

**Delia v Wieder**

2021 NY Slip Op 32990(U)

February 8, 2021

Supreme Court, Nassau County

Docket Number: Index No. 617091/18

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

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

MICHAEL DELIA and PAULA DELIA,

Plaintiffs,

-against-

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

Defendants.

TRIAL/IAS PART 30  
NASSAU COUNTY

Index No.: 617091/18  
Motion Seq. No.: 02  
Motion Date: 07/20/2020

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

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

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

Defendant Anthony Bruno, M.D. ("Dr. Bruno") moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint as against him. Plaintiffs oppose the motion.

In support of defendant Dr. Bruno's motion (Seq. No. 02), his counsel asserts, in pertinent part, that, "[t]his case sounds in medical malpractice. It makes allegations against all defendants that essentially claim that the defendants failed to timely diagnose and treat a serious skin infection in the plaintiff, MICHAEL DELIA's genital area, Fournier's gangrene, in early July 2016. As a result, it is claimed that Mr. Delia required surgical debridement of his penis and

scrotum and suffered the sequela therefrom. As will be shown below, Dr. Bruno did not depart from good and accepted practice in his care and evaluation of the plaintiff and further, there is no possible causal connection between the alleged malpractice and the plaintiff's claimed injuries. As such, the case against Dr. Bruno must be dismissed."

Counsel for defendant Dr. Bruno further submits, in pertinent part, that, "Michael Delia is currently a 63-year-old-male. His medical history includes a radical prostatectomy following prostate cancer in 2000. His history includes kidney stones, hypertension, hypercholesterolemia, stomach problems and a cholecystectomy (gall bladder removal) in 2008. His course thereafter included some urinary incontinence and frequent urinary tract infections. Based upon the records of Advanced Urology, Dr. Bruno's practice, Mr. Delia had been followed by other doctors there going back to February 23, 2009. At that first practice visit, Mr. Delia made complaints of urinary incontinence with gradual but persistent onset. He also complained of and described persistent urinary tract infections over the preceding months. Mr. Delia was followed by the practice in 2010 and 2011 for treatment of urinary incontinence and renal colic (kidney stones). There are no notes of any visits with Advanced Urology between 2011 and April 28, 2016.... Mr. Delia was first seen by Dr. Bruno on April 28, 2016, at which time he complained of back pain. Mr. Delia was worked (*sic*) for the possibility of a recurrence of a kidney stone, including a urinalysis, CT of the abdomen and pelvis, laboratory tests and instructions to follow up in one week. He did not follow up as instructed. The medical events relevant to the claims in this case begin (*sic*) on June 30, 2016 when Mr. Delia presented to his primary care doctor, defendant, Dr. Alan Wieder, with complaints of one week of pain in his lower bladder with urination with pain in the right buttock and going down the right leg. Following a history and physical, Dr. Wieder diagnosed the plaintiff has (*sic*) having sciatica and prescribed a Medrol (steroid)

dose pack. He also did a urine culture and dipstick and advised the plaintiff to follow up with Dr. Yee if the back and leg symptoms persisted. Dr. Wieder made a secondary diagnosis of dysuria, noted leukocytes and protein in the urine and noted that the urinary symptoms seemed to have resolved. He gave the plaintiff a prescription of Cipro, an antibiotic, with instructions to hold off on starting the medication unless the symptoms recurred or if the urinalysis or culture revealed a urinary tract infection.... Mr. Delia then presented to the emergency department of defendant, Mercy Medical Center, on July 5, 2016. He was brought by ambulance complaining of (*sic*) that he was having an allergic reaction to Aleve that he had taken for the first time that day. He stated that after taking the medication he became very weak and shaky. He denied fever, chills, abdominal pain, nausea, vomiting, shortness of breath and bowel or bladder dysfunction. He was given Zofran, a chest x-ray and advised to take Benadryl, discontinue the Aleve, and follow up with his primary care doctor in two days. Defendant Physician's Assistant Ambrose noted that she discussed the case with the attending Dr. Lukas Shutler, who agreed with the discharge plan.... Mr. Delia returned to Dr. Wieder's office on the afternoon of July 7, 2016.... Dr. Wieder examined the patient, his history and medications. In relevant part, with respect to the genitourinary exam, Dr. Wieder noted complaints of dysuria and hematuria. He noted blood at the tip of the penis and on the pad in the underwear. He noted the testicles to be non-tender and normal size and contour. Dr. Wieder then noted a diagnosis of gross hematuria that 'could be UTI or stone.' He noted the history of prostate cancer and broadened the antibiotic coverage to include Levaquin 500mg po daily x 7 days. He noted that he was referring the patient to a urologist urgently and sending urine for cytology. He noted advising the patient to go to an emergency room if symptoms worsened. He finally noted that the sciatica diagnosed at the previous visit had resolved. Shortly after leaving the office of Dr. Wieder, Mr. Delia presented to

the office of Dr. Anthony Bruno... Dr. Bruno performed a physical examination of the plaintiff. In relevant part he noted in the 'Review of Systems,' 'Present: blood in urine and testicular mass. Not present – change in urinary stream, dysuria, frequency, hesitancy, impotence, incomplete bladder emptying, penile lesions, testicular pain, urethral discharge, urgency and urinating at night.' ... Dr. Bruno again noted the gross hematuria and conducted a workup that consisted of a urinalysis and cystourethroscopy, an examination of the inside of the lower urinary tract and bladder through a cystoscope inserted through the urethra in the penis allowing the doctor to visually inspect the interior of the urethra and bladder. Dr. Bruno noted no visible source of bleeding. He advised the patient to go home, drink a lot of fluids, and to take his Furosemide as prescribed. He advised the patient to go to the emergency department as needed and to contact the office for a lack of improvement or worsening of symptoms... Just after noon on Sunday July 10, 2016, Mr. Delia presented to the emergency room of Winthrop-University Hospital with complaints of 'scrotal swelling and pain since Thursday.' This was almost three full days after leaving Dr. Bruno's office. Mr. Delia was afebrile and denied fever, but had been feeling chills. He denied any penile pain or discharge. He described feeling progressively weak and worsening pain. Once put in a cubicle, he made complaints of 'fever and chills with swelling of scrotum and lower abdomen' that he states started Tuesday. An exam showed the patient's scrotal area with swelling and purplish discoloration with swelling to the lower abdomen with redness and warmth to the touch. Further examination in the emergency room noted a '[ ]arge swollen tender bilateral scrotum. Positive induration. Erythema and induration extend into the perianal space and to lower part of abdomen. Positive foul odor. Abdomen is soft.' Urology and wound care were called for possible Fournier's gangrene... At 3:52 Dr. Eric Sloane examined the patient and noted that the patient reported penile and scrotal swelling had gotten progressively worse since

the prior Thursday. At the time of the exam, in the suprapubic region there was induration, redness and swelling that continued into the shaft of the penis. The penis skin was markedly edematous with cellulitis and ecchymosis as well as surrounding cellulitis of the scrotal region. The scrotum was markedly swollen. No crepitus was felt. Dr. Sloane diagnosed probably Fournier's gangrene at the time. A CT scan was performed, revealing gas formation in the scrotal area, indicative of possible Fournier's gangrene and the urology service was called. Urologist Dr. Toby Handler was called as she was on call at Winthrop at the time. She performed a debridement surgery on the patient on July 10, 2016. In her operative note, Dr. Handler noted gas formation around the penile area. Upon incision, the tissue appeared inflamed, but not necrotic. Pus was drained and cultured. No blackened skin or necrotic tissue was visualized. Surgical pathology noted acute inflammation and necrosis 'suggestive of at least cellulitis.' ... Mr. Delia remained hospitalized and under the care of the wound service for weeks thereafter, requiring one more debridement on July 19, 2016." See Defendant Dr. Bruno's Affirmation in Support of Motion (Seq. No. 02) Exhibits N-Q.

Counsel for defendant Dr. Bruno asserts, in pertinent part, that, "[a]s noted in the plaintiff's (*sic*) Verified Bill of Particulars, ..., it alleges that Dr. Bruno was negligent on July 7, 2016. It is alleged that he was negligent in most relevant part 'in failing when MICHAEL DELIA presented on July 7, 2016 with complaints of bright red urine, pain and scrotal edema for 2 days... in failing to treat Plaintiff's condition of an infection, resulting in severe infection, septic shock, Fournier's gangrene, severe permanent injuries, as well as other conditions.' ... In May 2018, Plaintiff (*sic*) served a Supplemental Verified Bill of Particulars ... with more specific allegations of negligence, to wit 'failing to diagnose and treat Fournier Gangrene of the penis with necrotic dermis and underlying fascia diffusely infiltrated by neutrophils resulting in

painful ulcerations to buttocks with significant amount of deep tissue injuries; fragments of dense fibrinous connective tissue with focal necrosis and acute inflammation; E-coli, bacteroides, fragilis, streptococcus and actinomyces; bacteria revealed vancomycin resistant enterococcus Candida.’ ... Essentially, it is alleged that Dr. Bruno was negligent in failing to diagnose the onset of Fournier’s gangrene in the plaintiff Michael Delia when he examined him in his office on July 7, 2016. It is alleged that as a result of failing to make that diagnoses at that time, Mr. Delia either developed Fournier’s gangrene or that it was allowed to progress until it was diagnosed and treated on July 10, 2016 at Winthrop-University Hospital. Plaintiff evidently claims that had the diagnosis of Fournier’s been made on July 7, 2016 that Mr. Delia would have been treated sooner and the infection would have been prevented or stopped before it progressed to the point of needing surgical debridement. Plaintiff also claims that as a result of a claimed delay in diagnosis, the infection progressed to the point of him becoming septic and going into renal failure.” *See* Defendant Dr. Bruno’s Affirmation in Support of Motion (Seq. No. 02) Exhibits C and D.

In support of the motion (Seq. No. 02), defendant Dr. Bruno submits the transcript from his Examination Before Trial (“EBT”) testimony and the transcript from plaintiff Michael Delia’s EBT testimony. *See* Defendant Dr. Bruno’s Affirmation in Support of Motion (Seq. No. 02) Exhibits F, G and M.

Also in support of the motion (Seq. No. 02), defendant Dr. Bruno submits the affirmation of his medical expert, Scott David, M.D. (“Dr. David”). *See* Defendant Dr. Bruno’s Affirmation in Support of Motion (Seq. No. 02) Exhibit R. Counsel for defendant Dr. Bruno asserts, in pertinent part, that, “[i]n order to defend this case, counsel has had urology expert Dr. Scott David renew the matter on behalf of Dr. Bruno.... As set forth in the annexed

affirmation of urologist Dr. Scott David, Dr. Bruno did not depart from accepted standards of practice in his evaluation of Mr. Delia. According to Dr. David, Mr. Delia did not present to Dr. Bruno or Dr. Wieder on July 7, 2016 with signs or symptoms that would indicate that Fournier's gangrene or even cellulitis should have been part of Dr. Bruno's differential diagnosis. According to Dr. David, the first outward manifestations of Fournier's gangrene are discoloration of very red or black appearance; severe swelling and crepitus. While Mr. Delia may have presented to Dr. Bruno on July 7, 2016 with some scrotal edema, that was rationally explained by his recent discontinuance of furosemide, or diuretic water pill. Given that both Dr. Wieder and Dr. Bruno noted examinations of the plaintiff's scrotum and penis, it can be reliably concluded that there were no outward signs of skin infections such as erythema (redness), warmth or crepitus. There was no foul odor noted. Without any of these signs there was absolutely no departure from acceptable standards of care for Dr. Bruno not to have diagnosed an infection that would not be diagnosed in Mr. Delia until three days later. Dr. David also notes that Mr. Delia was referred on an emergent basis to Dr. Bruno by Dr. Wieder essentially to rule out kidney stones or bladder tumor as the cause of the gross hematuria Mr. Delia was experiencing. He did so with a cystoscopy and reasonably concluded that the scrotal edema was attributable to the recent discontinuance of Furosemide. Dr. Wieder also properly advised the patient to return and Dr. Wieder had also advised to report to an emergency room with any worsening symptoms. While Mr. Delia may have been experiencing a urinary tract infection at the time, it was being managed by Dr. Wieder who was performing the proper studies and prescribing antibiotics. Unfortunately, the results of the urine culture done on July 7, 2016 were not available until July 11, 2016, after Mr. Delia had already been admitted to the hospital. Without any outward signs of the upcoming infection or reported symptoms consistent

with a diagnosis of Fournier's gangrene, nor requiring of further workup, Dr. Bruno did not depart from good and accepted medical standards of care in his evaluation of Michael Delia. Based upon the facts and opinions set forth in the affirmation of Dr. Scott David on the issue of liability, the defense has established entitlement to judgment as a matter of law. Dr. David further explains that it is essentially not possible to diagnose Fournier's gangrene at an early enough stage to prevent its progress and then allow the patient to avoid debridement surgeries. Fournier's gangrene is a very serious, acute process that can develop and become fatal in a matter of hours. It has a 40% percent (*sic*) mortality rate. The treatment for it includes aggressive IV antibiotic treatment and surgery to remove affected tissue. Further, it begins subcutaneously, without outward signs that would allow an early diagnosis. As it was here, Fournier's gangrene is often confirmed with a CT scan that will reveal gas or air pockets developing due to a necrotic process. Once that process begins, surgical debridement is inevitable. Thus, the defendant has established the absence of any causal relationship between the malpractice claimed and the damages alleged. On that basis as well, summary judgment in favor of Dr. Bruno is warranted."

*See id.*

Also in support of the motion (Seq. No. 02), defendant Dr. Bruno submits the affirmation of Toby Handler, M.D. ("Dr. Handler"). *See* Defendant Dr. Bruno's Affirmation in Support of Motion (Seq. No. 02) Exhibit S. Counsel for defendant Dr. Bruno asserts, in pertinent part, that, "[t]he defense also submits for the Court's consideration the affirmation of Dr. Toby Handler, the urologic surgeon who performed that first debridement surgery on Michael Delia on July 10, 2016.... Dr. Handler was called to treat Mr. Delia after the results of the CT scan that (*sic*) were indicative of an infectious process. Upon her performance of the surgical incision, drainage and debridement, she found no visibly necrotic tissue. Pathologic review of the pus and tissue

samples showed some necrosis on a microscopic level, but not grossly. According to Dr. Handler, based on her observations and experience with treating Fournier's gangrene, she was called in rather early in this acute process. Based on her observations, she did not see any indication that the Fournier's would have been present in Mr. Delia for a matter of two to three days preceding his admission on July 10, 2016 and was therefore not evident or diagnosable on July 7, 2016 when Mr. Delia was in Dr. Bruno's office. Based on the information provided by Dr. Handler, there is no basis whatsoever for the plaintiff to claim that Dr. Bruno could have and should have diagnosed Fournier's gangrene on July 7, 2016 and that if he had, Mr. Delia would have had a better or different outcome. There are absolutely no damages plaintiff can attribute to their claim that Dr. Bruno could have and should have diagnosed Fournier's gangrene on July 7, 2016." *See id.*

In opposition to defendant Dr. Bruno's motion (Seq. No. 02), 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. WIEER 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. 02).

Counsel for plaintiffs argues, in pertinent part, that, "[t]he Defendant in this matter has not provided sufficient evidence to satisfy the burden which the proponent of a summary judgment motion must meet. The Affirmations of Defendant's experts do not establish *prima facie* entitlement to judgment as a matter of law as they have failed to demonstrate with evidence that Defendant DR. BRUNO acted within the acceptable standard of medical care. Moreover, the Affirmations of Defendant's experts must be carefully scrutinized as they focus solely on whether or not Plaintiff was suffering from Fournier's Gangrene on July 7, 2016. They fail to address the critical fact that if Defendant had properly treated Plaintiff MICHAEL DELIA on July 7, 2016, 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 Bill of Particulars.... Defendant's counsel attempts to support their claim that there are no triable issues of fact herein by stating that Plaintiff MICHAEL DELIA did not have Fournier's Gangrene on July 7, 2016. Defendant's counsel ignores the fact that Plaintiff presented to Defendant DR. BRUNO with symptoms of painful gross hematuria, flank pain and scrotal swelling which all may be signs of infection. They further ignore the fact that if Mr. DELIA's infection was diagnosed and treated on July 7, 2016, the Fournier's Gangrene that he presented with on July 10, 2016 may have been prevented and avoided.... Additionally, Defendant's counsel offers as relevant testimony statements by Defendant DR. BRUNO that he

diagnosed Plaintiff has having 'resolving cystitis'. However, that 'diagnosis' is nowhere in Defendant's office visit note.... Thus, this gratuitous statement cannot be considered relevant." See Plaintiff Michael Delia's Affirmation in Opposition to Motion (Seq. No. 02) Exhibit A; Defendant Dr. Bruno's Affirmation in Support of Motion (Seq. No. 02) Exhibits C, D and N.

Counsel for plaintiffs further contends, in pertinent part, that, "[d]efendant Bruno's expert, Dr. David Scott claims that Dr. Bruno acted within the accepted standard of medical care and that his actions or inaction were not the cause of Plaintiff MICHAEL DELIA's injuries. Dr. David opines that DR. BRUNO rendered good care to the Plaintiff.... Dr. David focuses on the scrotal edema only, and fails to address that Defendant DR. BRUNO never sought the cause of Plaintiff's bleeding or other complaints of pain, all of which began prior to Plaintiff discontinuing his diuretic. Shockingly, Defendant's attorneys submit the Affirmation of treating physician Dr. Toby Handler in support of Defendant Bruno's summary judgment motion, while conspicuously failing to disclose that her opinion is biased due to her financial connection to said Defendant as his partner in his urology practice at the time that she treated the Plaintiff. Due to said bias, her opinion is scarcely probative and a careful review of Defendant's expert Dr. Toby Handler's Affirmation demonstrates that she never opines that Defendant DR. BRUNO's treatment of the Plaintiff was within the accepted standard of medical care.... Moreover, her statements in her Affirmation that Plaintiff did not have Fournier's Gangrene are contradicted by the medical record. Specifically, her own practice's office notes list Fournier's Gangrene as the diagnosis.... Plaintiff's (*sic*) urological expert disputes virtually every allegation of Defendant's experts. He/she opines that there were multiple deviations by Defendant Dr. BRUNO including: failing to consult with Plaintiff MICHAEL DELIA's internist, Defendant ALAN WIEDER, M.D., on July 7, 2016 when Plaintiff presented to Defendant BRUNO at the Defendant

internist's recommendation; failing to perform a differential diagnosis based on Plaintiff MICHAEL DELIA's symptoms of painful gross hematuria, flank pain and scrotal swelling on July 7, 2016; failing to perform the correct diagnostic testing, including but not limited to, a urine culture and a sonogram, regarding Plaintiff MICHAEL DELIA's symptoms of painful gross hematuria, flank pain and scrotal swelling on July 7, 2016; failing to conform to accepted medical practice by performing a cystoscopy which is contraindicated in the presence of painful gross hematuria symptoms; failing to investigate infection as a cause of Plaintiff MICHAEL DELIA's symptoms including but not limited to painful gross hematuria, flank pain and scrotal swelling; failing to provide for adequate follow-up care for Plaintiff MICHAEL DELIA; failing to properly diagnose and treat Plaintiff MICHAEL DELIA's infection; and failing to properly diagnose and treat Plaintiff MICHAEL DELIA's symptoms on July 7, 2016. Plaintiff's (*sic*) expert Urologist further opines, in direct opposition to the statements made by Defendant's experts, that if DR. BRUNO had acted within the accepted standards of medical care and had investigated the cause of Plaintiff's symptoms, Mr. DELIA's infection would have been treated and it's more likely that not that he would not have developed Fournier's Gangrene." See Plaintiff Michael Delia's Affirmation in Opposition to Motion (Seq. No. 02) Exhibit A; Defendant Dr. Bruno's Affirmation in Support of Motion (Seq. No. 02) Exhibits N and R.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To

obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

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

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. See *Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. See *Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

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

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

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

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

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

Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical opinions. See *Romano v. Persky*, 117 A.D.3d 814, 985 N.Y.S.2d 633 (2d Dept. 2014); *Shehebar v. Boro Park Obstetrics & Gynecology, P.C.*, 106 A.D.3d 715, 964

N.Y.S.2d 239 (2d Dept. 2013); *Poter v. Adams*, 104 A.D.3d 925, 961 N.Y.S.2d 556 (2d Dept. 2013); *Hayden v. Gordon*, 91 A.D.3d 819, 937 N.Y.S.2d 299 (2d Dept. 2012); *Wexelbaum v. Jean*, 80 A.D.3d 756, 915 N.Y.S.2d 161 (2d Dept. 2011); *McKenzie v. Clarke*, 77 A.D.3d 637, 908 N.Y.S.2d 370 (2d Dept. 2010); *Roca v. Perel*, 51 A.D.3d 757, 859 N.Y.S.2d 203 (2d Dept. 2008); *Graham v. Mitchell*, 37 A.D.3d 408, 829 N.Y.S.2d 628 (2d Dept. 2007); *Feinberg v. Feit*, 23 A.D.3d 517, 806 N.Y.S.2d 661 (2d Dept. 2005). "Such conflicting expert opinions will raise credibility issues which can only be resolved by a jury." *DiGeronimo v. Fuchs*, 101 A.D.3d 933, 957 N.Y.S.2d 167 (2d Dept. 2012).

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

Therefore, based upon the above, defendant Dr. Bruno's motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint as against him, is hereby **DENIED**.

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

This constitutes the Decision and Order of this Court.

ENTER:

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

**ENTERED**

**Feb 16 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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Dated: Mineola, New York  
February 8, 2021