

**Trienis v Spirt**

2022 NY Slip Op 32026(U)

June 27, 2022

Supreme Court, New York County

Docket Number: Index No. 805051/2017

Judge: Erika Edwards

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS

PART 10M

*Justice*

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JOHN C. TRIENIS and MONICA TRIENIS,

Plaintiffs,

INDEX NO. 805051/2017MOTION DATE 07/20/2021MOTION SEQ. NO. 003

- v -

SHERI ELLEN SPIRT, M.D., MOUNT SINAI HEALTH  
SYSTEM, INC. and MOUNT SINAI HEALTH SYSTEM, INC.  
d/b/a MOUNT SINAI DOCTORS FACULTY PRACTICE,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the court grants Defendant Sheri Ellen Spirt, M.D.'s ("Dr. Spirt") motion for summary judgment dismissal of Plaintiffs John C. Trienis' ("Mr. Trienis") and Monica Trienis' (Ms. Trienis) (collectively, "Plaintiffs") complaint and the court dismisses Plaintiffs' complaint as against Dr. Spirt. However, the court declines to take judicial notice that a person needs to seek medical attention to treat an erection lasting more than four hours.

Plaintiff Mr. Trienis' claims against Dr. Spirt include medical malpractice and lack of informed consent and his wife, Ms. Trienis, brings a loss of services action against Dr. Spirt. Plaintiffs previously discontinued their claims against the other defendants. Plaintiffs allege that Dr. Spirt departed from good and accepted practice in her psychiatric care and treatment of Mr. Trienis for his depression from December 2015 to January 2016 by improperly prescribing Trazodone to Mr. Trienis and failing to warn him of its potential side effects.

Plaintiff Mr. Trienis alleges that he suffered priapism (prolonged erection) and impotence, requiring surgery to implant a penile prosthesis, as a result of Dr. Spirt's malpractice and failure to warn.

In December 2015 Dr. Spirt prescribed Mr. Trienis Trazodone to use as needed for his insomnia. According to Dr. Spirt, in mid to late December 2015 and early January 2016 Mr. Trienis reported that the Trazodone was working well. On January 12, 2016, Mr. Trienis was treated in the emergency room for low blood sugar. He took Trazodone on the night of January 13, 2016. On the evening of January 14, 2016, he developed a prolonged, painful erection after being intimate with his wife. Mr. Trienis took a cold shower, took a Trazodone to help him sleep and went to bed. The next morning, Mr. Trienis called his primary care physician, former defendant Dr. Hojraj, and requested a prescription of Valium because Valium had worked when Mr. Trienis had a prolonged erection about 30 years earlier. Dr. Hojraj complied and Mr. Trienis took the Valium, but it did not get the erection to go down. Mr. Trienis went to the emergency room at Lenox Hill Hospital at approximately 8:00 p.m. Mr. Trienis reported that he had been taking Trazodone every other day for about a month. He was treated conservatively, but ultimately needed to have surgery to perform a penile cavernosal spongiosal shunt with "snake maneuver" and further procedures.

Defendant Dr. Spirt now moves under motion sequence 003 for summary judgment dismissal of Plaintiffs' complaint. Dr. Spirt relies on the expert affirmations of Dr. Robert Moldwin and Dr. Philip R. Muskin and argues that she did not depart from good and accepted practice, she prescribed the appropriate medications and she properly warned Mr. Trienis of the potential side effects of the medication, which include priapism and the need to go to the emergency room immediately if he developed an erection lasting more than four hours and that it

was a medical emergency. Dr. Spirt further argues that she explained the potential side effects to Mr. Trienis verbally and in writing, she referred him to her website for additional information, which is no longer available, and the pharmacy included the medication's risks, including priapism, and benefits with the medication. Dr. Spirt also alleges that she provided Mr. Trienis with an emergency telephone number and email for him to contact her. Dr. Spirt also argues in substance that the need to seek medical attention to treat an erection lasting more than four hours is common knowledge and the court should take judicial notice of this fact.

Dr. Spirt further argues that Mr. Trienis did not contact her until he emailed her on January 21, 2016, which was after the surgery, and advised her of what happened and blamed the Trazodone. Dr. Spirt called Mr. Trienis on January 23, 2016, and he advised her in substance that he had taken Trazodone the night before his prolonged erection and that he took another dose the night of his prolonged erection. When she asked him why he did not contact her sooner, Mr. Trienis admitted in substance that he did not know why he did not contact her and that he was stupid for not doing so. When she asked him why he had not followed her instructions when she advised him of the rare side effect of priapism, he failed to respond.

Therefore, Dr. Spirt argues in substance that Mr. Trienis' injuries were caused by his own conduct in delaying to seek medical treatment until approximately 27 hours after his prolonged, painful erection began. Dr. Spirt argues in substance that such delay cannot be attributed to her, since Mr. Trienis failed to contact her until it was too late.

Plaintiff Mr. Trienis opposes the motion and relies upon the expert affirmations of Dr. Larry S. Kirstein and Dr. Michael S. Brodherson. Mr. Trienis argues in substance that issues of fact exist as to whether Dr. Spirt satisfied her duty to warn Plaintiff of the risk of priapism when taking the medications that she prescribed, including Trazodone, Wellbutrin, Lexapro and

Strattera. Mr. Trienis further argues that Dr. Spirt failed to discuss any side effects of any of the medications until after the incident on January 23, 2016. Therefore, Dr. Spirt's claim that she verbally warned him and provided him with a document stating that he should seek emergency medical treatment in the event of a prolonged erection is not supported by the evidence in the case. Mr. Trienis recalls that the paper that she provided to him did not mention priapism and that it was not included in the medical records.

Mr. Trienis further argues in substance that Dr. Spirt's arguments regarding the court taking judicial notice is improper in a motion for summary judgment. Additionally, her argument regarding his alleged culpable conduct is improper in a motion for summary judgment and it relates to his failure to mitigate his injuries, which pertains to damages to be determined by a jury. Additionally, Mr. Trienis argues that Dr. Spirt appears to have conceded causation by her failure to address whether the medications that she prescribed caused priapism. Alternatively, Mr. Trienis argues in substance that there is an issue of fact as to whether his actions were reasonable once he realized that he had an erection lasting more than four hours and the issue of his credibility.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

In a medical or dental malpractice action, a defendant doctor or provider moving for summary judgment must establish that in treating the plaintiff there was no departure from good and accepted medical or dental practice or that any departure was not the proximate cause of the injuries alleged (*Roques v. Noble*, 73 AD3d 204, 206 [1st Dept 2010]; *Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]; *Thurston v Interfaith Med. Ctr.*, 66 AD3d 999, 1001 [2d Dept 2009]; *Rebozo v Wilen*, 41 AD3d 457, 458 [2d Dept 2007]). It is well settled that expert opinion must be detailed, specific, based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by the record (*see Roques*, 73 AD3d at 207; *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1st Dept 1995]; *Aetna Casualty & Surety Co. v Barile*, 86 AD2d 362, 364-365 [1st Dept 1982]; *Joyner-Pack v Sykes*, 54 AD3d 727, 729 [2d Dept 2008]). If a defendant's expert affidavit contains "[b]are conclusory denials of negligence without any factual relationship to the alleged injuries" and "fails to address the essential factual allegations set forth in the complaint" or bill of particulars, then it is insufficient to establish defendant's entitlement to summary judgment as a matter of law (*Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003] [internal quotations omitted]; *see Cregan v Sachs*, 65 AD3d 101, 108 [1st Dept 2009]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his or

her failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

In medical and dental malpractice actions, to defeat the motion, a plaintiff must rebut the defendant's prima facie showing by submitting an affidavit from a physician attesting that the defendant departed from accepted medical or dental practice and that the departure was the proximate cause of the injuries alleged (*Roques*, 73 AD3d at 207). An expert affidavit which sets forth general allegations of malpractice or conclusions, misstatements of evidence or assertions unsupported by competent evidence is insufficient to demonstrate that defendants failed to comport with accepted medical practice or that any such failure was the proximate cause of a plaintiff's injuries (*Coronel v. New York City Health & Hosps. Corp.*, 47 AD3d 456, 457 [1st Dept 2008]; *Alvarez*, 68 NY2d at 325).

Competing expert affidavits alone are insufficient to avert summary judgment since experts almost always disagree, but the question is whether plaintiff's expert's opinion is based upon facts sufficiently supported in the record to raise an issue for the trier of fact (*De Jesus v Mishra*, 93 AD3d 135, 138 [1<sup>st</sup> Dept 2012]). "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Diaz v New York Downtown Hospital*, 99 NY2d 542, 544 [2002] [internal quotations omitted]). However, "[w]here the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment" (*id.*).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). Summary judgment should be

awarded when a party cannot raise a factual issue for trial (*Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1<sup>st</sup> Dept 1984]; CPLR 3212[b]).

For a plaintiff to prevail on a lack of informed consent claim, “a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff’s circumstances, having been so informed, would not have undergone such procedure, and that lack of informed consent was the proximate cause of (plaintiff’s) injuries” (*see* Public Health Law § 2805-d; *Balzola v Giese*, 107 AD3d 587, 588 [1<sup>st</sup> Dept 2013]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1<sup>st</sup> Dept 1995]).

A lack of informed consent claim is limited "to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body" (*see* Public Health Law § 2805-d[2]; *Ortiz v Vernenkar*, 101 AD3d 637, 637-638 [1<sup>st</sup> Dept 2012]).

Here, the court finds that Dr. Spirt made a prima facie showing that Mr. Trienis’ informed consent was properly obtained prior to Dr. Spirt prescribing him with the Trazodone, that Dr. Spirt did not depart from good and accepted practice and that her actions or inactions did not cause Mr. Trienis’ alleged injuries. Additionally, the court finds that Plaintiff failed to raise a triable issue of fact by offering expert medical evidence establishing that he was not properly and adequately advised of the reasonably foreseeable risks, benefits or alternatives to Trazodone or any other medication and he failed to adequately rebut Dr. Spirt’s arguments regarding liability and causation.

Mr. Trienis attempted to raise issues of fact regarding whether Dr. Spirt adequately warned him of the risk of priapism, but he failed to adequately rebut the evidence regarding the

substance of Dr. Spirt's alleged verbal warning. Plaintiff Mr. Trienis stated in substance that he did not recall the details of Dr. Spirt's verbal warnings, which is insufficient to create an issue of fact to rebut Dr. Spirt's testimony regarding her custom and practice of using the same verbal warnings since the 1980s when prescribing Trazodone. These warnings include that if the patient develops an erection lasting more than four hours then he needs to go to the emergency room immediately because it is a medical emergency. Here, Plaintiff Mr. Trienis failed to do so. He did not go to the emergency room until over 24 hours after he had developed the prolonged erection and he failed to contact Dr. Spirt until several days later, after he had the surgery. Additionally, Mr. Trienis failed to advise Dr. Spirt that he had the condition 30 years earlier. Even Plaintiffs' expert, Dr. Brodherson, discussed the damage to the penile tissue and erectile dysfunction as a possible injury which occurs when priapism is left untreated.

Additionally, although Plaintiffs' allege that Dr. Spirt departed from accepted standard of medical care by failing to obtain proper informed consent when prescribing all of the medications, the evidence attributes the condition as being caused by Mr. Trienis' use of the Trazodone and not his use of any other medication. Therefore, Plaintiffs failed to demonstrate any causation related to Dr. Spirt's departure in failing to properly inform Mr. Trienis of the risks of any of the other medications.

As such, Mr. Trienis failed to rebut Dr. Spirt's experts' opinions and her arguments that the delay in treatment and failure to follow Dr. Spirt's instructions caused his injuries. Therefore, Plaintiff Mr. Trienis failed to raise an issue of fact regarding Dr. Spirt's alleged departures or that such alleged departures caused his injuries.

Additionally, the court declines to take judicial notice that a person needs to seek medical attention to treat an erection lasting more than four hours.

Therefore, the court grants Dr. Spirt’s motion for summary judgment and dismisses Plaintiffs’ complaint against her.

The court has considered any additional arguments raised but not discussed herein and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendant Sheri Ellen Spirt, M.D.’s motion for summary judgment dismissal of Plaintiffs John C. Trienis’ and Monica Trienis’ complaint and the court dismisses the complaint as against Dr. Spirt; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendant Sheri Ellen Spirt, M.D. as against Plaintiffs John C. Trienis and Monica Trienis, without costs to any party.

This constitutes the decision and order of the court.

*Erika M. Edwards*  
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6/27/2022  
DATE

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ERIKA EDWARDS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
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APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT       REFERENCE