and Salvatore Aidone during the period of alleged negligence [as]... Dr. Parasmo never saw Salvatore Aidone, never examined him, never discussed any care

or treatment, nor affirmatively advised him in any manner. Dr. Parasmo never spoke to Mr. Aidone concerning his blood results, and never communicated with Mr. Aidone in any fashion concerning whether he felt he was, or was not, a carrier of the thalassemia trait.” He states that “Ms. Gentile has even conceded at the time of her deposition that following the blood draw of January 8, 2014, there was no plan to return to Dr. Parasmo's office relating to the blood work results and that it was the couple's intention to discuss same with Dr. Goldstein.”

Dr. Moynihan next opines that “irrespective of whether Mr. Aidone was a patient of Dr. Parasmo's office, nothing Dr. Parasmo did, or did not do, was a proximate cause of the plaintiffs' alleged injuries. Taking the facts in the light most favorable to the plaintiffs, the evidence overwhelmingly demonstrates that the plaintiffs intended for their maternal fetal medicine specialist Dr. Goldstein to be the provider whom they would rely upon to make the determination of whether Salvatore Aidone was a carrier of the thalassemia trait.” He opines that “[u]nder the circumstances of this case, this was an entirely rational and appropriate belief to have held given that Ms. Gentile had specifically been referred to Dr. Goldstein after consulting with her obstetrician Dr. Polcino [and that]... a maternal fetal medicine specialist would be in the best position to make the determination as to whether Salvatore Aidone was a carrier of the thalassemia trait.”

Dr. Moynihan also states that “there is no evidence to demonstrate that Dr. Goldstein relied upon information or communications with Dr. Parasmo in his interpretation of the blood results [and that] [t]o the contrary, Dr. Goldstein in this instance has specifically testified that he did not speak to Dr. Parasmo concerning the blood results, and that with regards to the notation ‘normal’ on the report, that ‘[he] had formed [his] own opinion independent of’ said notation,”

(citing Dr. Goldstein's deposition at 33).

In this connection, Dr. Moynihan states, "Dr. Parasmo in this instance never communicated with Mr. Aidone or Dr. Goldstein that the lab results confirmed that he was not a carrier of the beta thalassemia trait. As the plaintiffs had no further contact with Dr. Parasmo for the remainder of the pregnancy with regards to the blood results, Dr. Parasmo and his staff cannot be held to have proximately caused any of the alleged injuries in this matter." He further states that "the only fault which could possibly be attributed to Dr. Parasmo would be in the performance of the January 8, 2014 blood draw [and] [n]o such allegations have been put forth against Dr. Parasmo, and there is no evidence in this matter that said blood draw was undertaken negligently."

Plaintiffs oppose the motions by the Polcino defendants and the Parasmo defendants and in support of their opposition submit the affidavit of a physician whose identity is redacted, and who states that he is licensed to practice medicine in certain states (which are redacted) and that he is board certified in obstetrics and gynecology as well as in maternal-fetal medicine. With regard to the Parasmo defendants, the expert opines that there is a physician-patient relationship between Dr. Parasmo and Mr. Aidone, based on the nurse drawing blood at his office, sending his blood for testing, and ordering a complete hemoglobin electrophoresis of Mr. Aidone's blood, and Dr. Parasmo writing "normal" on Mr. Aidone's bloodwork results. Plaintiffs' expert also opines that "the standard of care for all physicians is for the physician to understand the results of a blood test prior to writing the word 'normal,' or any other word for that matter, on the results [and that] [i]rrespective of whether Mr. Aidone was a patient of Dr. Parasmo's or not, Dr. Parasmo deviated from the standard of care when he wrote 'normal' on Mr. Aidone's blood

results, which were clearly not normal, especially where the second page of the results stated on its face that Mr. Aidone's hemoglobin A2 indicated that he had the beta thalassemia trait."

As for Dr. Polcino, plaintiffs' expert opines that:

The standard of care in 2014 was for an obstetrician-gynecologists ("ob-gyn") to offer prenatal genetic screening to all pregnant women of certain ethnicities, including women of Mediterranean descent. The American College of Obstetricians and Gynecologists also recommended offering such screening. In addition to the ob-gyn offering the prenatal genetic testing, the American College of Obstetricians and Gynecologists has made it clear that all couples have the right to prenatal diagnostic testing if they choose, so if a patient requests that prenatal genetic testing be done, the standard of care was to perform the prenatal genetic test. Also, all ob-gyns are trained in performing amniocentesis and chorionic villi sampling, and thus are capable of performing these procedures.

The expert states that "in this case, where both parents were of Italian descent and the mother was a known carrier of thalassemia, amniocentesis or chorionic villi sampling was absolutely appropriate. In fact, either her heritage or thalassemia trait alone was sufficient to support the performance of amniocentesis or chorionic villi sampling." The expert opines that "Dr. Goldstein and Polcino were both wrong when they told the couple that Ms. Gentile did not meet the criteria for an amniocentesis."

Plaintiffs' expert further opines that "[i]t was a deviation from the standard of care for Dr. Goldstein and Dr. Polcino to refuse to perform amniocentesis or chorionic villi sampling on Ms. Gentile [and that] [i]f either Dr. Goldstein or Dr. Polcino was not comfortable performing the procedure himself, he could have sent Ms. Gentile to another ob-gyn or maternal fetal medicine physician willing to perform the test. It was a deviation from the standard of care for Dr. Goldstein and Dr. Polcino not to refer Ms. Gentile to a physician willing to perform amniocentesis or CVS [and that] [i]n this case, amniocentesis or CVS would have definitively

answered the couple's major concern regarding beta thalassemia."

With regard to causation, plaintiffs' expert states that "[b]oth Ms. Gentile and Mr. Aidone unequivocally testified that they would have terminated the pregnancy if the fetus had beta thalassemia major." The expert opines that "Dr. Parasmó's failure to properly interpret Mr. Aidone's blood results and hence writing the word 'normal' on the results, [and] Dr. Polcino's failure to perform amniocentesis or CVS on Ms. Gentile, and Dr. Polcino's failure to refer Ms. Gentile for amniocentesis or CVS were proximate causes of Ms. Gentile and Mr. Aidone's lack of knowledge of their fetus's beta thalassemia diagnosis, deprived them of the opportunity to terminate the pregnancy, and cost them the significant expense involved in providing medical care and treatment to G.A. to treat his beta thalassemia major, and they continue to have to incur significant expense to provide G.A. with the medical care and treatment his beta thalassemia major requires."

In reply, the Polcino defendants submit a further affirmation from Dr. Klein who opines that contrary to the opinion of plaintiffs' expert, "[i]t is not the standard of care to perform invasive genetic testing simply based on ethnic heritage without first performing carrier testing to assess the risk to the fetus. Amniocentesis and CVS are invasive tests that pose significant risks to the pregnancy, including but not limited to fetal loss." He further opines that "based upon Dr. Goldstein's determination that Mr. Aidone was not a carrier of the thalassemia trait and that 'routine antepartum care be provided,' there was no indication for Dr. Polcino to independently refer the patient for an amniocentesis or CVS in light of the significant risk these tests pose to the pregnancy [and that] [i]t was appropriate and within the standard of care for Dr. Polcino to rely on the expertise and determinations of the Maternal Fetal Medicine physician with regard to Mr.

Aidone's carrier status and the need for further prenatal testing.”

As for the Parasmio defendants, they argue in reply that plaintiffs have failed to show a physician-patient relationship between Dr. Parasmio and Mr. Aidone during the period of alleged negligence, and that, in any event, they did not owe a duty of care to Mr. Aidone, who relied exclusively on Dr. Goldstein to interpret his blood test results, and that since Dr. Parasmio did not interpret the results nor did Dr. Goldstein rely on his interpretation, any alleged deviation by Dr. Parasmio was not a proximate cause of plaintiffs’ alleged injuries.

Discussion

A defendant moving for summary judgment in a medical malpractice action must make a prima facie showing of entitlement to judgment as a matter of law by showing “that in treating the plaintiff there was no departure from good and accepted medical practice or that any departure was not the proximate cause of the injuries alleged.” Roques v. Nobel, 73 AD3d 204, 206 (1st Dept 2010). To satisfy this burden, a defendant must present expert opinion testimony that is supported by the facts in the record and addresses the essential allegations in the Bill of Particulars. Id The expert opinion relied on by defendant must be based on the facts in the record or those personally known to the expert. Defense expert opinion should specify “in what way” a patient’s treatment was proper and “elucidate the standard of care.” Ocasio-Gary v. Lawrence Hosp., 69 AD3d 403, 404 (1st Dept 2010). A defendant’s expert opinion must also “explain what defendant did and why.” Id. (quoting Wasserman v. Carella, 307 AD2d 225, 226 [1st Dept 2003]).

Once a defendant meets this standard, the burden shifts to plaintiff “to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact

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

In addition, a plaintiff’s expert’s opinion “must demonstrate the requisite nexus between the malpractice allegedly committed and the harm suffered.” Dallas-Stephenson v. Waisman, 39 AD3d 303, 307 (1st Dept 2007) (internal citations and quotations omitted). If “the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation... the opinion should be given no probative force and is insufficient to withstand summary judgment.” Diaz v. Downtown Hospital, 99 NY2d 542, 544 (2002). On the other hand, summary judgment is not proper where “conflicting opinions of the parties’ experts raise triable issues of fact.” Boston v. Weissbart, 62 AD3d 517, 518 (1st Dept 2009).

As for the threshold issue of whether Dr. Polcino owed a duty of care with respect to genetic testing in connection with assessing Mr. Aidone’s thalassemia carrier status and its potential impact on the fetus, the court notes that “[w]hether a duty is owed in the first instance is a question for the court, and generally not an appropriate subject for expert opinion” Dallas-Stephenson v Waisman, 39 AD3d at 307 (internal citations omitted). “[T]he duty of a physician may be limited to those medical functions undertaken by the physician and relied upon by the

patient...the question is whether the physician owes a duty under the circumstances of a particular scenario.” Burtman v. Brown, 97 AD3d 156, 161-162 (1st Dept 2012)(internal citations and quotations omitted); see also O’Toole v. Goodman, 170 AD3d 615, 616 (1st Dept 2019). Additionally, “the mere referral of a patient by one physician to another does not render the referring physician liable for the negligence of the treating physician” Mandel v. New York County Public Administrator, 29 AD3d 869, 870-871 (2d Dept 2006) (internal citations and quotations omitted). At the same time, however, “joint liability may be imposed where the referring physician was involved in decisions regarding diagnosis and treatment to such an extent as to make them his or her own negligent acts.” Id at 871.

Here, Dr. Polcino has submitted evidence that he had no involvement in the issues relating to genetic testing, which issues he referred to Dr. Goldstein and his practice following Ms. Gentile’s first appointment with him after the confirmation of her pregnancy. Specifically, the record includes evidence that Dr. Polcino did not interpret Mr. Aidone’s blood results to determine whether Mr. Aidone was thalassemia carrier, or decide whether further pre-natal genetic testing was warranted, but rather relied wholly on Dr. Goldstein’s determinations. Moreover, the record is devoid of evidence that Dr. Polcino consulted with Dr. Goldstein regarding the plaintiffs following his referral of them to Dr. Goldstein.

In opposition, plaintiffs have failed to controvert this showing by producing evidence that Dr. Polcino assumed a duty of care with regard to testing the fetus for thalassemia (or other genetic condition). In this regard, testimony that plaintiffs informed Dr. Polcino that Dr. Goldstein told them Ms. Gentile was not a candidate for amniocentesis and Dr. Polcino concurred is insufficient to raise an issue of fact as to whether Dr. Polcino assumed a duty with

respect to testing for thalassemia. Nor is there any evidence that plaintiffs relied on Dr. Polcino as to the issue of genetic testing. In this regard, Ms. Gentile testified that once Dr. Goldstein told her she was not a candidate for amniocentesis she took no further steps to see if she was a candidate for the test since Dr. Goldstein “would have been the one to order it.” See e.g. Burtman v. Brown, 97 AD3d at 158 (primary care physician owed no duty to plaintiff where defendant “played no role in advising the plaintiff in diagnosis or treatment of an abdominal mass”); Burns v. Goyal, 145 AD3d 952, 954-955 (2d Dept 2016)(defendant primary care physician and his practice owed no duty to decedent who suffered a heart attack after he stopped taking his heart medication in order to have kidney surgery where defendants submitted uncontroverted evidence that they “had no role in treating decedent for his heart issues.”); compare Mandel v. New York County Public Administrator, 29 AD3d at 871 (question of fact raised for jury as to whether a referring internist jointly participated in the care and treatment of decedent with the pulmonary specialist such that he could be held liable for failure to order a needle biopsy).

When, as here, “no duty is found to exist, the opinion of [a] plaintiff’s expert that the defendant deviated from the standard of accepted medical practice is irrelevant.” Burtman v. Brown, 97 AD3d at 158; see also O’Toole v. Goodman, 170 AD3d at 616 (“to reach any discussion about deviation from accepted medical practice, it is first necessary to establish the existence of a duty”). Accordingly, the court need not consider plaintiffs’ expert opinion that there was a deviation from the standard of care in failing to perform further genetic testing or to refer plaintiffs for further testing, and summary judgment in favor of the Polcino defendants is thus warranted.

The court will next consider the summary judgment motion by the Parasomo defendants.

The preliminary issue on this motion is whether a physician-patient relationship existed between Dr. Parasmo and Mr. Aidone such as he owed Mr. Aidone a duty. To the extent that the parties' experts have opined with respect to this issue, it raises "'a question of law, not medicine" and thus the experts' opinions in this regard "transcend[] [the] bounds of [their] competence and intrudes upon the exclusive prerogative of the court.'" Sawh v. Schoen, 215 AD2d 291, 294 (1st Dept 1995) quoting Lipton v. Kaye, 214 AD2d 319, 322-323 (1st Dept 1995). At the same time, under certain circumstances, issues of fact are created as to whether a physician's advice gives rise to a sufficient basis for finding physician-patient relationship. See Tom v. Sunddaran, 107 AD3d 479, 480 (1st Dept 2013); Campbell v. Hager, 274 AD2d 946, 947 (2000).

"The physician-patient relationship is a consensual one, and while it may arise out of a contract, the existence of the relationship does not depend upon the existence of any express contract. The relationship is created when the professional services of a physician are rendered to and accepted by another person for the purposes of medical or surgical treatment." Lee v. City of New York, 162 AD2d 34, 36 (2d Dept 1990), appeal denied 78 NY2d 863 (1991). However, "[i]t is not necessary that a [physician] see, examine, take a history of or treat a patient," in order to raise an issue of fact as to the existence of a physician-patient relationship. Tom v. Sunddaran, 107 AD3d at 480, quoting Raptis-Smith v. St Joseph's Medical Center, 302 AD2d 246, 247 (1st Dept 2003). Thus, an implied physician-patient relationship can arise based on evidence that "a physician gave advice to a patient by communicating through another health-care professional" (Rogers v. Maloney, 77 AD3d 1427, 1428-1429 [4th Dept 2010]), or "the physician has formulated plans in conjunction with other medical professionals who later relied

on those recommendations.” Tom v. Sunddharasan, 107 AD3d at 480 (internal citations omitted).

At the same time, not every discussion by a physician regarding a patient’s condition gives rise to “an affirmative duty to accurately advise the treating physician regarding the care of their patient.” Sawh v. Schoen, 215 AD2d at 292-293 (physician “who attends group staff meetings where patient’s condition is discussed [does not] thereby assume liability from accepted medical practice in the course of treatment rendered by his associates”); see also Ingber v. Kandler, 128 AD2d 591, 592 (2d Dept 1987)(granting summary judgment to defendant doctor where record showed that although he “gave an informal opinion to a fellow physician regarding the case....there [was] no showing that the [the defendant] had any contact with the patient, saw any records relating to the case, or even knew the patient's name”).

Here, the record is devoid of evidence that Dr. Parasmo advised plaintiffs as to Mr. Aidone’s blood test results, that plaintiffs sought his advice, or that Dr. Parasmo communicated with Dr. Goldstein as to Mr. Aidone’s blood test results, or as to plaintiffs generally. compare Tom v. Sunddharasan, 107 AD3d at 480 (finding issue of fact as to whether physician-patient relationship existed between plaintiff and defendant physician based on a telephone consultation with neurosurgeon regarding plaintiff where discussion concerned plaintiff’s transfer to hospital where defendant physician was the attending neurosurgeon and where there was evidence of joint plan for treatment of plaintiff).

Plaintiffs assert, however, that a physician-patient relationship arose when Dr. Parasmo communicated with Dr. Goldstein by allegedly writing the word “normal” on Mr. Aidone’s blood test results. Absent from the record is evidence that Dr. Parasmo undertook any duty to inform

plaintiffs of the blood test results or that plaintiffs' relied on Dr. Parasmo's interpretation of such results. See e.g. Burtman v. Brown, 97 AD3d at 158. Thus, the circumstances here do not give rise to factual questions as to an implied physician-patient relationship.

Next, with respect to plaintiffs' argument that Dr Parasmo wrote the word "normal" on Mr. Aidone's blood test result, and that such writing would have been sufficient to give rise to a duty on Dr. Parasmo's part to accurately report the test results, even if this allegation is accepted, plaintiffs have failed to controvert the Parasmo defendants' showing that no nexus existed between the word "normal" and any injuries to plaintiffs based on their expert's opinion and Dr. Goldstein's testimony. In this connection, Dr. Goldstein testified that although he saw the word "normal" on the blood test results, he made "an independent judgment" that Mr. Aidone was not a carrier of the thalassemia trait. Moreover, plaintiffs rely on the conclusory opinion of their expert that "Dr. Parasmo's failure to properly interpret the blood tests and hence writing the word 'normal' on the results were the proximate causes of Ms. Gentile and Mr. Aidone's lack of knowledge of their fetus' beta thalassemia diagnosis [which] deprived them of the opportunity to terminate the pregnancy and costs them significant medical expenses." See Koeppel v. Park, 228 AD2d 288, 290 (1st Dept 1996)(defendant gynecologist entitled to summary judgment where there was no nexus between the delay in diagnosing patient with colon cancer and defendant's alleged negligence in failing to take a complete medical history during a visit, and failing to follow up with patient and internist after referring the patient to the internist); Heckstall v. Pinkus, 19 AD3d 203, 204 (1st Dept 2005)(trial court should have dismissed medical malpractice claim against defendants, the manufacturer of a smoking cessation drug and the physician who prescribed it,

where plaintiff failed to show that the drug caused or aggravated patient's arrhythmia which caused his death).

Accordingly, in the absence a physician-patient between Dr. Parasmo and plaintiffs or other relationship giving rise to a duty with regard to Mr. Aidone's blood test results, and as defendants have failed to raise a triable issue of fact as to causation, the Parasmo defendants are entitled to summary judgment dismissing the complaint and any cross claims against them.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by the defendants Michael H. Polcino, M.D. and Michael H. Polcino, M.D. P.C., (motion seq. no. 004) is granted and the complaint and any cross claims against them are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion for summary judgment by defendants Frank J. Parasmo, Jr., M.D. and Frank J. Parasmo, Jr., M.D., P.C. (motion seq. no. 004) is granted and the complaint and any cross claims against them are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the caption is amended to remove Michael H. Polcino, M.D., Michael H. Polcino, M.D. P.C., Frank J. Parasmo, Jr., M.D. and Frank J. Parasmo, Jr., M.D., P.C. as defendants from the caption; and it is further

ORDERED that the caption as amended shall read as follows:

KERRY GENTILE and SALVATORE AIDONE

Index No. 805289/16

Plaintiffs

-against-

JONATHAN DAVID GOLDSTEIN, M.D.,
MADONNA PHYSICIAN SERVICES, P.C.,
MADONNA PHYSICIAN PRENATAL SERVICES,
IRA SPECTOR, M.D. & STEVEN KLEIN, M.D.,
P.C.; and GYNECOLOGICAL SPECIALISTS OF
LONG ISLAND, LLC,

Defendants.

and it is further

ORDERED, that the Policino defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (Room 119) and the County Clerk (room 141B), who are directed to mark their court records to reflect the removal of defendants Michael H. Polcino, M.D., Michael H. Polcino, M.D. P.C., Frank J. Parasmo, Jr., M.D. and Frank J. Parasmo, Jr., M.D., P.C. from the caption; and it is further

ORDERED that such service upon the General Clerk's Office and the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that the pre-trial conference previously scheduled for May 7, 2020, shall be held by conference call on June 18, 2020 at noon and the remaining parties shall email the court at SFC-Part11@nycourts.gov to provide the information for the conference call with the court.

Dated: May 15, 2020

Joan
Madden

Digitally signed by Joan Madden
DN: C=US, OU=NY County Supreme Court,
O=NYS Courts, CN=Joan Madden,
E=jmadden@nycourts.gov
Reason: I am the author of this document
Location: New York, NY
Date: 2020-05-15 18:28:36
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J.S.C.