SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

MYRON WASCHITZ and MARLENE WASCHITZ,

Plaintiffs,

-against-

HENRY ZUPNICK, M.D. and NORTHWELL HEALTH PHYSICIAN PARTNERS MEDICINE SPECIALTIES AND CARDIOLOGY LYNBROOK,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 606274/19
Motion Seq. No.: 01
Motion Date: 04/28/2020

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Statement of Material Facts	1
Affirmation in Opposition to Motion and Exhibits and Response and Counterstatement to Statement of Material Facts	2
Reply Affirmation	3

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

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint, with prejudice, or, in the alternative, move, pursuant to CPLR § 3212(g), for an order granting partial summary judgment as to any of the issues addressed herein which plaintiffs fail to rebut with competent evidence. Plaintiffs oppose the motion.

In support of the motion, counsel for defendants asserts, in pertinent part, that, "Mr. Waschitz was a patient of Dr. Zupnick's office for many years. Mr. Waschitz' medical history was significant for sarcoidosis affecting his lungs, going back to at least 2008. As of

May 14, 2012, Mr. Waschitz was on the steroid Prednisone 10 mg daily. The dosage of Prednisone was to be decreased to 7.5 mg.... On May 5, 2016, Mr. Waschitz was diagnosed by Dr. Zupnick with asthmatic bronchitis and was prescribed Levaquin/Levofloxacin 500 mg. Mr. Waschitz was to take Prednisone 10 mg daily for 4 days. No adverse reaction to the Levaquin/Levofloxacin was reported.... On June 28, 2016, Mr. Waschitz was again diagnosed by Dr. Zupnick with asthmatic bronchitis. Levaquin/Levofloxacin 500 mg was prescribed, again without adverse reaction.... On November 16, 2016, Mr. Waschitz was seen by Dr. Zupnick for a cough for one week, which produced green sputum. He was receiving oxygen at home, was on Symbicort, and used Albuterol by nebulizer in the morning. He also remained on Prednisone and was diagnosed with acute bronchitis and for the third time was prescribed Levaquin/Levofloxacin 500 mg. The plan was to attempt to decrease the Prednisone when the acute infection improved. Mr. Waschitz did not have an adverse reaction to the antibiotic.... On June 15, 2017, Mr. Waschitz presented to Dr. Zupnick with complaints of headaches, sticking pain in his throat, pain in his ears, and increased shortness of breath. He also felt that he had sputum that he felt he could not expectorate and advised that his nebulizer was not helping. Dr. Zupnick's assessment was of acute bronchitis and asthma for which he prescribed Levaquin/Levofloxacin, without incident.... On December 7, 2018, although not documented in the chart, Dr. Zupnick testified to speaking with either Mr. Waschitz or his wife, Marlene Waschitz[,] via telephone and prescribing Levaquin/Levofloxacin for complaints of a productive cough and an impression of pneumonia.... Ms. Waschitz testified to calling Dr. Zupnick on the morning of Friday December 7, 2018, because her husband was experiencing a cough, heaviness in his chest and weakness. She spoke with Dr. Zupnick directly and informed him that Myron Waschitz was coughing and spitting up phlegm. She anticipated that the symptoms persisted for

a couple of days and asked that an antibiotic be called in and advised that Mr. Waschitz would present to the office on Monday. She further testified that Mr. Waschitz was too sick to come in that day…. The CVS Pharmacy records confirm that a prescription was filled on December 7, 2018, for Levaquin 500 mg. Seven pills were dispensed, and the prescription was for one pill per day…. Ms. Waschitz testified that her husband felt better after starting the Levaquin, but was still coughing…. On Monday, December 10, 2018, Mr. Waschitz was seen by Dr. Zupnick for complaints of a severe productive cough for three days. He was afebrile, but felt weak and tired. He reported that he began taking Levaquin 500 mg oral tablet once daily two days prior, following which the sputum lightened…. The physical examination performed on December 10, 2018, demonstrated shortness of breath, cough, and dyspnea on exertion. Dr. Zupnick's impression was of possible pneumonia and the plan was to continue Levofloxacin 500 mg oral tablet once daily, a complete blood count with differential, comprehensive metabolic panel, and chest x-ray…. The CVS records reflect that an additional two pills were filled for Levaquin 500 mg on December 11, 2018, for a total of nine pills having been filled…. The chest x-ray was performed at Zwanger-Pesiri Radiology on December 10th and demonstrated increased interstitial markings in the left perihilar region and right lung base. There was also pleural thickening along the lateral chest wall bilaterally, which were possibly acute or chronic and could be associated with his prior diagnosis of sarcoidosis. Comparison with prior chest x-rays was advised for further evaluation. Labs collected on December 10th and returned on December 11th were significant for an elevated white blood cell count (10.8), elevated neutrophil count (9.48), low lymphocyte count (0.54), elevated glucose level (103), and elevated creatinine level (1.32)…. On December 11, 2018, Dr. Zupnick documented that Mr. Waschitz called advising that he had pain in both lower extremities and had been on Levofloxacin for a

pulmonary infection. Dr. Zupnick documented that he explained to Mr. Waschitz that he may have tendonitis, which was a known complication of quinolones. Levaquin is in this class of drugs. Dr. Zupnick documented that Mr. Waschitz was told, 'We try to avoid their use in simple infection but (*sic*) was used because he seemed relatively ill.' Mr. Waschitz was instructed not to take the remaining dose, to continue use of Advil and stay off his feet. If there was no improvement, ruptured tendons would have to be ruled out. Mr. Waschitz was to call in 3 to 4 days to provide and update.... Mr. Waschitz testified that on December 12, 2018, he attempted to get out of bed and could not stand on his legs. He had terrible pain and his wife called Dr. Zupnick. Ms. Waschitz testified that upon calling, Dr. Zupnick he directed that Mr. Waschitz stop taking the Levaquin.... On December 16, 2018, Mr. Waschitz called and reported that he was not improved. Dr. Zupnick explained that he may have tendonitis or Achilles tendon ruptures and an MRI was indicated.... MRIs of both lower legs were performed at Zwanger Pesiri on December 18, 2018. A low grade partial tearing of the distal Achilles tendon and a possible longitudinal split of the peroneus brevis tendon was identified in the left ankle MRI. The MRI of the right ankle identified insertional Achilles tendinosis with partial tearing. On December 19, 2018, Dr. Zupnick documented that he advised Mr. Waschitz that he had bilateral partial tears of the Achilles tendons.... Dr. Zupnick told the patient that a decision had to be made as to whether these injuries would be handled conservatively or surgically, and referral was made to an orthopedist. Mr. Waschitz did not have surgery.... In January 2019, Mr. Waschitz experienced a fall following which imaging demonstrated a full tear. Mr. Waschitz did not have surgery." *See* Defendants' Affirmation in Support Exhibits E-G and J-K.

Counsel for defendants further asserts, in pertinent part, that, "[t]his case involves allegations of the negligent prescription of the antibiotic, Levquin (*sic*)/Levofloxacin between December 7th and December 10, 2018, through December 12, 2018, which plaintiff alleges was contraindicated due to his age and long term steroid use. It is also alleged that Dr. Zupnick negligently failed to perform a workup including a culture to support the prescribing of the antibiotic, and that he was negligent in prescribing this medication over the phone. It is alleged that due to long-term steroid use, plaintiff was at high risk for developing tendon injury, a known potential complication associated with Levaquin/Levofloxacin. Per the Verified Complaint, Plaintiff (*sic*) has advanced two causes of action against Dr. Zupnick and North Shore-LIJ Internal Medicine at Lynbrook, P.C. sounding in medical malpractice, and loss of services.... Plaintiff (*sic*) has not set forth separate and unique allegations of negligence against North Shore-LIJ Internal Medicine at Lynbrook, P.C. As set forth below, the treatment rendered to Myron Waschitz by the moving defendants was in all respects within the standards of good and accepted medical practice, and any injuries allegedly suffered by plaintiffs were not caused by any alleged negligent treatment provided by them." *See* Defendants' Affirmation in Support Exhibit B.

In further support of the motion, defendants submit the affirmation of their medical expert, E. Neil Schachter, M.D. ("Dr. Schachter"). *See* Defendants' Affirmation in Support Exhibit A. Dr. Schachter opines, in pertinent part, that, "[i]t is my opinion to a reasonable degree of medical certainty that the care and treatment provided to Myron Waschitz by Dr. Zupnick was at all times appropriate and there was no negligence that contributed to plaintiff's claimed injuries. As discussed above, Mr. Waschitz had a long-standing history of asthma and sarcoidosis of the lungs at the time of the December 2018, treatment at issue. It is my opinion within a

reasonable degree of medical certainty that the prescription of Levaquin/Levofloxacin was not contraindicated and it was not a departure from the standard of care to prescribe Levaquin/Levofloxacin given the patient's history of pulmonary conditions, namely asthma and sarcoidosis, presenting complaints and prior success with the drug for respiratory illnesses. Levaquin is used for significant infections, and in this case, Mr. Waschitz presented with cough, heaviness in the chest, weakness and spitting up phlegm for a couple of days. The fact that the mucous was being expectorated along with chest heaviness suggested an infection in the lungs. The December 10, 2018, chest x-ray showed abnormalities compatible with a lung infection. All of which suggested a serious respiratory infection in a person with compromised lung capacity/function. The fact that there is a black box warning for the medication does not preclude the prescription of Levaquin/Levofloxacin. It is information to be considered when prescribing it. The use of Levaquin is not contraindicated with patients over 60 or on steroids. It is a common antibiotic administered throughout this country to all ages of population and to individuals on steroids. Given the success of the drug as prescribed by Dr. Zupnick on four prior occasions, without incident, and the seriousness of the patient's respiratory complaints, it was reasonable to prescribe the antibiotics and the use of Levaquin was certainly not contraindicated. This was an antibiotic that Mr. Waschitz had been on previously and was a proven effective antibiotic for the patient. It was not a departure to prescribe the medication over the phone on Friday December 7, 2018, given the fact that Dr. Zupnick was familiar with Mr. Waschitz as he had been treating him for many years, and the fact that Mr. Waschitz was to present to the office on Monday, December 10, 2018, only three days later. It is further my opinion within a reasonable degree of medical certainty that contrary to the Bill of Particulars, the performance of a sputum culture in an office setting prior to the prescription of the Levaquin/Levofloxacin was not the standard of

care. Antibiotics are routinely prescribed for respiratory conditions in an out-patient setting. Prescribing antibiotics over the phone before a sputum culture was performed was not a departure from the standard of care. It was within good and accepted medical practice for Dr. Zupnick to exercise his medical judgment when considering alternative regimens for treatment and electing to prescribe Levoquin/Levofolxacin (*sic*) given the patient's history of respiratory illnesses, including asthma and sarcoidosis, prior success with the drug, and the level of presenting sickness. Based upon the foregoing, it is my opinion to a reasonable degree of medical certainty, that all of the care and treatment rendered by defendant Henry Zupnick, M.D. to Myron Waschitz, comported in all respects, with the standards of good and accepted internal medicine and pulmonary medicine practices. Additionally, there was no negligence on the part of Dr. Zupnick that contributed to the tendonitis or Achilles tendon injury." *See id.*

In opposition to the motion, counsel for plaintiffs asserts, in pertinent part, that, "[a]s of December 7, 2018, Mr. Waschitz was 66 years old and had been seeing Dr. Zupnick as his primary care physician for about 25 years. Dr. Zupnick was prescribing several corticosteroids for his pulmonary conditions of asthma and sarcoidosis. Mr. Waschitz had no trouble walking and did not need any assistive devices.... The testimony taken in this case reflects that on December 7, 2018, a call was placed to Dr. Zupnick by Mr. Waschitz's wife, Marlene Waschitz, to report that her husband was feeling ill with cough, weakness and achiness. Mrs. Waschitz reported also that her husband's cough was producing phlegm.... Dr. Zupnick made no written note about this call and testified that he has no memory of the call.... However, his chart and the pharmacy records reflect that on December 7, 2018, Dr. Zupnick prescribed Levofloxacin.... Mr. Waschitz testified that he began taking the medication the same day as prescribed.... Levaquin/Levofloxacin is an antibiotic medication that belongs to a class of drugs called

fluoroquinolones. Fluoroquinolones pose serious adverse reactions including tendinitis, tendon rupture and peripheral neuropathy. Prior to December 2018, the U.S. Food and Drug Administration announced an enhanced black box warning for these antibiotics because of the serious side effect associated with these medications. Because the risks of tendinitis, tendon rupture and peripheral neuropathy are even greater for severe tendon injuries in certain patients who are over the age of 60 and who are taking corticosteroid drugs, and therefore should not be prescribed for these particular patients unless there is no other treatment option and only after a very careful evaluation of the patient.... On December 10, 2018, Mr. Waschitz was seen in the office of Dr. Zupnick.... Dr. Zupnick has no memory of this office visit.... Mr. Waschitz reported that he was feeling a little better.... Mr. Waschitz complained of continuing productive cough, weakness and feeling tired. Dr. Zupnick documented in an office visit note that there was no fever and no wheezing. The note further states that 'sputum has lightened a little, he says his breathing is not significantly worse than usual...'. Dr. Zupnick's physical examination documents no respiratory abnormalities. Indeed, the note states: Pulmonary: no respiratory distress, lungs were clear to auscultation bilaterally, no accessory muscle use.... Dr. Zupnick testified that the documented physical exam findings noted a normal examination of the lungs.... Dr. Zupnick extended Mr. Waschitz's prescription of Levofloxacin for two more additional days and ordered a Chest Xray (*sic*) and blood work, both performed the same day.... Mr. Waschitz continued taking the antibiotics as prescribed until several days later when he awoke with severe and excruciated pain at both ankles and burning pain at his heels.... Mr. Waschitz telephoned Dr. Zupnick to report this condition and Dr. Zupnick informed him to stop taking the Levofloxacin.... Dr. Zupnick made a note of this telephone call on December 14, 2018 and he labeled the note an office visit of December 11, 2018, which he admitted during his testimony

that it was not.... Similarly, Dr. Zupnick made another note labeled an office visit of December 11, 2018 on December 16, 2018 (*sic*) reflected a second telephone call about Mr. Waschitz lower extremity condition. Again, Dr. Zupnick testified that this was not an office visit but instead a telephone call that he documented on December 16, 2018. This note documents that Mr. Waschitz did not improve and that he likely has tendonitis or Achilles tendon ruptures and that Dr. Zupnick was ordering an MRI.... MRIs of the left and right ankles were performed on December 18, 2018 at Zwanger Pesiri Radiology revealing bilateral Achilles Tendon partial tears.... A third December 11, 2018 office visit note was created by Dr. Zupnick on December 19, 2018 referring in reality to a telephone call where he informed Mr. Waschitz that he has partial tears of both Achilles tendons.... Mr. Waschitz sought orthopedic consultation on December 21, 2018 by Dr. Stephen H. Marcus who recommended conservative treatment for the treatment of the Achilles tendons and ordered shoe lifts and a rolling walker for ambulation.... Mr. Waschitz developed right calf pain leading to the performance of bilateral lower extremity Doppler Venous studies on December 27, 2018.... The studies demonstrated findings of right sided Deep Venous Thrombosis ('DVT').... Dr. Zupnick prescribed Xarelto, an anticoagulant for the treatment of the treatment of the DVT.... On or around January 20, 2019, Mr. Waschitz's legs and ankles gave out from under him while ambulating with the walker. He collapsed and fell in excruciating pain.... Dr. Zupnick ordered additional MRIs of the ankles, which were performed on January 22, 2019 at Zwanger Pesiri.... The results of those studies confirmed complete bilateral ruptures of both Achilles tendons.... On January 24, 2018, Mr. Waschitz was seen by John Feder, M.D. an orthopedic surgeon who reviewed the MRI studies and confirmed the diagnosis.... Unfortunately, Mr. Waschitz was not a surgical candidate because of how badly torn the Achilles Tendons were and because he was on Xarelto, the blood thinner for the DVT of

the right leg.... Despite conservative treatment, including Cam walker boots, physical therapy, medication management and use of a walker, Mr. Waschitz remains in pain and debilitated. He continues to require the use of a walker to ambulate. His complaints of severe ankle pain, burning heel pain, and numbness of the feet continue.... Mr. Waschitz can no longer perform many of his regular activities, perform household chores, watch his grandkids, and can no longer enjoy walks as he once did. He can no longer drive long distances or sit for long periods of time because of the pain." *See* Plaintiffs' Affirmation in Opposition Exhibits A-D; Defendants' Affirmation in Support Exhibits E, G, J and K.

In further support of the opposition, plaintiffs submits a Medical Expert affirmation. *See* Plaintiffs' Affirmation in Opposition Exhibit A. Counsel for plaintiffs asserts that said Medical Expert opines, in pertinent part, that, "[p]laintiffs' Board Certified Expert in the field of Internal Medicine, licensed to practice medicine in the State of New York, and well qualified by his education, training and experience as a primary care physician of patients presenting with a wide array of conditions including respiratory infections and knowledgeable of the standards involved for the prescribing of antibiotics, submits an Affirmation setting forth the specific departures of the moving Defendants from good and accepted medical practices and the basis for each of his opinions which are supported by testimony and medical records. Plaintiffs' Expert further reviewed the submissions contained within Dr. E. Neil Schachter's Affirmation annexed to Defendants' motion and disagrees with the Defendants entirely regarding the defendants' medical treatment rendered to Mr. Waschitz.... Plaintiffs' expert opines and submits the specific departures, of defendants, from good and accepted medical practice, in negligently prescribing Levofloxacin on December 7, 2018 and December 10, 2018 resulting in Mr. Waschitz suffering serious and permanent physical injuries of bilateral complete Achilles Tendon ruptures.

Plaintiffs' expert explains that Levaquin/Levofloxacin is an antibiotic medication that belongs to a class of drugs called fluoroquinolones. Fluoroquinolones pose serious adverse reactions including tendinitis, tendon rupture and peripheral neuropathy. Prior to December 2018, the U.S. Food and Drug Administration announced an enhanced black box warning for these antibiotics because of the serious side effect associated with these medications. Because the risks of tendinitis, tendon rupture and peripheral neuropathy are even greater for severe tendon injuries in certain patients who are over the age of 60 and who are taking corticosteroid drugs, fluoroquinolones should not be prescribed for these particular patients unless there is no other treatment option and only after a very careful evaluation of the patient. In situations when carefully considered, appropriate cultures and susceptibility tests should be performed before treatment with Levaquin/Levofloxacin to determine if in fact it is the only therapy available, and the appropriate therapy to be selected. Plaintiffs' expert's opinions are in stark contrast to those of defendants' expert and actually are based upon the facts, testimony taken and medical records. Plaintiffs' expert sets forth that on December 7, 2018 and December 10, 2018, Dr. Zupnick deviated from accepted medical standards in prescribing Levofloxacin to Mr. Waschitz because Mr. Waschitz was at an increased risk for severe tendon rupture because Mr. Waschitz was over the age of 60 at that time and because of his ongoing long-term corticosteroid use. Both are facts which were well known to Dr. Zupnick when he prescribed the Levofloxacin as he was plaintiff's primary care physician for around 25 years and was the doctor actually prescribing the corticosteroids. Dr. Zupnick should not have issued this prescription because of the risk of severe tendon disorder with fluroquinolones is higher in older patients over the age of 60 and in patients taking corticosteroids, as per the drug warnings including the FDA issued enhanced black box warnings in 2016 and determined that fluoroquinolones should be reserved for use in such

patients with no alternative treatment options…. As such, in Mr. Waschitz's case, it was 'negligent for Dr. Zupnick to prescribe the medication over the telephone without even assessing the plaintiff in the office or over the telephone for that matter. No work up or evaluation was performed at all to assess the need for this potentially injurious medication. Indeed, Dr. Zupnick stated in his testimony given in this matter that he did not order any tests to evaluate Mr. Waschitz's condition on December 7, 2018.' … Plaintiffs' expert further explains that any prescription of fluoroquinolones to Mr. Waschitz required a careful assessment that proved that Levofloxacin was the only antibiotic that could be used to treat an infection caused by a susceptible bacteria. In this case, Dr. Zupnick did not have any information confirming that Mr. Waschitz's illness was even bacterial. No culture or susceptibility tests were ever performed before treatment was commenced. A sputum culture with susceptibility testing, if performed, would have confirmed a bacterial infection and would have identified whether Levofloxacin would have even been effective treatment. As such, there was no such assessment conducted…. Plaintiffs' expert stated in the annexed Affirmation that 'there is no support in the medical records generated by Dr. Zupnick, nor in any of his testimony that supports the prescription of Levofloxacin. There were no complaints, physical exam findings, or test results, hat supports any claim that Mr. Waschitz was experiencing a serious bacterial infection that required Levofloxacin.' … 'Dr. Zupnick testified repeatedly that he had no recollection of the telephone discussion of December 7, 2018. Additionally, there is no documentation created by Dr. Zupnick of that December 7, 2018 telephone call that led to him prescribing Levofloxacin. Additionally, the office visit record of December 10, 2018 confirms that there were no physical exam findings that support a diagnosis of bacterial pneumonia. Indeed, Dr. Zupnick testified that the physical examination findings were normal. As such, there is no basis for Dr. Schachter to say there was

any evaluation, and certainly not a careful evaluation or reasonable judgment used by Dr. Zupnick.' … The plaintiffs' expert further states, 'In the case of patients such as Mr. Waschitz, alternative non-fluoroquinolones antibiotics should be prescribed. Fluoroquinolone antibiotics should be reserved for those patients who do not have alternative treatment options. Here, there certainly were other treatment options available for this respiratory illness experienced by Mr. Waschitz. Moreover, the fact that Mr. Waschitz had a history of sarcoidosis and asthma did not warrant the administration of Levofloxacin without any evaluation, as occurred here.' … In further addressing Dr. Schachter's statements, plaintiffs' expert responds, 'it is no defense that Dr. Zupnick had on prior occasions prescribed Levofloxacine (*sic*) without complications. The fact that prior negligent administrations of the antibiotic did not result in injuries to Mr. Waschitz does not in any way decrease or negate the risk of tendon injury with later administrations of the antibiotic. Mr. Waschitz's substantial increased risk for severe tendon injuries did not change because he was previously prescribed Levofloxacine (*sic*) without incident.' Plaintiffs' expert addresses and disagrees with Dr. Schacter's additional assertions…. In addressing causation, plaintiffs' expert sets forth that there is no doubt that Mr. Waschitz would not have suffered the bilateral Achilles Tendon ruptures had Dr. Zupnick performed a proper evaluation, considered his significant increased risk factors of age and long term corticosteroid use, and prescribed alternative treatments including any one of the numerous non-fluoroquinolone antibiotic drugs for respiratory bacterial infections." *See* Plaintiffs' Affirmation in Opposition Exhibits A and B.

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 defendants' medical expert 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' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Verified Complaint, with prejudice, or, in the alternative, pursuant to CPLR § 3212(g), for an order granting partial summary judgment as to any of the issues addressed herein which plaintiffs fail to rebut with competent evidence, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
September 21, 2021

ENTERED
Sep 29 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE