

Payne v Karpenko

2022 NY Slip Op 34919(U)

February 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 502910/2018

Judge: Pamela L. Fisher

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 7th day of February 2022.

P R E S E N T:

HON. PAMELA L. FISHER,
J.S.C.

-----X
HUGH PAYNE,

Plaintiff,

DECISION/ORDER

- against -

Index No: 502910/2018

OLEG KARPENKO, DPM, KINGSBROOK JEWISH
MEDICAL CENTER and NEW YORK CITY
HEALTH & HOSPITALS CORPORATION,

Defendants.

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed_____	<u>1, 2, 3, 4</u>
Opposing Affidavits (Affirmations)_____	<u>5</u>
Reply Affidavits (Affirmations)_____	<u>6</u>

Upon the foregoing papers in this medical and podiatric malpractice action, defendant, Oleg Karpenko, DPM, moves, pursuant to CPLR § 3212, for summary judgment, dismissing plaintiff's complaint against him in its entirety.

Plaintiff commenced this action by filing a summons and complaint on February 12, 2018 (Defendant's Affirmation in Support ¶ 4; Pleadings at 1, annexed as Exhibit B to defendant's motion papers). Issue was joined by Dr. Karpenko on April 13, 2018, and plaintiff served verified bills of particulars upon defendants on or about August 14, 2018 (Defendant's Affirmation in Support ¶ 4; Pleadings at 4; Bills of Particulars, annexed as Exhibits C, D, and E to defendant's motion papers). In his complaint and bill of particulars, plaintiff alleges that Dr. Karpenko departed from good and acceptable podiatric practice in his treatment of the plaintiff between May 27, 2015 and November 10,

MS# 1 - XMG(EXT)

2016 by “failing and neglecting to properly manage an open wound on the dorsal hallux of the right foot in an uncontrolled diabetic,” “permitting” “the worsening wound to penetrate the skin with involvement of subcutaneous tissue and periosteum,” “neglecting to take the necessary steps to [e]nsure timely radiographic studies were performed,” “failing” “to perform culture and sensitivity testing through a partial thickness ulceration,” and “failing” “to identify the underlying pathogen” (Complaint ¶¶ 18, 19, 30, 31; Verified Bill of Particulars as to Oleg Karpenko, DPM ¶¶ 1, 2). As a result of defendant’s alleged malpractice, plaintiff is claiming to have sustained the following injuries: progression of the wound to “Grade III Wagner Classification with bony erosion and osteomyelitis,” “[s]evere infection, soft tissue swelling, and subcutaneous emphysema of the forefoot with exposure of the first proximal phalangeal site,” “right below the knee amputation,” “post-operative anemia requiring transfusions,” “impaired functional mobility, decreased endurance with fatigue and very severe pain at the amputated stump,” “continued weakness, instability and poor balance,” “episodes of open painful wounds at the stump site,” “permanent disability,” “[i]njuries to the nerve, blood vessels, muscles, tendons, ligaments and other soft tissues in and around the affected site,” and “[s]evere emotional distress and psychological overlay associated with a permanent disability and ongoing pain” (*Id.* at ¶ 3).

The following facts are not in dispute. Plaintiff, a 72-year-old man with “a history of diabetes” “first presented to Dr. Karpenko on May 27, 2015, complaining of painful lesions on the top of his right and third left toes” (Plaintiff’s EBT tr. 8, line 20, annexed as Exhibit G to defendant’s motion papers; Defendant’s Statement of Undisputed Material Facts Pursuant to Uniform Court Rules 202.8-g ¶ 1). The “lesions” “caus[ed] him pain when weight bearing and wearing shoes” (*Id.*). Dr. Karpenko examined the plaintiff, and he noticed “diminished sensation in both [of plaintiff’s] feet, indicative of peripheral neuropathy” (*Id.*). The chart states that a “vascular examination [revealed] normal pulses of the dorsalis pedis (DP) artery, but diminished pulses of the posterior tibialis (PT) artery, indicating

diminished vascularity” (*Id.*). The “[c]apillary refill time” and “temperature of the feet” were normal (*Id.*). The records indicate that a “dermatological examination” was performed, revealing that “all of plaintiff’s toenails were dystrophic and discolored,” but there was no “evidence of drainage” (*Id.*). The notes also state that plaintiff had “hyperkeratotic lesions, which is a corn or callus, on the 3rd toes with some erythema but no open wounds” (*Id.*). Dr. Karpenko also conducted a “musculoskeletal examination,” which showed “hammertoe deformities on both feet” (*Id.*). His diagnosis was “hyperkeratotic lesions of the 3rd toes with bursitis secondary to pressure and fungal nails” (*Id.*). The chart documents that “Dr. Karpenko discussed with plaintiff surgical removal of the corns and calluses as well as surgical correction of the hammertoe deformities” (*Id.*). He wrote that “surgery was a last treatment option if [plaintiff’s] pain was severe, limited his activity, and was not responsive to local treatment” (*Id.*). Dr. Karpenko “prescribed antifungal medication, debrided/cut the toenails, and recommended diabetic shoes” (*Id.*). Plaintiff was directed to “return to [Dr. Karpenko’s] office in six weeks” (*Id.*).

On May 5, 2016, plaintiff returned to Dr. Karpenko’s office for the first time since May 27, 2015 (*Id.* at ¶ 2). He complained of “painful lesions on his right and left third toes, as well as fungal toenails o[n] all 10 toes” (*Id.*). The chart indicates that “Dr. Karpenko debrided the lesions and toenails, and again discussed surgical treatment” with the plaintiff (*Id.*). He also gave the plaintiff a “new pair of diabetic shoes” (*Id.*; Records of Dr. Karpenko at 5, annexed as Exhibit K to defendant’s motion papers). Plaintiff was directed “to return to [Dr. Karpenko’s] office in six weeks, but did not return until July 14, 2016” (Defendant’s Statement of Undisputed Material Facts Pursuant to Uniform Court Rules 202.8-g ¶ 2). At the July 14, 2016 visit, “he had continued complaints of lesions on his third toes and fungal toenails,” and “[h]is fasting blood sugar (“fbs”) was” “145” (*Id.*). Dr. Karpenko “debrided the lesions and toenails, and advised plaintiff to return in six weeks” (*Id.*). On August 11, 2016, plaintiff arrived at Dr. Karpenko’s office, and the records state that he complained of an “open

wound on the big toe of his right foot, that had been present for two weeks” (*Id.* at ¶ 3). The chart documents that his “fasting blood sugar (“fbs”) was 145, indicating uncontrolled diabetes” (*Id.*). Dr. Karpenko examined plaintiff’s foot, revealing a “0.4 cm x 0.6 cm wound that had only disrupted the superficial layer of the skin, and there was no foul odor” (*Id.*). Dr. Karpenko noted that the “wound was located on the tip of the toe, with a clean, moist, beefy red, and granulated wound bed, and no exposed bone” (*Id.*). He recorded that “[t]here was minimal serosanguineous discharge,” and his “assessment was an ulcer of the right hallux, described as a Wagner Grade II Stage I ulcer” (*Id.*). Dr. Karpenko “clean[ed] and debride[d] the wound, removing all the necrotic debris” (*Id.* at ¶ 5). He wrote that he “recommended a surgical shoe to prevent further pressure over the ulcer area, and prescribed the antibiotic Augmentin for 10 days” (*Id.*).

On August 17, 2016, plaintiff presented to Dr. Karpenko’s office, and he examined the plaintiff’s wound, which was now “slightly smaller at 0.4 cm x 0.5 cm” (*Id.* at ¶ 6). He documented that there was “no foul odor,” or “purulent discharge from the wound” (*Id.*). The wound was “described as clean, moist, beefy red and granulated with fibrotic slough, which indicated that the ulcer was healing” (*Id.*). Dr. Karpenko “debrided the ulcer, followed by a dry sterile dressing with Collagenase” (*Id.*). Plaintiff was “advised to finish the course of Augmentin, use the surgical shoe and to return in one week” (*Id.*). Plaintiff arrived at Dr. Karpenko’s office on August 25, 2016 with a “fasting blood sugar level [of] 155” (*Id.* at ¶ 7). Dr. Karpenko performed an examination of plaintiff’s wound, which revealed that it had “decreased in width, but had increased in depth,” “measuring approximately 0.3 cm x 0.5 cm” (*Id.*). Dr. Karpenko “noted that the ulcer probed down to the periosteum,” and the “wound bed of the ulcer was still described as clean, moist, beefy red and granulated with fibrotic slough” (*Id.*). Further, the notes state that there was “no purulent discharge or foul odor,” and “Dr. Karpenko’s assessment was a Wagner Grade 2 ulcer at this visit” (*Id.*). Dr. Karpenko “debrided the ulcer followed by a dressing with Collagenase” (*Id.*). The chart indicates that

plaintiff was “instructed to obtain x-rays to rule out possible osteomyelitis” (*Id.*). On September 8, 2016, plaintiff “missed his appointment with Dr. Karpenko” (*Id.* at ¶ 8). On September 7, 2016, plaintiff presented to “his endocrinologist, Dr. Saks Kazeem, who noted he had been seen by a podiatrist who had performed a debridement on his right first toe” (*Id.*).

On September 14, 2016, plaintiff had an appointment with Dr. Karpenko (*Id.* at ¶ 9). Dr. Karpenko examined plaintiff’s wound, which had decreased in size to 0.2 cm x 0.2 cm (*Id.*). Dr. Karpenko noted that the wound was “down to the periosteum with no foul odor,” and the “wound bed was still” “clean, moist, beefy red and granulated without purulent discharge” (*Id.*). His “assessment remained a Wagner Grade 2 ulcer that he debrided and dressed with Collagenase” (*Id.*). The chart states that “[p]laintiff was again instructed to obtain an x-ray to rule out osteomyelitis, and [to] return in one week” (*Id.*). On September 28, 2016, plaintiff returned to Dr. Karpenko’s office, who wrote that “plaintiff was not compliant [with his instructions], as the wound was not dressed, and the x-ray had not been performed” (*Id.* at ¶ 10). He examined the wound, which was “slightly larger at 0.3 cm x 0.3 cm,” and “remained to the depth of the periosteum” (*Id.*). Dr. Karpenko recorded that the “wound bed was still clean, moist, beefy red and granulated with no purulent discharge, but a new finding of a mild malodor was noted” (*Id.*). The chart indicates that plaintiff “complained of pain for the first time at this visit, for which Dr. Karpenko prescribed the pain medication Tramadol” (*Id.*). Dr. Karpenko “also gave [plaintiff] a PT (posterior tibial) nerve block injection to block pain in the foot” (*Id.*). His “assessment remained a Wagner Grade 2 Stage I ulcer, and [he] debrided the ulcer, followed by the application of Collagenase” (*Id.*). Dr. Karpenko noted that plaintiff was “again instructed to obtain x-rays, and to return in one week” (*Id.*).

On October 12, 2016, plaintiff visited Dr. Karpenko’s office, and Dr. Karpenko examined the wound (*Id.* at ¶ 11). He documented that the wound was “slightly larger at approximately 0.4 cm x 0.3 cm, but the depth was unchanged, as it was still to the level of the periosteum” (*Id.*). Further, the

“wound bed was described as clean, moist, beefy red and granulated with no purulent discharge, but there was still a mild malodor” (*Id.*). His “assessment was a Wagner Grade 2 ulcer,” and he “noted that plaintiff was not compliant, as the wound was not dressed, and x-rays of the right foot were not done as recommended” (*Id.*). Dr. Karpenko “debrided the wound through subcutaneous tissue under local anesthesia,” and he noted that he “instructed plaintiff to obtain an x-ray to rule out osteomyelitis, and [to] return in one week” (*Id.*). On October 19, 2016, plaintiff presented to “his primary care physician, Dr. Adebola Orafidya” (*Id.* at ¶ 12). The chart from this visit “indicates an unspecified ulcer, but otherwise there are no documented complaints or concerns” (*Id.*). Plaintiff returned to Dr. Orafidya on November 2, 2016, and there is “no documentation of any foot ulcerations or any complaints by plaintiff about his foot” (*Id.*).

On November 3, 2016, plaintiff arrived at Dr. Karpenko’s office, complaining of “severe pain of the right 1st toe” (*Id.* at ¶ 13). Dr. Karpenko examined the plaintiff, and noted that the “ulcer still measured 0.4 [cm] by 0.3 cm, but the depth, for the first time, was down through the periosteum to the level of the bone” (*Id.*). The wound was described as “clean, moist, beefy red, granulated with no purulent discharge,” and there was “still” “mild malodor” (*Id.*). Dr. Karpenko “checked the pulses in the foot, and his findings were unchanged from prior visits” (*Id.*). His “assessment was a nonhealing diabetic ulcer, Wagner Grade 3, with possible osteomyelitis,” and “Dr. Karpenko performed a debridement through subcutaneous tissue and bone under local anesthesia” (*Id.*). The chart documents that Dr. Karpenko “discussed with plaintiff that surgical debridement was necessary with possible removal of exposed/infected bone, to be performed as soon as possible at Kingsbrook Jewish Medical Center (“Kingsbrook”)” (*Id.*). Plaintiff went to Kingsbrook for x-rays on November 4, 2016, and the “[x]-rays” “demonstrated bone erosion at the tip of the right first toe, indicative of osteomyelitis” (*Id.* at ¶ 14). On November 10, 2016, Dr. Karpenko “performed an amputation of the distal phalanx of the toe” at Kingsbrook, and the “amputation site was stitched closed at the end of the procedure” (*Id.*).

Plaintiff “received the antibiotic Ancef by IV” “[d]uring the surgery,” and the “antibiotic Augmentin after surgery” (*Id.*). The pathology results revealed that plaintiff had “acute and chronic osteomyelitis” (*Id.*). The operative report indicates that a “dressing was applied to the wound” “[a]fter surgery,” and “plaintiff was provided with a surgical shoe and a cane” (*Id.*). The discharge instructions stated that plaintiff could put some weight on his right heel with the surgical shoe and cane, but “instructed plaintiff to not remove the dressings” (*Id.*). Plaintiff was directed to “return to Dr. Karpenko’s office on November 17, 2016” (*Id.*).

On the night of November 10, 2016, plaintiff was in “significant pain, so he removed the bandages” (*Id.* at ¶ 15). He also noticed that the “stitches were hanging off the toe, so he took out the stitches himself” (*Id.*). Plaintiff did not return to Dr. Karpenko’s office after the surgery (*Id.* at ¶ 16; Plaintiff’s Counterstatement of Material Facts Pursuant to Uniform Rule 202.8-g ¶ 16). On November 17, 2016, plaintiff arrived at Kings County Hospital Emergency Room, “complaining of worsening toe pain after right first toe surgery one week earlier” (Defendant’s Statement of Undisputed Material Facts Pursuant to Uniform Court Rules 202.8-g ¶ 17). An examination of the toe revealed a “dehiscing wound (an open surgical incision)” (*Id.*). The records indicate that “DP pulses were not palpable but were audible by Doppler examination bilateral,” and that “[t]here were no signs or symptoms of an infection” (*Id.*). The chart states that the “assessment was wound dehiscence and arterial insufficiency” (*Id.*). The records document that “[x]-rays were” “performed to rule out osteomyelitis,” and the results showed “mild soft tissue swelling of the stump tissue, but there was no gas within the soft tissues or evidence of osteomyelitis” (*Id.* at ¶ 18). Plaintiff was seen by a vascular surgeon, who “noted [that] plaintiff had several weeks of worsening toe pain with discoloration after debridement by an outside podiatrist” (*Id.* at ¶ 19). The chart indicates that a “vascular exam” revealed “2+ femoral and popliteal pulses bilateral and audible signal of the posterior tibial (PT) pulses bilateral” (*Id.*). The vascular surgeon’s “assessment” “was chronic ischemic changes with no evidence of critical limb ischemia or

need for acute surgical intervention” (*Id.*). Mr. Payne was “discharged on November 17, 2016 with instructions to change his bandages daily and follow up in the Vascular and Podiatry clinics in 2 weeks, and [with] his [primary care physician] in one week” (*Id.*). He was advised to return to the emergency room “if his symptoms recur[red] or worsen[ed]” (*Id.*).

On December 7, 2016, plaintiff “presented to the Vascular clinic of Kings County Hospital,” “where he was seen by Vascular Surgeon, Jon Kirwin, M.D.” (*Id.* at ¶ 20). Dr. Kirwin examined the plaintiff, and recorded that there was a “nonhealing ulcer on the first toe of the right foot,” but the bone was not exposed (*Id.*). He “reviewed the Pulse Volume Recording and found it to be consistent with small vessel disease” (*Id.*). Dr. Kirwin “prescribed the medication Pletal to improve [plaintiff’s] circulation, in addition to the daily aspirin he was already taking” (*Id.*). Plaintiff was advised to “return in three weeks to ensure compliance with the new medication, and to look at his wound” (*Id.*). On December 16, 2016, plaintiff presented to the Emergency Room at Kings County Hospital, “complaining of pain after stubbing his right first toe the day before” (*Id.* at ¶ 21). The toe was examined, and there was a “2 cm x 2 cm eschar with no pus, erythema, or wound dehiscence” (*Id.*). The chart states that the foot was “healing” “well,” and plaintiff “was discharged” “with instructions to follow up with his podiatrist” (*Id.*). On December 28, 2016, plaintiff “returned” to the Kings County Hospital “Vascular Clinic,” and saw Dr. Kirwin (*Id.* at ¶ 22). There “were no clinical signs of an infection that day,” and “no wound cultures or white blood cell testing was done” (*Id.*). Plaintiff was directed to return to the clinic in three weeks (*Id.*). On January 18, 2017, plaintiff visited the Vascular Clinic at Kings County Hospital, and saw Dr. Kirwin (*Id.* at ¶ 23). Dr. Kirwin examined the plaintiff, “not[ing] the presence of small exposed bone, which he described as a change in the condition of the wound” (*Id.*). Dr. Kirwin told the plaintiff that “he would need surgery to remove the exposed bone and clean up the foot” (*Id.*).

On January 24, 2017, plaintiff was seen by Dr. Kirwin after having been admitted to the Emergency Room at Kings County Hospital the previous day with “hyperglycemia, an acute kidney injury and a foot infection” (*Id.* at ¶ 24). Dr. Kirwin operated on the plaintiff on February 3, 2017, and the surgery “consisted of an amputation of [plaintiff’s] right first through third toes” (*Id.*). The operative report states that the “bone on the first metatarsal was resected down to the proximal metatarsal bone” (*Id.*). Further, “[d]ry gangrene was found on the second and third toes, and upon surgical exploration, an abscess was found under the second and third toes, and those toes were amputated at the level of the proximal metatarsals” (*Id.*). Mr. Payne was “discharged” from Kings County Hospital on “February 13, 2017, with instructions to follow-up in the Vascular Clinic,” and the “discharge summary notes that appropriate wound healing was observed during this admission without signs of infection or complication” (*Id.*). Plaintiff returned to the Vascular Clinic on February 22, 2017, and an “examination of [the] amputation site found no signs of active bleeding or infection” (*Id.*). Plaintiff did not return to the Vascular Clinic after March 8, 2017 (*Id.*).

On March 23, 2017, plaintiff presented to “New York Methodist Hospital, where the amputation site was determined to be infected” (*Id.* at ¶ 25). On March 24, 2017, a “below the knee amputation was recommended and performed” (*Id.*). After the “amputation site had healed, plaintiff was provided with a prosthetic” (*Id.*).

In support of his motion for summary judgment, defendant submits an expert affidavit from Dr. Barry I. Rosenblum, D.P.M., a duly licensed podiatrist, contending that Dr. Karpenko did not deviate from acceptable podiatric practice in his treatment of the plaintiff, and that no act or omission of his proximately caused the plaintiff’s injuries (Defendant’s Expert Affidavit ¶¶ 2, 5, annexed as Exhibit A to defendant’s motion papers). Dr. Rosenblum’s opinion is based on review of the pleadings, bills of particulars, “expert witness disclosures,” deposition transcripts, medical records, as well as his education, training, and experience (*Id.* at ¶ 5). Dr. Rosenblum opines that Dr. Karpenko appropriately

treated plaintiff's right toe ulcer from August 11, 2016 through November 10, 2016 by debriding the ulcer, prescribing Augmentin, applying Collagenase to the wound, providing plaintiff with a surgical shoe, and advising plaintiff to "change the wound dressing every day" (*Id.* at ¶¶ 31, 34, 35, 36). Dr. Rosenblum points out that plaintiff "responded to the treatment regimen implemented by Dr. Karpenko," as "[t]he ulcer started to heal, which was confirmed at each visit when the size of the ulcer diminished" (*Id.* at ¶ 33). He maintains that Dr. Karpenko did not deviate from the standard of care by failing to "obtain wound cultures" during his treatment of the plaintiff, as there were no signs of infection, such as "purulent or malodorous drainage" (*Id.* at ¶¶ 32, 34, 35). Further, he indicates that a "culture of a noninfected wound could lead to a false positive and unnecessary treatment" (*Id.* at ¶ 32). Dr. Rosenblum claims that Dr. Karpenko "appropriately altered his treatment plan to include an x-ray" on August 25, 2016 when he noticed that plaintiff's ulcer went "down to the periosteum or membrane that covers the bone" (*Id.* at ¶ 34). Dr. Rosenblum explains that this finding "elevated Mr. Payne's risk of developing osteomyelitis, or a bone infection," and that "[a]n x-ray is an appropriate diagnostic test to reveal a bone infection" (*Id.*). He alleges that Dr. Karpenko adhered to the standard of care by repeatedly reminding plaintiff to get an x-ray during his office visits in September and October of 2016 (*Id.* at ¶¶ 35-36). Dr. Rosenblum contends that Dr. Karpenko appropriately advised Mr. Payne that he "had to be admitted to the hospital for" "a surgical debridement with possible removal of infected bone," when he returned to Dr. Karpenko's office on November 3, 2016 without obtaining an x-ray, and his wound was "slightly larger and probed down through the periosteum to the bone" (*Id.* at ¶ 37). Dr. Rosenblum states that an x-ray taken on November 4, 2016 "confirmed osteomyelitis," and Dr. Karpenko "properly performed" "an amputation of [plaintiff's] distal right 1st toe" on November 10, 2016 (*Id.* at ¶ 38).

Dr. Rosenblum opines that Dr. Karpenko did not proximately cause plaintiff's injuries, as plaintiff never returned to Dr. Karpenko's office after November 10, 2016, and plaintiff took out his

own stitches the evening of the surgery “despite instructions” advising him not to remove “his dressings and sutures” (*Id.* at ¶ 39). He maintains that plaintiff’s injuries “were caused by his non-compliance” with Dr. Karpenko’s instructions, and highlights the fact that plaintiff was not diagnosed with an infection until “over two months after he stopped treating with Dr. Karpenko” (*Id.* at ¶¶ 40, 42). Dr. Rosenblum contends that plaintiff’s infection and subsequent below the knee amputation were not caused by any act or omission of Dr. Karpenko, as the infection occurred too “remote” in time from Dr. Karpenko’s treatment (*Id.* at ¶ 40).

In opposition to defendant’s motion for summary judgment, plaintiff submits a redacted expert affidavit from a duly licensed podiatrist, who concludes that Dr. Karpenko departed from acceptable podiatric practice in his treatment of the plaintiff, and that these departures proximately caused the plaintiff’s injuries (Plaintiff’s Expert Affidavit ¶¶ 2, 6, annexed as Exhibit A to plaintiff’s opposition papers). Plaintiff’s expert opinion is based on review of the pleadings, medical records, deposition transcripts, as well as his/her own education, training, and experience (*Id.* at ¶ 6). Plaintiff’s expert maintains that Dr. Karpenko deviated from the standard of care by failing to culture plaintiff’s wound on August 11, 2016 and August 17, 2016, as Dr. Karpenko classified the wound as a Wagner Grade II, which is a “deep ulcer penetrating from subcutaneous tissue and potentially exposing bone, tendon, ligament and joint capsule,” and plaintiff had “diabetes and vascular insufficiency” (*Id.* at ¶¶ 9, 10, 13). Further, plaintiff’s expert contends that Dr. Karpenko departed from acceptable podiatric practice by failing to ensure that plaintiff obtained an x-ray (*Id.* at ¶ 14). He suggests that Dr. Karpenko did not adequately explain to the patient the reason an x-ray was necessary, as “[n]o reasonable person, if given a clear explanation that the final outcome of such a wound could be amputation of toes or limbs, would ignore the advice to get an x-ray” (*Id.*). He affirms that Dr. Karpenko further deviated from the standard of care by failing to culture the wound on September 28, 2016, as plaintiff’s wound “probed to the periosteum,” had a foul odor, and plaintiff was in a lot of pain (*Id.* at ¶ 15). As the wound was

“open to the bone” on this date, plaintiff’s expert maintains that “the standard of care required Dr. Karpenko to order and arrange for an emergent x-ray” (*Id.*). Plaintiff’s expert alleges that Dr. Karpenko continued to deviate from the standard of care on October 12, 2016 and November 3, 2016 by failing to culture plaintiff’s wound (*Id.* at ¶¶ 15-16). After an x-ray on November 4, 2016 confirmed “osteomyelitis with bone erosion at the tip of the right toe,” plaintiff’s expert suggests that Dr. Karpenko departed from acceptable podiatric practice by failing to perform the amputation of the “distal phalanx (tip) of Mr. Payne’s right first toe” until November 10, 2016 (*Id.* at ¶¶ 17-18). He claims that Dr. Karpenko deviated from the standard of care on November 10, 2016 by neglecting to “give an order for the tissue and bone samples to undergo culture and sensitivity testing by the hospital’s pathology department” (*Id.* at ¶ 19). He explains that a “surgeon must always make an effort to identify the organism which caused the osteomyelitis, in order to know which antibiotic to administer” (*Id.*).

Plaintiff’s expert concludes that Dr. Karpenko’s deviations from the standard of care proximately caused the plaintiff’s injuries, as “[o]steomyelitis, once seeded in a bone, tends to spread via vascular tunnels to adjacent bony structures” (*Id.* at ¶ 27). He/she alleges that there was a “window of opportunity to have changed [plaintiff’s] course somewhere between August 11, 2016 and October 12, 2016,” and that had Dr. Karpenko “undertaken the appropriate care” “from the first indication that the toe wound was slow to heal, Mr. Payne would not have progressed to osteomyelitis” (*Id.* at ¶ 26). Plaintiff’s expert opines that the “die was cast for Mr. Payne as soon as the infection had invaded the distal phalanx of his right first toe,” and “[w]hether or not he was fully compliant with any medical advice/instructions” “would not have changed the outcome” (*Id.* at ¶ 28).

In reply, defendant reiterates that he did not depart from acceptable podiatric practice during his treatment of the plaintiff, and that he did not proximately cause any of plaintiff’s injuries (Reply Affirmation ¶ 3). Defendant contends that the cause of action for lack of informed consent must be

dismissed, as plaintiff has failed to oppose this relief (*Id.* at ¶ 21). Defendant argues that plaintiff's expert opinion is conclusory, as it fails to "address or even acknowledge the months of treatment after leaving Dr. Karpenko's care, or plaintiff's conduct in removing his own surgical stitches" (*Id.* at ¶¶ 8-10). Further, defendant maintains that plaintiff's expert opinion is not "based upon accepted principles of medicine," and provides another affidavit from Dr. Rosenblum to support this contention (*Id.* at ¶ 14). Dr. Rosenblum affirms that "bone infections do not spread from bone to bone as described by plaintiff's expert," and that "bone infection[s] will not spread beyond an immediately adjacent bone, and do not cross over the multiple intervening joints between the bones" (Affidavit of Barry Rosenblum, DPM ¶ 9, annexed as Exhibit A to defendant's reply papers).

To prevail on a cause of action for medical [or podiatric] malpractice, the plaintiff must prove that defendant "deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Stukas v. Streiter*, 83 AD3d 18, 23 [2d. Dept. 2011]; *Paone v. Lattarulo*, 123 AD3d 683, 683 [2d. Dept. 2014]). On a motion for summary judgment, defendant must "make a prima facie showing that there was no departure from good and accepted medical [or podiatric] practice or that the plaintiff was not injured thereby" (*lulo v. Staten Is. Univ. Hosp.*, 106 AD3d 696, 697 [2d. Dept. 2013]; *Paone*, 123 AD3d at 684; *Parrilla v. Sapphire*, 149 AD3d 856, 857 [2d. Dept. 2017]). Once the defendant meets its burden, the burden then shifts to the plaintiff 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). If the defendant "makes only a prima facie showing that he or she did not deviate or depart from accepted medical [or podiatric] practice, the plaintiff, in order to defeat summary judgment, need only raise a triable issue of fact as to the alleged deviation or departure, and need not address the issue of proximate cause" (*Hayden v. Gordon*, 91 AD3d 819, 821 [2d. Dept. 2012]). Conclusory allegations that are "unsupported by competent evidence tending to establish the essential elements of medical [or

podiatric] malpractice are insufficient to defeat defendant physician's summary judgment motion" (*Deutsch v. Chaglassian*, 71 AD3d 718, 719 [2d. Dept. 2010]). Where the parties have submitted conflicting expert reports, summary judgment should not be granted; "[s]uch credibility issues can only be resolved by a jury" (*Id.*).

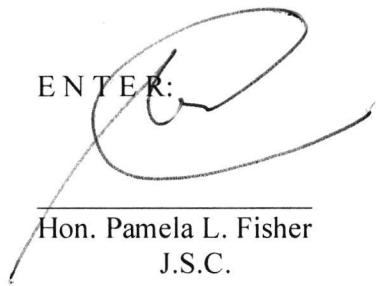
Here, defendant met his prima facie burden on the podiatric malpractice cause of action. Defendant's expert, Dr. Rosenblum, affirmed that the practice and procedures by Dr. Karpenko were within acceptable standards of podiatric practice, and that no act or omission of his proximately caused any injury to the plaintiff. Dr. Rosenblum maintains that Dr. Karpenko appropriately treated plaintiff's right toe wound, advised him to obtain an x-ray, and properly performed an amputation of plaintiff's distal right first toe. Dr. Rosenblum alleges that plaintiff's injuries were not caused by Dr. Karpenko's treatment, as his infection was not diagnosed for more than two months after leaving Dr. Karpenko's care. His opinion constitutes competent evidence, in that it is based on the pleadings, bills of particulars, expert witness disclosures, deposition transcripts, medical records, and his own training and experience.

In opposition, plaintiff produced an affidavit of merit from a duly licensed podiatrist, attesting to departures from accepted standards of podiatric practice, and that these departures were a competent producing cause of the plaintiff's injuries. Defendant's expert claims that plaintiff's expert opinion is not "based on accepted principles of medicine," on the grounds that "bone infection[s] will not spread beyond an immediately adjacent bone, and do not cross over the multiple intervening joints between the bones" (Affidavit of Barry Rosenblum, DPM ¶ 9). However, plaintiff's expert never explicitly states that "bone infection[s]" "spread beyond an immediately adjacent bone," or that they "cross over the multiple intervening joints between the bones" (*Id.*). Therefore, a Frye hearing is not warranted on the issue of whether plaintiff's expert's causation argument is "based upon accepted scientific principles" (*See Lugo v. New York City Health and Hospitals Corp.*, 89 AD3d 42, 56 [2d. Dept. 2011];

Lipschitz v. Stein, 65 AD3d 573, 575 [2d. Dept. 2009] (stating that “defendant’s request for a Frye hearing” “should have been denied,” as “the theory characterized by the defendant and his expert as ‘novel’ was never actually put forward by the plaintiff or the plaintiff’s expert”). Plaintiff’s expert opinion, based on review of the pleadings, medical records, and deposition transcripts, raises triable issues of fact as to the cause of action for podiatric malpractice. Due to the conflicting expert reports, defendant’s motion for summary judgment is denied as to the cause of action for podiatric malpractice (See *Deutsch*, 71 AD3d at 719). As plaintiff has failed to oppose dismissal of the cause of action alleging lack of informed consent, the second cause of action for lack of informed consent is hereby dismissed. Defendant’s motion for summary judgment is granted in part and denied in part.

This constitutes the decision and order of the Court.

ENTER:



Hon. Pamela L. Fisher
J.S.C.

HON. PAMELA L. FISHER