SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JAMES DAVIS,

Plaintiff,

- against -

EVAN KRAKOVITZ, ARPAN GOEL, ERIC FISHMAN, RICHARD SCHUTZER, SERENA MAK, KONSTANTIN MILLERMAN, FRANTZ TORCHON, EVA RUBIN, MISBAHUDDIN KHAJA, ROBIN GOLDBERG, DEBRA SPICEHANDLER, JONATHAN FINEGOLD, JAMES EHRLICH, MARK PERALTA, KAROLINA WEISS, NANCY CHUNG, MARCIN KARCZ SHIRANDA RHODEN, BRONXVILLE CARDIOLOGY, ASSOCIATES, P.C., DOCTORS UNITED, INC., WESTCHESTER MEDICAL GROUP, P.C. d/b/a WESTMED, LAWRENCE MEDICAL ASSOCIATES, P.C. a/k/a NEW YORK-PRESBYTERIAN MEDICAL GROUP/ WESTCHESTER, COLUMBIA UNIVERSITY MEDICAL CENTER d/b/a COLUMBIA DOCTORS, NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM, INC., and NEW YORK-PRESBYTERIAN/LAWRENCE HOSPITAL, a/k/a LAWRENCE HOSPITAL CENTER,

Defendants.

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Index No.: 64768/2017

DECISION and ORDER
Defendant Debra Spicehandler
Mtn. for Summary Judgment

Seq. No. 2

Hubert, JSC

Before the Court is the motion of the Defendant Debra Spicehandler, M.D. (the Defendant or Defendant Doctor) seeking an order from the Court pursuant to CPLR § 3212 granting summary judgment against the Plaintiff James Davis and dismissing in its entirety the Plaintiff's action alleging medical malpractice against the Defendant. The Court has reviewed the submissions of the parties, as posted under NYSCEF Index No. 64768/2017, filed in support of and in opposition to the motion of the Defendant. Upon due consideration it is the decision of the Court that the Defendant's motion be granted.

As stated in the Affirmation of the Defendant's attorney in support of the motion, the Plaintiff's action alleging medical malpractice arises from a laparoscopic appendectomy performed by colorectal surgeons at Lawrence Hospital (the Hospital) on April 28, 2017, and from the post operative treatment of the Plaintiff given between April 28, 2017 and May 7, 2017 by the Critical Care Unit (CCU or ICU) in conjunction with the Defendant.

The CCU/ICU, post operatively, was tasked with overseeing the Plaintiff's recovery from the surgery and administering treatment. During the surgery on April 28 2017, a laceration of Plaintiff's mesenteric artery occurred, creating significant internal bleeding that required emergency intervention by a board certified vascular surgeon (VS), Dr. Eric Fishman, who was an on call respondent to the Hospital.

Along with additional help from a second vascular surgeon, Dr. Richard Schutzer, the two VS doctors were able to stop the bleeding. They then performed full inspection of the abdomen and determined that all bleeding had been controlled, i.e., "Hemostasis [was] achieved." The surgery having concluded, the Plaintiff was then transferred to the Intensive Care Unit (ICU or CCU) for recovery. The Plaintiff was intubated and was evaluated as being in a critical, but stable, condition. See, Operative Report, Exhibit M, p. 424 and p. 432.

Five days later, on May 6, 2017, the Defendant Doctor Spicehandler was called into CCU to fill in for Dr. Robin Goldberg, the attending CCU infectious disease doctor (IDD). According to the Plaintiff's Attorney Affirmation (¶ 36), Dr. Krakovitz (the colo-rectal surgeon) visited the Plaintiff on that date and saw an elevated white blood cell count, but could not identify the source of the leukocytosis. Dr. Krakovitz thus requested IDD consultation and upon the request Dr. Spicehandler complied.

Like Dr. Goldberg, Dr. Spicehandler was an IDD, and, as a treatment consultant (albeit self employed) she could continue IDD treatment and evaluation of the Plaintiff in Dr. Goldberg's absence (see Defendant EBT at pp. 10-11). In addition to the May 6, 2017 date, Dr. Spicehandler also covered for Dr. Goldberg on the following day, May 7 2017.

Accordingly, on May 6, 2017, the Defendant Doctor went to the Hospital ICU to see the Plaintiff. The Plaintiff was post operative and was being treated with antibiotics. The progress reports showed that he had white blood cell count elevation. Dr. Spicehandler was aware that the elevation could be a sign of the presence of sepsis. The Defendant also viewed the Plaintiff's last CAT scan which was taken on May 4, 2017. Defendant EBT at pp. 32-34.

The Defendant Doctor further noted the presence of liver enzymes and elevated pancreatic enzymes. She was further concerned about pancreatitis, gallbladder involvement and organ failure from elevated septic shock affecting the liver. Accordingly, Dr. Spicehandler broadened the Plaintiff's antibiotic coverage so that anaerobic bacterial and fungal infections would be treated. The presence of ischemic bowel, however, was not indicated in the progress reports. Defendant EBT at pp. 36-38.

Dr. Spicehandler returned to the Hospital the following day, May 7, 2017, to again see the Plaintiff. She noted that the Plaintiff's white blood cell count was now lower. However, the Plaintiff had a temperature increase. Nevertheless, the Plaintiff had previously been scheduled for transfer to a tertiary care center. Accordingly, late in the afternoon, Plaintiff was transferred to New York Presbyterian-Columbia University Hospital (NYPCU). Defendant Attorney Affirmation at ¶. 39. The Plaintiff having been transferred to NYPCU, the Defendant Doctor was not further called to monitor and treat the Plaintiff. Defendant EBT, p. 51.

The Plaintiff's Attorney Affirmation in opposition to the motion of the Defendant lists no fewer than fourteen doctors as defendants, including Dr. Spicehandler.[1] All are alleged to have committed "departure[s] from the standard of care" at some point. However, the Plaintiff's Attorney Affirmation in opposition to the Defndant's motion seems to support the Defendant's claim of no departure by agreeing that ". . . that Dr. Spicehandler acted within the standard of care when she ordered antibiotics for [Plaintiff] on May 6, 2017 [the first time she met with the Plaintiff in ICU] . . .", and that " it was within the standard of care when she ordered antibiotics for a patient [the Plaintiff] with leukocytosis." Plaintiff's Attorney Affirmation at ¶ 120. Nevertheless, in spite of the acceptance in the Plaintiff's Attorney Affirmation of the Defendant's order of antibiotics, and his agreement as to the treatment care given to Plaintiff by the Defendant Doctor on May 6, 2017 (the first time she saw, monitored and treated the Plaintiff), the Plaintiff's Attorney Affirmation still draws the conclusion that the Defendant wrongly used her judgment and wrongly relied upon her expertise as an IDD which was ". . . a direct and proximate cause of Mr. Davis' injury." Affirmation, supra, at ¶ 120.

This is an odd conclusion given the Affirmation's full admission of the Plaintiff's need of expansive antibiotic treatment resulting from the Plaintiff's symptoms. It is also an odd conclusion by the Plaintiff's Attorney (highlighted in the Affirmation) that in spite of the fact that the Defendant Dr. Spicehandler made note to radiology on May 6, 2017 for repeat of a CT scan

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[1] In the Plaintiff's affirmation, these physicians are of various specialties who attended the Plaintiff at various times. They are also the subject of the Plaintiff's experts' conclusions alleging departures from the standard of care by all who came into treatment contact with the Plaintiff. This includes Lawrence Hospital as the Hospital entity. As already set forth by the Court herein, the Plaintiff's focus on the Defendant Dr. Spicehandler is very narrow, committed almost entirely to questions of differential diagnosis which is not well analyzed.

of Plaintiff's abdomen, the Plaintiff's Attorney Affirmation nevertheless concluded there was a departure outside of the standard of care by the Defendant.

As previously stated, the Plaintiff was transferred to NYPCU on the following day, May 7, 2017, which thereby concluded Dr. Spicehandler's treatment and monitoring of the Plaintiff.

NYPCU did, however, review the May 4, 2017 CT scan and concluded there was "concerning for mesenteric ischemia." NYPCU responded to their concern by conducting an abdominal CT Angiogram on May 8, 2017. Plaintiff's Attorney Affirmation at ¶¶ 40-41. Thus none of the actions (or inactions) by Defendant Dr. Spicehandler were ultimately departures from standard of care. First, Dr. Spicehandler had no interaction with the Plaintiff prior to May 6, 2017; a full eight (8) days after Plaintiff's surgery and assignment to ICU. She was neither radiologist nor surgeon and was not asked to act as such. As stated before, her area of practice was infectious diseases (IDD). She consulted, when so asked, with the patient physicians as well as with the patients themselves because the health issue fell into the category of illnesses familiar to the Defendant Doctor. Dr. Spicehandler's approach, in the present case (and when consulting), was to review the most recent charts of the Plaintiff by the ICU attendings, the treating physicians and the supervisor. Defendant EBT at pp. 16-18.

Dr. Spicehandler, in her EBT, spoke of her duties as an IDD when called to consult. She had, for example, authority to order blood cultures. As in the instant case, she would typically be called to see a patient undergoing treatment and recovery in the ICU. The Defendant's patient monitoring included white blood cell counts, patient fever, and presence of positive infection cultures. Antibiotic treatment, choices, and utilization often times required Dr. Spicehandler's approval on their use. Where patient examination yielded a need for testing, she would discuss

and suggest the testing be done. Defendant EBT at pp. 19-23.

Summary judgment is generally not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions, since conflicting expert opinions (usually) raise credibility issues which can only be resolved by the jury or fact finder. *Pinnock v. Mercy Med. Ctr*, 180 A.D.3d 1088, 1090, 119 N.Y.S.3d 559 (2d Dep't 2020); *Feinberg v. Felt*, 23 A.D.3d 517, 519, 806 N.Y.S.2d 661 (2d Dep't 2005). However, "expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact." *Wagner v. Parker*, 172 A.D.3d 954, 955, 100 N.Y.S.3d 280 (2d Dep't 2019); *also see, Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002)("[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, ... [his or her] opinion should be given no probative force and is insufficient to withstand summary judgment"). "In order not to be considered speculative or conclusory, expert opinions in opposition should address specific assertions made by the movant's experts, setting forth an explanation of the reasoning and relying on 'specifically cited evidence in the record' " (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2017], quoting *Roca v Perel*, 51 AD3d 757, 759 [2008]). "An expert opinion that is contradicted by the record cannot defeat summary judgment" (*Bartolacci-Meir v Sassoon*, 149 AD3d 567, 572 [2017]). *Lowe v. Japal*, 170 A.D.3d 701, 702–03, 95 N.Y.S.3d 363 (2019). Expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact (see *Bowe v Brooklyn United Methodist Church Home*, 150 AD3d 1067, 1068 [2017]; *Kerrins v South Nassau Communities Hosp.*, 148 AD3d 795, 796 [2017]; *703 *Spiegel v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 149 AD3d 1127, 1128 [2017]). These are the issues on the motion before this Court.

There are three unnamed experts retained by the Plaintiff in support of their respective conclusions as to the question of departure from standard of care by the Defendant Dr. Spicehandler. As previously set forth by the Court herein, the experts' focus on the Defendant Dr. Spicehandler is very narrow. They raise questions limited to conclusions of a lack of differential diagnosis. The lack of a factual basis is not well set forth or analyzed and does not support their conclusions.

The first unnamed "Critical Care Specialist" (CCS) expert is presented as "board certified in Internal Medicine . . . and pulmonary disease." A Pulmonologist commonly treats asthma, chronic obstructive lung disease (COPD), emphysema, lung cancer,complex lung and pleural infections such as tuberculosis, pulmonary hypertension and cystic fibrosis diseases. An Internist generally see patients with conditions such as heart disease, hypertension, diabetes, and chronic lung disease. However none of these illnesses and conditions are part of the instant cause of action filed by the Plaintiff.

As stated earlier, herein, the Plaintiff's action alleging medical malpractice arises from a laparoscopic appendectomy performed by a colo-rectal surgeon at Lawrence Hospital (the Hospital) on April 28, 2017. A laceration of Plaintiff's mesenteric artery occurred during the appendectomy which created significant internal bleeding that required emergency intervention by a board certified vascular surgeon to stop the bleeding. The bleeding was stopped. Thus, the Plaintiff's action arises exclusively from the post operative treatment of the Plaintiff given between April 28, 2017 and May 7, 2017 by the Critical Care Unit (CCU or ICU) alleging causation of injury by lack of differential diagnosis that could have discovered the Plaintiff's bowel ischemia.

While claiming familiarity with ICU attending physicians and various post-operative complications addressing suspected bowel ischemia, the source of the CCS expert's familiarity is nowhere set forth other than in general conclusions. For example: "I am . . . familiar with various treatments available to address suspected bowel ischemia." CCS Expert'a Affirmation at ¶¶ 2-3. The available treatments referenced were neither addressed nor diclosed.

The Second Department, in the medical malpractice case of *Galluccio v. Grossman*, overturned the lower court's denial of the defendant Island Medical's motion for summary judgment citing that where the board-certified expert in internal medicine and infectious disease retained by the plaintiff does not indicate in the affirmation that she (or he) had training in emergency medicine, or did not familiarize herself with the standard of care for this specialty, the affirmation lacks probative value. *Galluccio v. Grossman*, 161 A.D.3d 1040,1052, 78 N.Y.S.3d (2d Dep't 2018); *see*, *also*, *Mustello v. Berg*, 44 A.D. 3d 1018, 1019, 845 N.Y.S.2d 86 (2d Dep't 2007)(affidavit of the plaintiff's expert did not mention whether he had any specific training or expertise in gastroenterology and did not indicate that he had familiarized himself with the relevant literature or set forth how he became familiar with the applicable standards of care). *Id.*

As with the Plaintiff's Attorney Affirmation in opposition to the motion of the Defendant, the CCS Expert's Affirmation also has no fewer than fourteen defendant doctors (including Dr. Spicehandler) listed as having deviated from standards of care and thereby causing injury. And, as with the Plaintiff's Attorney Affirmation, Dr. Spicehandler is accusingly mentioned only once in the entire CCS expert's Affirmation (see ¶42). What then is offered as accusation? The CCS expert lends the following:

Dr. Spicehandler's expert, Dr. Sandford Goldberg, a gasttroenterologist, states that

> Dr. Spicehandler acted within the standard of care when she ordered antibiotics for Mr. Davis on May 6, 2017. On it's face, I do not disagree with that entire statement. It is within the standard of care for Dr. Spicehandler to order antibiotics for a patient with leukocytosis. . . . [But] considering the fact that Mr. Davis had previously been on broad spectrum antibiotics and his leukocytosis was persistent, it should have allerted her that antibiotics were not the answer. . . . Dr. Spicehandler departed from the standard of care in this case by failing to consider bowel ischemia . . . . CCS Affirmation: at ¶42.

In other words, the CCS expert is suggesting that the Defendant Docter, while acting within the standard of care, should not have ordered antibiotics for treatment of the Plaintiff suffering from leukocytosis. She should have considered bowel ischemia. But if leukocytosis was evidence of bowel ischemia, as opined by the Plaintiff's unnamed GVS (General Vascular Surgeon) expert, how could the Defendant Doctor have failed or "departed from care standards" by treating it as stated above?

Like the issue in the Second Department medical malpractice case of *Leigh v. Kyle*, the Plaintiff's experts herein opine that "the standard of care for every provider engaged in diagnosing and treating the [injured paintiff] . . . absolutely required a complete investigation of the [presence of bowel ischemia] and that failure to ensure that the injured plaintiff's [bowels] were evaluated constituted a departure from the applicable standard of care." *Leigh v. Kyle*, 143 A.D.3d 779, 782, 39 N.Y.S.3d 45 (2d Dep't 2016).[2]

But the result as in *Leigh v. Kyle* was the same as here. As stated by the Second Department, "[c]ontrary to the assertion of the plaintiffs' expert, the . . . examination by [the defendant], without more, did not create a further duty on [her] part to supervise or participate in

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[2] *Sphenoid sinuses* and their content, as opposed to *bowel eschemia*, was the disputed health condition at issue in *Leigh v. Kyle , supra*. However the Court, herein, replaced the former term with the later term to avoid confusion.

other aspects of plaintiff's care . . . [and Plaintiff] failed to adduce any evidence that [defendant] assumed a general duty of care." *Supra,* at 783.

The unpublished May 4th CT scan , published to Dr. Spicehandler on May 6, 2017, and to NYPCU on May8th, showed "something of interest and concern." Thus on May 6, 2017, the day before Plaintiff was to be transferred to NYPCU, Dr. Spicehandler made a request by note to radiology for repeat of a CT scan of the Plaintiff's abdomen.

A CT scan was not done by Lawrence Hospital, but was done by NYPCU on May 8, 2017. They conducted an abdominal CT Angiogram on that date. The CCS expert, nevertheless concluded this was a departure outside of the standard of care by the Defendant Spicehandler.

In the Court's view, the CCS expert's conclusions are not conclusions based on the facts. They are conclusions reached after the facts. They are conclusions without support.

The CCS expert apparently neglected to review the EBT of the Defendant Dr. Spicehandler and (perhaps) accidentally missed critical evidence previously set forth herein, to wit as follows:

> The progress reports showed that he [plaintiff] had white blood cell count elevation. Dr. Spicehandler was aware that the elevation could be a sign of the presence of sepsis. The Defendant also viewed the Plaintiff's last CAT scan which was taken on May 4, 2017. . . . [On May 6, 2017,] the Defendant Doctor [Spicehandler] further noted the presence of liver enzymes and elevated pancreatic enzymes. She was further concerned about pancreatitis, gallbladder involvement and organ failure from elevated septic shock affecting the liver. ***Accordingly, Dr. Spicehandler broadened the Plaintiff's antibiotic coverage so that anaerobic bacterial and fungal infections would be treated*** (emphasis added). ***The presence of ischemic bowel, however, was not indicated in progress reports*** (emphasis added). Dr. Spicehandler returned to the Hospital the following day, May 7, 2017, to again see the Plaintiff. She noted that the Plaintiff's white blood cell count was now lower. However, the Plaintiff had a temperature increase. Defendant EBT at pp. 36-38.

Broadened antibiotic coverage was needed by the Plaintiff as of the Defendant Doctor's

first visit with him on May 6, 2017. Her expertise and consultive purpose on May 6, and 7, 2017 was to see that treatment be executed in accord with her training, experience, and the recent charts of the Plaintiff in order to assist in monitoring the Plaintiff by making sure that treatment of the plaintiff's symptoms were consistent with his needs. This is entirely within the standard of care required and met by the Defendant.

The second unnamed expert, retained by the Plaintiff in support of the respective conclusions as to the question of departure from standard of care, is a radiologist. The submitted affirmation is claimed to be in opposition to the Defendant Dr, Spicehandler's motion for summary judgment. Plaintiff's Radiologist expert Affirmation at ¶ 4. The expert's stated opinion is that six defendants (including Dr. Spicehandler) ". . . all departed from the standard of care in their treatment of Mr. Davis. . . . and that these departures were direct and proximate cause of Plaintiff's injuries." Plaintiff's Radiologist expert Affirmation at ¶¶ 7, 17 and 18. Of the six Defendants, including Dr. Spicehandler, all are accused of departure from standard of care as a result of the release of a CT report on May 6, 2017. In as much as that date was the first time the Plaintiff was seen by Dr. Spicehandler, after being called to Lawrence Hospital for consultive purposes as an IDD, she was engaged by the hospital to evaluate the Plaintiff's post operative condition, monitor same, and treat in accordance with the known symptoms.

Nevertheless, upon publication of the May 4, 2017 CT study, sent to Defendant on May 6, 2017, Dr. Spicehandler reached out to radiology on May 6, 2017 noting for them to repeat the CT scan of Plaintiff's abdomen. As stated before, the repeat, however, was not performed by the Hospital. As perviously stated, the Plaintiff was transfered to NYPCU on May 7, 2017. NYPCU reviewed the May 4, 2017 CT scan and concluded there was "concerning for mesenteric

ischemia." NYPCU responded to their concern by conducting an angiogram on May 8, 2017.

The Third unnamed expert retained by the Plaintiff is a General Vascular Surgeon (GVS) who has submitted an affirmation in opposition to the Defendant Dr. Spicehandler's motion for summary judgment. Interestingly enough, the unnamed GVS admits that leukocytosis is a sign and symptom of bowel ischemia and Plaintiff exhibited this symptom ". . . during his admission to the Lawrence Hospital ICU." GVS affirmation at ¶¶ 15-17.

Since all of these experts (GVS, Radiologist, and CCS) agree (or take no position) that Dr. Spicehandler, an infectious disease doctor (IDD), acted within the standard of care when she ordered antibiotics for a patient (Plaintiff Mr. Davis) with leukocytosis on May 6, 2017, what facts are presented by the Plaintiff's experts that support their claims of a departure from standard of care by Dr. Spicehandler?

As stated previously, at the request of the CCU attendings at Lawrence Hospital Dr. Spicehandler responded on May 6, 2017 to monitor and treat the Plaiintiff. Dr. Spicehandler responded for a second time on May 7, 2017 (the date of Plaintiff's transfer to NYPCU) to monitor and render further medical treatment. She treated the Plaintiff in accord with his symptoms and charts. The Plaintiff's experts cannot properly assert that Dr. Spicehandler, on the one hand, was acting within the standard of care by administering antibiotics, and at the same time claim the Defendant was not acting within the standard of care. GVS affirmation at ¶¶ 46-47. As previously stated, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact. *Wagner v. Parker, supra* at 955. It is the conclusion of the Court that triable issues of fact have not been raised in the instant matter. Accordingly, it is hereby

ORDERED, that so much of the motion by the Defendant Dr. Debra Spicehandler, M.D, seeking summary judgment against the Plaintiff James Davis, is granted and the Plaintiff's complaint against the Defendant Dr. Debra Spicehandler is hereby dismissed.

The forgoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 24, 2021

Hon. James W. Hubert, J.S.C.