To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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YERASIMOS MAZARAKIS and KELLY MAZARAKIS,

Plaintiffs,

-against-

CAREMOUNT MEDICAL, P.C., DANA L. MURPHY, M.D., JEFFREY S. POWELL, M.D. and BENJAMIN A. SPENCER, M.D.,

Defendants.

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Index No. 68955/2018

DECISION AND ORDER

Motion Sequence No. 3

RUDERMAN, J.

The following papers were read on a motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in favor of all defendants:

Papers	Numbered
Notice of Motion, Defendants' Statement of Material Facts, Affirmation in Support, Exhibits A-R	NYSCEF Docs. 77-97
Plaintiffs' Statement of Material Facts, Affidavit, Affirmations in Opposition, Exhibit 1	NYSCEF Docs. 98-102
Reply Affirmation, Exhibits A-B	NYSCEF Docs. 103-105

Plaintiffs commenced the present medical malpractice action seeking money damages for defendants' alleged failure to, inter alia, order PSA testing for plaintiff Yerasimos Mazarakis (hereinafter "plaintiff"), ensure that the PSA testing was performed, and diagnose plaintiff's prostate cancer. Plaintiffs also assert a derivative claim on behalf of plaintiff Kelly Mazarakis, Yerasimos Mazarakis' wife.

It is uncontroverted that plaintiff was diagnosed with prostate cancer based on the results

of a Prostate-Specific Antigen ("PSA") test ordered on February 21, 2018, by defendant Dana L. Murphy, M.D., and Dr. Murphy referred plaintiff to defendant Benjamin A. Spencer, M.D., a urologist. Plaintiff was previously seen by Dr. Spencer on September 17, 2015, after a referral by Dr. Murphy, for a consultation with respect to testicular pain. Plaintiff also previously treated with non-defendant Dr. Weinberg, a urologist, who ordered PSA testing, with the last PSA test on March 16, 2012. Plaintiff was also treated by defendant Jeffrey S. Powell, M.D., an endocrinologist, for his diabetes. All defendant-physicians were employees of defendant Caremount Medical, P.C.

Plaintiffs allege in their bills of particulars and amended bills of particulars that defendants were negligent as follows: failed to take proper medical history; failed to order PSA testing; failed to confirm PSA testing took place; failed to timely diagnose plaintiff's prostate cancer as the result of alleged failures to order PSA testing; failed to confer with other physicians and to report to other physicians treating plaintiff and arrange for coordination of care; failed to follow up with plaintiff and other Caremount physicians to confirm that PSA testing was conducted; failed to advise plaintiff to have PSA testing; failed to consider plaintiff's medical history and family history in treating him in regard to the potential prostate cancer and screening; failed to conduct rectal examinations; advised plaintiff that rectal examinations showed no prostate cancer issues; failure to consider and follow guidelines for prostate cancer screening by PSA testing; failed to advise plaintiff that a normal or negative rectal examination did not rule out prostate cancer or the need for PSA testing; and failed to order periodic PSA testing and follow up to make sure that the PSA testing had been performed. Plaintiffs further allege that defendants were negligent by failing to maintain systems and keep and record proper medical records, including PSA testing, in a manner such that (1) all prescribing and treating

physicians were advised and made aware of all orders for testing and whether such testing, including PSA testing, had taken place, and the results of the testing, and (2) there would be follow up with patients to report test results and ask patients why testing that had been ordered had not been performed, and advise patients that such testing should be performed.

In order for a plaintiff to prevail on a cause of action for medical malpractice, the plaintiff must prove that the defendant deviated or departed from accepted standards of medical care, and that such departure was a proximate cause of the plaintiff's injuries (*see Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; *see Rebozo v Wilen*, 41 AD3d 437 [2d Dept 2007]).

Defendants now seek summary judgment in their favor dismissing plaintiffs' complaint in its entirety. Defendants contend that they complied with the good and accepted standards of medical practice, or did not have a duty with regard to screening and following Mr. Mazarakis for prostate cancer.

To be entitled to summary judgment, the moving defendant must make a prima facie showing of entitlement to judgment as a matter of law by "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In a medical malpractice action, to establish entitlement to summary judgment the moving defendant must submit competent evidence refuting plaintiff's contention in the pleadings and bill of particulars of a departure from good and accepted medical practice, or that plaintiff was not injured by any departure (*see Gross v Friedman*, 73 NY2d 721, 722-723 [1988]; *Stukas*, 83 AD3d at 24; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902 [2d Dept 2012]; *Swezey v Montague Rehab & Pain Mgt., P.C.*, 59AD3d 431, 433 [2d Dept 2009]). A defendant's burden in a medical malpractice action is met only where the defendant addresses and rebuts any specific allegations of malpractice set forth in the plaintiff's bill of particulars

(*see Seiden v Sonstein*, 127 AD3d 1158, 1160 [2d Dept 2015]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1044 [2d Dept 2016]). The "failure to make such a prima facie showing of entitlement to summary judgment requires denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez*, 68 NY2d at 324).

Upon a prima facie showing by the defendant to entitlement to summary judgment as to the cause of action, the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting evidentiary facts or materials, such as "an expert's affidavit attesting to a departure from accepted practice and containing an opinion that the defendant's acts or omissions were a competent producing cause of the injury" (*Johnson v Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 526 [2d Dept 2005]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Martin v Siegenfeld*, 70 AD2d 786 [2d Dept 2010]; *Bustamonte v Koval*, 98 AD2d 739 [2d Dept 1983]). Plaintiff is only required to "raise a triable issue of fact with respect to the element of the cause of action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Stukas*, 83 AD3d at 24-25; *see Gillespie*, 96 AD3d at 902). Conclusory opinions of the plaintiff's expert or opinions of the plaintiff's expert that are unsupported by the record are insufficient to defeat defendant physician's summary judgment motion (*Gillespie*, 96 AD3d at 902; *Deutsch v Chaglassian*, 71 AD3d 718, 719 [2d Dept 2010]).

Where the parties have submitted conflicting expert reports as to whether defendant deviated from the accepted standards of medical practice or whether such deviation was a proximate injury of plaintiff's injury, summary judgment should not be granted since "[s]uch credibility issues can only be resolved by a jury" (*Deutsch*, 71 AD3d at 719; *Barrocales v New York Methodist Hosp.*, 122 AD3d 648, 649 [2d Dept 2014]). However, "[t]he existence of a duty is a question of law to be determined by the court" (*Markley v Albany Med. Ctr. Hosp.*, 163

AD2d 639 [3d Dept 1990]; *see Eiseman v State of New York*, 70 NY2d 175 [1987]). "Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied upon by the patient" (*Markley* at 640; *see Leigh v Kyle* 143 AD3d 779, 782 [2d Dept 2016] [single examination by defendant as consulting neurosurgeon, which did not indicate neurosurgical intervention was necessary, did not create a further duty on defendant's part to supervise or participate in other aspects of plaintiff's care]).

Summary Judgment as to Dr. Powell

The moving papers demonstrate entitlement to summary judgment dismissing the complaint insofar as asserted against Dr. Powell. A review of the submissions establishes that Dr. Powell, an endocrinologist treating plaintiff for diabetes, had no duty to, inter alia, follow or monitor plaintiff's prostate screening, confer with plaintiff's other treating physicians as to the foregoing, conduct a rectal examination or advise plaintiff as to whether rectal examinations could detect prostate cancer (*see Markley*, 163 AD2d 639). Dr. Loren Wissner Greene, defendants' endocrinology expert, asserts that an endocrinologist specializes in treating disorders of the endocrine system by the management of deficiency or excess hormones secreted by the endocrine system, including diabetes. Plaintiff neither contradicts the foregoing, nor does he contend or establish that Dr. Powell undertook to follow or manage prostate screenings, to perform rectal examinations, or to provide plaintiff with information regarding prostate cancer screening or the relevance of rectal examinations.

Plaintiffs' conclusory contentions that summary judgment is not warranted as a factual analysis establishes that "a duty" was owed by each defendant, or at least issues of fact exist requiring a determination of the "'duty' issue," is insufficient to defeat that branch of

defendants' motion for summary judgment with respect to Dr. Powell. Moreover, plaintiffs failed to lay a sufficient foundation for the opinion of Edmund Mandal, M.D., plaintiff's expert who is board certified in urology, as to the duty of Dr. Powell (*Glazer v Choong-Hee Lee*, 51 AD3d 970, 971 [2d Dept 2008], *lv dismissed in part, denied in part* 11 NY3d 781 [2008]; *Mustello v Berg*, 44 AD3d 1018, 1019 [2d Dept 2007]; *lv denied* 10 NY3d 711 [2008]). Where the plaintiff fails to lay a foundation tending to support the reliability of opinions of their expert rendered outside the expert's fields of expertise, the affirmation is insufficient to raise an issue of fact (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017]).

Accordingly, defendants' motion for summary judgment dismissing plaintiffs' complaint is granted insofar as it is asserted against Dr. Powell.

Summary Judgment as to Dr. Spencer

With respect to the claims asserted against Dr. Spencer, defendants assert that since plaintiff was referred to Dr. Spencer only for an evaluation as to testicular pain, his duty to plaintiff was limited. Defendants rely upon the affirmation of Dr. William C. Huang, their urological expert, who opines that since plaintiff was referred to Dr. Spencer on September 17, 2015 for an evaluation as to testicular pain, Dr. Spencer had no duty to order PSA testing, to follow up on tests ordered by other physicians, to ensure plaintiff went for tests ordered by other physicians, or to counsel plaintiff concerning screening and evaluation for prostate cancer, nor did he have a duty to perform clinical evaluations and/or examinations for prostate cancer. Dr. Huang bases his opinion upon his assertion that testicular pain is not a symptom of prostate cancer, and there was nothing in plaintiff's history, as told to Dr. Spencer, or in the physical examination, which would warrant Dr. Spencer sending plaintiff for PSA testing or scheduling a

follow up examination.

Dr. Huang also asserts that Dr. Spencer did not deviate from the standard of care in his treatment of plaintiff. Dr. Huang states that, on September 17, 2015, Dr. Spencer took an appropriate history for evaluation of testicular pain, performed an appropriate genitourinary examination, and appropriately concluded the examination was consistent with a normal prostate examination for someone of plaintiff's age. Dr. Huang further opines that Dr. Spencer appropriately concluded that plaintiff's pain was musculoskeletal, and not urologic, in light of its chronic, intermittent and mild nature, and because the pain was relieved by repositioning. Finally, Dr. Huang opines that Dr. Spencer's treatment of plaintiff on February 28, 2018, which included ordering a repeat PSA and advising plaintiff to repeat PSA testing in six weeks, did not deviate from the standard of care.

In opposition, however, plaintiffs rely upon the affirmation of their urological expert, Dr. Mandal, who opines that PSA testing was necessary in 2015, since the chronic, mild and intermittent pain described by plaintiff was consistent with metastatic prostate cancer, which may be relieved by repositioning. Based upon the foregoing, Dr. Mandal opines that Dr. Spencer had a duty to check plaintiff's medical records for PSA testing, and the failure to check the medical records, inquire as to plaintiff's last PSA testing and the results of the test was a deviation from the accepted standard of care since no PSA tests were in plaintiff's Caremount medical record. Further, Dr. Mandal opines that, in view of plaintiff's complaints and his history, Dr. Spencer deviated from the accepted standard of care on September 17, 2015 by failing to conduct a full urologic workup to rule out prostate cancer, including PSA testing and a rectal examination.

In view of the conflicting opinions of the parties' experts as to whether testicular pain

could be a symptom of prostate cancer, defendants are not entitled to summary judgment dismissing the complaint insofar as alleged against Dr. Powell on the basis that he did not have a duty to, inter alia, conduct an examination or order screening tests for prostate cancer, including PSA testing. Moreover, although defendants demonstrated entitlement to summary judgment as to Dr. Powell on the basis that his treatment of plaintiff did not deviate from the standard of care, the contrary opinion of plaintiffs' urological expert was sufficient to raise a triable issue of fact.

Therefore, defendants are not entitled to summary judgment dismissing the complaint insofar as asserted against Dr. Spencer.

Summary Judgment as to Dr. Murphy

Defendants failed to established their prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against Dr. Murphy, because they failed to submit competent evidence refuting all of plaintiffs' specific contentions in the bill of particulars and amended bills of particulars as to Dr. Murphy. Although defendants made a prima facie showing, through the opinion of their internal medicine expert, Charles L. Bardes, M.D., that Dr. Murphy did not deviate from the standard of care by failing to order PSA testing during plaintiff's sick visits from 2011 through 2013, or during plaintiff's routine physicals on October 16, 2014 and February 20, 2017, defendants did not submit evidence refuting plaintiffs' other allegations. Notably, Dr. Bardes failed to address or refute plaintiffs' allegations that: Dr. Murphy advised plaintiff that rectal examination showed no prostate cancer issues, that Dr. Murphy failed to conduct rectal examinations, and that Dr. Murphy failed to advise plaintiff that normal or negative rectal examination did not rule out prostate cancer or the need for PSA testing.

Accordingly, defendants are not entitled to summary judgment dismissing the complaint insofar as asserted against Dr. Murphy.

Summary Judgment Against Caremount Medical, P.C.

In view of this Court's determinations that defendants are not entitled to summary judgment as to two of the individual defendants and the fact that defendants did not address plaintiffs' allegation with respect to the failure to maintain systems and keep proper medical records, defendants did not establish prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against Caremount Medical, P.C.

The parties' remaining contentions are either without merit or need not be reached in view of the foregoing.

In view of the foregoing, it is

ORDERED that defendants' motion for summary judgment in their favor and dismissing the complaint is granted only with respect to Dr. Powell, and plaintiff's complaint is dismissed only insofar as it is asserted against Dr. Powell; and it is further

ORDERED that the matter is referred to the Settlement Conference Part for a settlement conference at a date and time to be scheduled by that Part.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 17, 2021

HON. TERRY JANE RUDERMAN, J.S.C.