

**Delia v Wieder**

2021 NY Slip Op 32988(U)

February 17, 2021

Supreme Court, Nassau County

Docket Number: Index No. 617091/18

Judge: Denise L. Sher

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.

**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.: 05  
Motion Date: 09/08/2020

**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion (Seq. No. 05), Affirmation and Exhibits	1
Affirmation in Opposition to Motion (Seq. No. 05) and Exhibit and Affidavits	2
Affirmation in Reply to Motion (Seq. No. 05)	3

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

Defendants Mercy Medical Center (“Mercy”), Jessica Ambrose, P.A. (“Ambrose”) and Lukas J. Shutler, M.D. (“Dr. Shutler”) move (Seq. No. 05), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs’ Verified Complaint as against them. Plaintiffs oppose the motion (Seq. No. 05).

In support of defendants Mercy, Ambrose and Dr. Shutler’s motion (Seq. No. 05), their counsel asserts, in pertinent part, that, “[b]y way of background, from June through July 2016, plaintiff, Michael Delia, was a then 60-year-old male with a medical history significant for prostate cancer in 2000 for which he underwent a retropubic radical prostatectomy with resultant

stress incontinence, morbid obesity (as of 5/11/16, he weighed 290 lb. (*sic*), giving him a BMI of 39.47), hypertension, neuropathy, edema, glaucoma, and depression. On June 30, 2016, Plaintiff presented to his primary care physician and co-defendant, Alan Wieder, M.D., for a sick visit with complaints of back pain and right leg pain as well as approximately one week of pain with urination and pain from the right buttock and groin. A urine dipstick was done and the results (reported on 7/2/16) were <10,000 CFU/mL gram negative rods, which indicates the plaintiff did not have a urinary tract infection. Dr. Wieder provided prescriptions for Cipro 250 mg by mouth twice daily for 7 days and Medrol 4 mg by mouth and the plaintiff was instructed to hold off on starting the Cipro unless the symptoms recurred or if the urinalysis or urine culture revealed a UTI.... The prescriptions were filled at CVS on the same date.... On July 5, 2016, plaintiff was brought in by ambulance ... at 4:20 p.m. to the Mercy Medical Center Emergency Department during which time care and treatment was (*sic*) provided by the named defendants, Lukas J. Shutler, M.D. and Jessica Ambrose, PA. Plaintiff was brought for evaluation of a possible allergic reaction to Aleve.... According to the Mercy Medical Center records, the patient reported he had taken Aleve for the first time and became 'very weak and shaky and felt like he was going to pass out.' He denied fever, chills, abdominal pain, hematuria, and difficulty urinating. Plaintiff reported a past medical history that was significant for prostate cancer. The flow sheets contain a report of chronic radiating back pain. Temperature was 98.4°. In the Emergency Department, blood pressures were reported as follows: 4:29 p.m., 108/62, 4:51 p.m., 90/50, and 7:08 p.m., 101/50. Physical examination was within normal limits. The work-up documented included a chest x-ray, routine chemistries, cardiac labs, CBC, urinalysis, and an EKG. Chest x-ray and EKG were within normal limits. WBC was 16.57 with elevated neutrophils, elevated bands of 13%, elevated creatine, and low calcium. Urinalysis was

attempted but not completed, as plaintiff testified that at the time a porter came to collect the urine sample, he was unable to provide one. Plaintiff received Zofran for complaints of nausea without vomiting and reported improvement. At discharge around 8:00 p.m., the diagnosis was an allergic reaction to Aleve and the plaintiff was instructed to follow with his primary care physician in two days. Plaintiff was also instructed to return to the Emergency Department if he developed worsening symptoms. Plaintiff left the Emergency Department accompanied by his wife in 'good' condition. . . . Two days later, on July 7, 2016, plaintiff returned to Dr. Wieder for complaints of blood in the urine and swollen testes. Plaintiff reported he started the Cipro-took 3 doses and now has (*sic*) been having gross hematuria for the past day with blood from the urethra even without voiding. Dr. Wieder sent the urine for cytology; ordered labs, referred the patient to a urologist urgently, and broadened the UTI coverage to Levaquin 500 mg by mouth once daily for 7 days (prescription filled same day at CVS). Lab results were returned on July 11, 2016 and now revealed 25,000 CFU/mL E. coli and 10,000 CFU/mL coag negative Staphylococcus. Susceptibility reflected the bacteria were resistant to both ciprofloxacin and levofloxacin. . . . Following the July 7, 2016 office visit with Dr. Wieder, plaintiff went directly to the office of urology co-defendant, Anthony Bruno. According to the records . . . , plaintiff reported scrotal edema for two days and that he had been off his furosemide (for edema). Dr. Bruno documented a comprehensive genitourinary exam, which noted scrotum was swollen (scrotal edema), nontender. Urine dipstick revealed negative nitrites and small leukocyte esterase. Cystoscopy was performed and revealed no masses. Dr. Bruno instructed the plaintiff to restart his furosemide. Dr. Bruno's records documented that the plaintiff had been on Cipro x3 doses, which is consistent with Dr. Wieder's documentation regarding the Cipro. Following the July 7, 2016 office visit with Dr. Bruno, plaintiff next sought medical treatment three days later on July

10, 2016. Plaintiff presented to non-party, Winthrop University Hospital, wherein a CT scan showed thickening of the scrotal and penile planes with extensive subcutaneous gas surrounding the proximal penile shaft with extension into the mid-line anterior lower abdomen. The impression was the CT findings were compatible with Fournier (*sic*) gangrene. As a result, plaintiff underwent an incision and drainage of a scrotal abscess, partial scrotoectomy, and Foley catheter insertion, which was completed by non-party urologist, Toby Handler, M.D., assisted by Mitchell Efros, M.D., both physicians affiliated with Advanced Urology Centers of New York. Pathology revealed necrotic dermis and underlying fascia diffusely infiltrated by neutrophils. The neutrophils extended into the epidermis. The acute inflammation and necrosis suggests (*sic*), at least, a cellulitis. Pathology recommended correlation to exclude necrotizing fasciitis and a Fournier (*sic*) gangrene (in the right clinical context). Thereafter, on July 19, 2016, plaintiff underwent a debridement of penile tissue and cremasteric fascia and pulse lavage irrigation of the wound. The surgery was performed by Dr. Michael Castellano assisted by Daniel Bannen, PA. The pre-and postoperative diagnosis was open wound of the perineum and penis and suprapubic area. The pathology from the July 19, 2016 surgery revealed fragments of dense fibrinous connective tissue showing focal necrosis with associated acute and chronic inflammation. The July 19, 2016 bacteria revealed vancomycin-resistant enterococcus and candida... On July 22, 2016, plaintiff was discharged with instructions to keep his scheduled follow-up appointments with Dr. Handler and Dr. Castellano. Following his discharge, plaintiff received wound care at non-party Winthrop Wound Healing Center, on approximately five occasions between July 28, 2016 and September 12, 2016 where it was noted the penile area granulated and healed." See Defendants Mercey, Ambrose and Dr. Shutler's Affirmation in Support of Motion (Seq. No. 05) Exhibits Z, AA, BB, CC, HH, LL and KK.

Counsel for defendants Mercy, Ambrose and Dr. Shutler further asserts, in pertinent part, that, “[i]n this instance, no bona fide issue of fact exists. The proof submitted in support of defendants’ motion demonstrates *prima facie* entitlement to summary judgment as a matter of law.... The Physician Affirmations of Andrew Leifer, M.D. and Michael Palese, M.D. outline the facts of this case, their opinions regarding the issues of this case, and the bases of said opinions, which, in effect, demonstrates (*sic*) *prima facie* entitlement to summary judgment as a matter of law.... Both Dr. Leifer and Dr. Palese opined (*sic*) the plaintiff, Michael Delia, did not exhibit and/or demonstrate signs or symptoms of Fournier’s gangrene during the July 5, 2016 Emergency Department presentation to Mercy Medical Center and, therefore, such a diagnosis could not have been made. The evidence shows the diagnosis of Fournier’s gangrene was made approximately five days later on July 10, 2016 at non-party, Winthrop University Hospital. Accordingly, they opined that the claimed injuries were not proximately caused and/or resultant from the care and treatment of MERCY MEDICAL CENTER s/h/a MERCY MEDICAL CENTER HOSPITAL, JESSICA AMBROSE, P.A., and LUKAS J. SHUTLER, M.D. on July 5, 2016.... Both experts explained (*sic*) the Mercy Medical Center records do not reflect any signs and symptoms of Fournier’s gangrene.... Put another way, at no time did plaintiff exhibit signs and symptoms of Fournier’s gangrene while treating with the moving Defendants. Further, they noted plaintiff denied any complaints indicative of Fournier’s gangrene during the July 5, 2016 presentation to Mercy Medical Center (plaintiff denied fever, swelling to anal area, pain to anal area, malodor on genitals, rubbing scrotal area, ...) ... Furthermore, the subsequent medical records, namely the office records of Drs. Wieder and Bruno, similarly demonstrate the plaintiff was not exhibiting signs and symptoms of Fournier’s gangrene: neither physician diagnosed or suspected Fournier’s gangrene, and genitourinary examinations did not reveal Fournier’s

gangrene. As the medical records reflect, the plaintiff did not offer genitourinary complaints to either the non-party EMTs when the ambulance was called and transported plaintiff to Mercy Medical Center and likewise during the July 5, 2016 presentation to Mercy Medical Center. Dr. Leifer opined with a reasonable degree of medical certainty that it was reasonable and appropriate to not perform a genitourinary physical examination during the July 5, 2016 presentation to Mercy Medical Center. Rather, the plaintiff offered complaints of possible allergic reaction to a medication and was noted to be hypotensive. As these complaints are unrelated to genitourinary complaints, and are directly related to a possible allergic reaction, Dr. Leifer is of the opinion that a genitourinary examination was not indicated during the July 5, 2016 presentation to Mercy Medical Center.... Assuming *arguendo* plaintiff had been admitted overnight to Mercy Medical Center, Dr. Leifer stated the subsequent medical records demonstrate plaintiff was not symptomatic of Fournier's gangrene (*sic*) two days after the July 5, 2016 presentation to Mercy Medical Center. Accordingly, plaintiff was likewise not symptomatic on July 6, 2016.... In addition, Dr. Leifer opined had plaintiff provided a urine sample during the July 5, 2016 Emergency Department presentation to Mercy Medical Center and revealed the presence of an infection in the urine, the care and treatment for same would have been a broad-spectrum antibiotic similar to the Cipro, which had already been prescribed by Alan Wieder, M.D. on June 30, 2016.... Dr. Leifer explained, according to the medical records of Alan Wieder, M.D. and Anthony Bruno, M.D., plaintiff started taking the Cipro on July 6, 2016, one day after his presentation to Mercy Medical Center. In fact, the medical records show the plaintiff reported to both Drs. Wieder and Bruno that he had taken three doses by the time of his office presentations to them on July 7, 2016. Accordingly, regardless of plaintiff's inability to provide a urine sample on July 5, 2016 and/or the collection of same, the subsequent medical

records reflect plaintiff commenced Cipro, which is a reasonable and appropriate antibiotic for urinary tract infections.” See Defendants Mercy, Ambrose and Dr. Shutler’s Affirmation in Support of Motion (Seq. No. 05) Exhibits A and B.

Counsel for defendants Mercy, Ambrose and Dr. Shutler further argues, in pertinent part, that, “[s]imilarly and relative to all of the care and treatment rendered to the plaintiff by the Defendants on July 5, 2016, there is no proof that had a genitourinary examination been performed or the plaintiff was admitted overnight or if any of the Defendants’ care and treatment was modified in some way that the outcome not (*sic*) would have been the same. As such, there is a failure of proof on the element of causation and without such proof, there is a failure to establish a prima facie case. [citation omitted].... [T]he evidence shows Dr. Bruno and Dr. Wieder performed thorough genitourinary examinations on the plaintiff on July 7, 2016 and the plaintiff was not found to have Fournier’s gangrene or any signs or symptoms suggestive of same.... Dr. Palese continued that the medical records from non-party Winthrop University Hospital, and likewise, the physician affirmation of subsequent treating urologist and non-party, Toby Handler, M.D., further bolster his opinion that the plaintiff did not have and could not have been diagnosed with Fournier’s gangrene on July 5, 2016 or July 7, 2016.... In addition, both Dr. Leifer and Dr. Palese opined (*sic*) the plaintiff first exhibited signs and symptoms of Fournier’s gangrene on July 10, 2016 and that prior medical records did not similarly demonstrate same.... Both experts opined (*sic*) plaintiff did not exhibit signs and symptoms of Fournier’s gangrene at any time prior to July 10, 2016. Accordingly, both experts opined that regardless of plaintiff’s complaints and findings during the July 5, 2016 Emergency Department presentation to Mercy Medical Center, plaintiff was not symptomatic of Fournier’s gangrene and therefore, said condition could not have been diagnosed that day. They likewise opined (*sic*) the

Fournier's gangrene was not proximately caused by the Defendants' care and treatment.... In addition, the evidence and the physician affirmations submitted in support of the instant motion and those of the co-defendants demonstrates (*sic*) not only that the Fournier's gangrene could not have been diagnosed prior to July 10, 2016, but also that the only treatment for this condition is the treatment plaintiff received – aggressive intravenous antibiotics and debridement surgeries.... The record and the affirmations of defendants' experts demonstrate that plaintiff's second episode of Fournier's gangrene is entirely unrelated to the first, and was not proximately caused by the defendants' care and treatment." See Defendants Mercy, Ambrose and Dr. Shutler's Affirmation in Support of Motion (Seq. No. 05) Exhibits A, B, MM and NN.

In opposition to defendants Mercy, Ambrose and Dr. Shutler's motion (Seq. No. 05), 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. 05).

Counsel for plaintiffs argues, in pertinent part, that, "[t]he Defendants in this matter have not provided sufficient evidence to satisfy the burden which the proponent of a summary judgment motion must meet. The Affirmations of Defendants' experts do not establish *prima facie* entitlement to judgment as a matter of law as they have failed to demonstrate with evidence that the MERCY Defendants acted within the acceptable standard of medical care. Moreover, the Affirmations of Defendants' experts focus solely on whether or not Plaintiff was suffering from Fournier's Gangrene on July 5, 2016. They fail to address the critical fact that if Defendants had properly treated Plaintiff MICHAEL DELIA during the July 5, 2016 emergency department presentation, he would not have developed Fournier's Gangrene or the resultant devastating injuries. Nor do they address any of the other injuries and areas of malpractice alleged in Plaintiffs' Verified Bills of Particulars.... Defendants' counsel attempts to support their claims that there are no triable issues of fact herein by stating that Plaintiff MICHAEL DELIA did not have Fournier's Gangrene on July 5, 2016 and that he did not offer any genitourinary complaints. Such claims ignore both Plaintiffs' sworn testimony and the crucial fact that it is more likely than not that Plaintiff would not have developed Fournier's Gangrene if he had been appropriately treated the MERCY Defendants on July 5, 2016.... Additionally, Defendants' counsel argues that Defendants DR. SHUTLER and PA AMBROSE acted within the accepted standards of medical care (*sic*) they limited their examination (*sic*) of Plaintiff MICHAEL DELIA to only those issues related by the ambulance emergency medical technicians. However, as demonstrated by Plaintiffs' emergency medicine expert, the MERCY defendants acted 'with blinders on' and

failed to take into account all of their patient's symptoms." See Plaintiff Michael Delia's Affirmation in Opposition to Motion (Seq. No. 05) Exhibit A; Plaintiff Michael Delia's Affidavit in Opposition to Motion (Seq. No. 05); Defendants Mercy, Ambrose and Dr. Shutler's Affirmation in Support of Motion (Seq. No. 05) Exhibits F, I-L, R and S.

Counsel for plaintiffs further contends, in pertinent part, that, "[t]he MERCY Defendants' emergency medicine expert, Dr. Andrew Leifer, claims that Plaintiff was not suffering from Fournier's Gangrene on July 5, 2016. Thus, he opines that the MERCY Defendants acted within the accepted standard of medical care and their actions or inaction were not the cause of Plaintiff MICHAEL DELIA'S injuries.... He states that the MERCY Defendants were not required (*sic*) engage in a genitourinary examination of Plaintiff because such complaints allegedly were not made to the ambulance EMTs and that no Fournier's Gangrene was present on July 5, 2016.... Dr. Leifer focuses on the alleged complaints made to the EMTs and lack of the presence of Fournier's Gangrene on July 5, 2016. Additionally, Dr. Leifer makes an incredible assumption, completely unsupported by the testimony of DR. SHUTLER or PA AMBROSE, (*sic*) even if Mr. DELIA had provided a urine sample on July 5, 2016, that he would have received the same or similar antibiotic prescribed by Defendant DR. WIEDER.... Such an assumption, it is respectfully submitted, has no basis in fact, the medical record or any testimony taken in this matter and must, it is respectfully submitted, be rejected. The MERCY Defendants' urology expert, Dr. Michael Palese, also claims that the MERCY defendants acted within the accepted standard of medical care and that their actions or inaction were not the cause of Plaintiff MICHAEL DELIA'S injuries. However, Dr. Palese renders no opinion whatsoever with regard to the adequacy of the treatment provided to Mr. DELIA by the MERCY Defendants on July 5, 2016. Dr. Palese conveniently ignores the fact that if the Defendants had properly treated

Mr. DELIA in a timely fashion, his case of Fournier's Gangrene could have been avoided. He fails to acknowledge that timely diagnosis and proper treatment of the infection, before it developed into Fournier's Gangrene, would have prevented Plaintiff's devastating injuries.... The Mercy Defendants, and Dr. Palese also rely 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.... Plaintiffs' emergency medicine expert disputes virtually every allegation of Defendants' experts. He/she opines that there were multiple deviations by Defendant DR. SHUTLER and Defendant PA AMBROSE including: failing to address Plaintiff's elevated white blood count with bacteremia; failing to address the cause of, and treat, Plaintiff MICHAEL DELIA'S hypotension prior to his discharge from the Emergency Department at Defendant MERCY MEDICAL CENTER; failing to complete the ordered urinalysis of Plaintiff MICHAEL DELIA prior to his discharge from the Emergency Department at Defendant MERCY MEDICAL CENTER; failing to address Plaintiff MICHAEL DELIA'S complaints of pain prior to his discharge from the Emergency Department at Defendant MERCY MEDICAL CENTER; failing to appropriately and accurately log and record Plaintiff MICHAEL DELIA'S pain levels during his presentation at the Emergency Department at Defendant MERCY MEDICAL CENTER; failing to order appropriate tests including but not limited to:

blood cultures and a lactic acid level during his presentation at the Emergency Department at Defendant MERCY MEDICAL CENTER; failing to admit Plaintiff MICHAEL DELIA to the hospital despite his presentation of sepsis and hypotension during his presentation at the Emergency Department at Defendant MERCY MEDICAL CENTER; failing to consider other differential diagnoses during his presentation at the Emergency Department at Defendant MERCY MEDICAL CENTER; failing to timely diagnose and adequately treat the Plaintiff MICHAEL DELIA; and failing to perform the necessary diagnostic tests on Plaintiff MICHAEL DELIA during his presentation at the Emergency Department at Defendant MERCY MEDICAL CENTER. Plaintiff's (*sic*) emergency medicine expert further opines, in direct opposition to the statements made by Defendants' experts, that if the MERCY Defendants had acted within the accepted standards of medical care and had investigated the cause of Plaintiff's ongoing symptoms, Mr. DELIA would more likely that not have avoided the development of Fournier's Gangrene." *See* Plaintiff Michael Delia's Affirmation in Opposition to Motion (Seq. No. 05) Exhibit A; Plaintiff Michael Delia's Affidavit in Opposition to Motion (Seq. No. 05); Defendants Mercy, Ambrose and Dr. Shutler's Affirmation in Support of Motion (Seq. No. 05) Exhibits A, B, F, I-L, R, S and BB.

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 (1<sup>st</sup> Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. See *Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

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

“A defendant seeking summary judgment in a medical malpractice action bears the initial burden of establishing, *prima facie*, either that there was no departure from the applicable standard of care, or that any alleged departure did not proximately cause the plaintiff’s injuries.” *Michel v. Long Is. Jewish Med. Ctr.*, 125 A.D.3d 945, 5 N.Y.S.3d 162 (2d Dept. 2015) *lv denied* 26 N.Y.3d 905, 17 N.Y.S.3d 86 (2015). See also *Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648, 996 N.Y.S.2d 155 (2d Dept. 2014); *Berthen v. Bania*, 121 A.D.3d 732, 994 N.Y.S.2d 359 (2d Dept. 2014); *Trauring v. Gendal*, 121 A.D.3d 1097, 995 N.Y.S.2d 182 (2d Dept. 2014); *Stukas v. Streiter*, *supra* at 23; *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012). Expert evidence is required when evaluating the “performance of functions that are an integral part of the process of rendering medical treatment ... to a patient.” *D’Elia v. Menorah Home and Hosp. for the Aged & Infirm*, 51 A.D.3d 848, 859 N.Y.S.2d 224 (2d Dept. 2008). See also *Koster v. Davenport*, 142 A.D.3d 966, 37 N.Y.S.3d 323 (2d Dept. 2016) *lv to appeal denied* 28 N.Y.3d 911, 47 N.Y.S.3d 227 (2016). Additionally, the conclusions reached by the defendant and his or her expert(s) must be supported by evidence in the record. See *Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013).

“Once a defendant physician has made such a showing, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the

defendant met the prima facie burden.” *Gillespie v. New York Hosp. Queens*, 96 A.D.3d 901, 947 N.Y.S.2d 148 (2d Dept. 2012).

“Establishing proximate cause in medical malpractice cases requires a plaintiff to present sufficient medical evidence from which a reasonable person might conclude that it was more probable than not that the defendant’s departure was a substantial factor in causing the plaintiff’s injury.” *Semel v. Guzman*, 84 A.D.3d 1054, 924 N.Y.S.2d 414 (2d Dept. 2011) *citing Johnson v. Jamaica Hosp. Med. Ctr.*, 21 A.D.3d 881, 800 N.Y.S.2d 609 (2d Dept. 2005); *Goldberg v. Horowitz*, 21 A.D.3d 802, 73 A.D.3d 691, 901 N.Y.S.2d 95 (2d Dept. 2010). *See also Skelly-Hand v. Lizardi*, 111 A.D.3d 1187, 975 N.Y.S.2d 514 (2d Dept. 2013). A plaintiff is not required to eliminate all other possible causes. *See Skelly-Hand v. Lizardi, supra* at 1189. “The plaintiff’s evidence may be deemed legally sufficient even if [her] expert cannot quantify the extent to which the defendant’s act or omission decreased the plaintiff’s chance of a better outcome or increased [the] injury, as long as evidence is presented from which the jury may infer that the defendant’s conduct diminished the plaintiff’s chance of a better outcome or increased [the] injury.” *Alicea v. Ligouri*, 54 A.D.3d 784, 864 N.Y.S.2d 462 (2d Dept. 2008) *quoting Flaherty v. Fromberg*, 46 A.D.3d 743, 849 N.Y.S.2d 278 (2d Dept. 2007) *citing Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623, 760 N.Y.S.2d 199 (2d Dept. 2003); *Wong v. Tang*, 2 A.D.3d 840, 769 N.Y.S.2d 381 (2d Dept. 2003); *Jump v. Facelle*, 275 A.D.2d 345, 712 N.Y.S.2d 162 (2d Dept. 2000) *lv denied* 95 N.Y.2d 931, 721 N.Y.S.2d 607 (2000) *lv denied* 98 N.Y.2d 612, 749 N.Y.S.2d 3 (2002).

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 defendants Mercy, Ambrose and Dr. Shutler'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, defendants Mercy, Ambrose and Dr. Shutler's motion (Seq. No. 05), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint as against them, 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 17, 2021

**ENTERED**

**Feb 23 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE