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| <b>Pittelli v MacGillivray</b>                                                                                                                                                                                                 |
| 2023 NY Slip Op 31322(U)                                                                                                                                                                                                       |
| April 12, 2023                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 805304/2014                                                                                                                                                                                           |
| Judge: Erika M. Edwards                                                                                                                                                                                                        |
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

*Justice*

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FRANK PITTELLI and ELIZABETH PITTELLI,

Plaintiffs,

- v -

JOHN MACGILLIVRAY, THE HOSPITAL FOR SPECIAL  
SURGERY, STUART CHALE, and STONY BROOK  
EMERGENCY PHYSICIANS, UNIVERSITY FACULTY  
PRACTICE CORPORATION,

Defendants.

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INDEX NO. 805304/2014MOTION DATE 03/28/2022,  
03/18/2022MOTION SEQ. NO. 003, 004

## DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 143, 145, 147, 149, 150, 153, 155, 157, 159, 161, 163, 165, 167, 168, 171, 173, 175, 177, 178, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 198, 199, 200

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 144, 146, 148, 151, 152, 154, 156, 158, 160, 162, 164, 166, 169, 170, 172, 174, 176, 179, 196, 197, 201

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, the court grants Defendants John MacGillivray's ("Dr. MacGillivray") and Hospital for Special Surgery's ("HSS") motion for summary judgment dismissal of Plaintiffs' Frank Pittelli's ("Mr. Pittelli") and Elizabeth Pittelli's ("Ms. Pittelli") (collectively, "Plaintiffs") complaint, filed under motion sequence 003. The court also grants Defendants Stuart Chale's ("Dr. Chale"), Stony Brook Emergency Physicians' ("Stony Brook") and University Faculty Practice Corporation's ("UFPC") motion for summary judgment dismissal of Plaintiffs' complaint, filed under motion sequence 004.

Plaintiffs brought this medical malpractice and spousal derivative action against Defendants MacGillivray, HSS, Chale, Stony Brook and UFPC (collectively, "Defendants").

Plaintiffs allege in substance that Defendants failed to properly diagnose and treat Mr. Pittelli for a distal right triceps tendon rupture and failed to order an MRI, which caused Mr. Pittelli to have weakness and permanent injuries to his right arm, which caused him to fall on two subsequent occasions and suffer additional injuries. Mrs. Pittelli claims loss of spousal services, society and companionship.

Plaintiffs allege in substance that on July 16, 2012, Mr. Pittelli was struck by a tree as it was being removed from a construction site, causing him to flip in the air and fall on his extended right arm. At the time, Mr. Pittelli was 53 years old and an avid weight lifter. On the same day, he was treated by Defendant Dr. Chale in the emergency room at Stony Brook University Hospital, while Dr. Chale was allegedly employed by Stony Brook and UFPC. Mr. Pittelli complained of pain and swelling in his right elbow and upper arm. An x-ray was performed, which indicated that there were no fractures and he was discharged. Mr. Pittelli traveled to Las Vegas and upon his return, he was examined by his primary care physician, non-party Dr. Philip Mantia, on July 24, 2016. Dr. Mantia ordered a CPK blood test, which was normal.

Plaintiffs further allege that on August 6, 2012, Mr. Pittelli was treated by Defendant MacGillivray at HSS. Mr. Pittelli complained of pain, swelling, loss of range of motion and strength in his right elbow, shoulder and upper arm. Although Mr. Pittelli asked Dr. MacGillivray to order an MRI, Dr. MacGillivray refused to do so. Plaintiffs further allege that on September 11, 2012, Mr. Pittelli was examined by Dr. Svetlana Ilizarov. He complained of weakness in the triceps area and an inability to extend his elbow against gravity or do triceps exercises. Dr. Ilizarov found atrophy and reduced motor strength. Therefore, she suspected that

he had a triceps tendon tear and ordered an MRI. The MRI revealed a right triceps complete tendon tear and Mr. Pittelli subsequently had reconstruction surgery on September 28, 2012.

Plaintiffs allege in substance that Defendants were negligent and departed from good and accepted medical practice in their care and treatment of Mr. Pittelli from July 16, 2012, until September 28, 2012, by failing to perform proper differential diagnosis to determine the cause of Mr. Pittelli's complaints, failing to do proper range of motion and strength testing, failing to order an MRI or other imaging study and discharging him without providing him with a proper diagnosis or proper care for a ruptured triceps tendon. Plaintiffs further allege that Defendants' departures caused him to delay necessary surgery and caused him the loss of a chance to have a timely repair procedure, which could have allowed him to regain a fully functional right arm. They argue that the delay caused Mr. Pittelli's triceps muscle to retract, which required him to have a more extensive repair and reconstructive surgery, which resulted in permanent deficits. Plaintiffs further allege that Mr. Pittelli suffered pain, loss of strength, loss of triceps extension of his dominant arm, deformity and inability to exercise that arm or have full use of it.

Plaintiffs further allege that because of Defendants' departures, Mr. Pittelli suffered additional injuries from two subsequent slips and falls on wet floors while he was on vacation. They allege that he was injured because of weakness in his right triceps which prevented him from extending his right arm to protect himself and break his fall. Plaintiffs allege in substance that Mr. Pittelli slipped and fell in Punta Cana, Dominican Republic on January 3, 2016, causing him to suffer a right rotator cuff tear, injury to his left hip and left knee meniscus tear, which required surgery. Plaintiffs further allege that Mr. Pittelli slipped and fell in Aruba on February 22, 2020. His injuries included a left elbow triceps tear, a right knee quadriceps tendon tear and medial patella-femoral ligament tear, which all required surgery, a right clavicle separation and

deformity, and a left-sided shoulder torn labrum, a torn rotator cuff, which will require surgery, and extensive physical therapy with over 80 treatment visits and continued home exercise therapy. Plaintiffs allege that these injuries were proximately caused by Defendants' departures.

A. Defendants Dr. MacGillivray and HSS's Summary Judgment Motion

Defendants Dr. MacGillivray and HSS now move under motion sequence 003 for summary judgment dismissal of Plaintiffs' complaint, or in the alternative, for partial summary judgment in their favor. The movants rely on the Independent Medical Examination (IME) report of Andrew N. Bazos, M.D. and the expert affirmation of Ramesh H. Gidumal, M.D., an orthopedic expert. They argue in substance that Dr. MacGillivray, an orthopedic surgeon at HSS, and HSS did not depart from good and accepted medical practice by diagnosing Mr. Pittelli with traumatic olecranon bursitis, instead of a ruptured right triceps tendon, and by not ordering an MRI, as there was no reason to do so. Additionally, they argue that there was no causal connection between Dr. MacGillivray's treatment of Mr. Pittelli and the alleged delay in Mr. Pittelli's triceps tendon repair surgery and other injuries.

The movants further argue in substance that Dr. MacGillivray only examined Mr. Pittelli on August 6, 2012. They argue that from the date of the initial accident on July 16, 2012, until the date of Dr. MacGillivray's examination, there is no evidence that Mr. Pittelli's right triceps tendon had ruptured. The movants further argue that Dr. MacGillivray reviewed the x-ray from Stony Brook Hospital's emergency room taken on the date of the accident and it showed no fracture or avulsion. Defendants argue that an avulsion, or piece of bone attached to the triceps tendon, is commonly seen in triceps tendon ruptures, so the x-ray was inconsistent with a rupture. They argue that Dr. MacGillivray examined Mr. Pittelli's elbow, conducted an active

and passive strength and range of motion examination and found tenderness, but specifically noted that the distal triceps was intact.

The movants further argue that Dr. MacGillivray properly diagnosed Mr. Pittelli with traumatic olecranon bursitis and properly prescribed him anti-inflammatories, elevation, ice and an olecranon sleeve. Dr. MacGillivray advised Mr. Pittelli in substance to return if his symptoms did not improve, but Mr. Pittelli never returned or called for another appointment. Although Mr. Pittelli alleges that he asked Dr. MacGillivray to order an MRI based on conversations that he had with physicians in Las Vegas, the movants argue that it would not have been within the standard of care to order an MRI because one was not indicated based on Dr. MacGillivray's findings after the examination, Mr. Pittelli's complaints and history and the x-ray results.

Additionally, the movants argue that two other doctors who examined Mr. Pittelli prior to Dr. MacGillivray also found no triceps tendon rupture. On July 16, 2012, Dr. Chale did not diagnose it and on July 24, 2012, Dr. Mantia also found no rupture of the right triceps tendon. Additionally, the x-ray and CPK blood test were not consistent with a triceps tendon rupture. The movants further argue that Mr. Pittelli first made complaints related to a tear a month later on September 11, 2012, when he was examined by Dr. Svetlana Ilizarov and complained of weakness in the triceps area and an inability to extend his elbow against gravity or do triceps exercises. Dr. Ilizarov examined Mr. Pittelli's arm and elbow and found atrophy and reduced motor strength. Based on his complaints and her examination, Dr. Ilizarov suspected a triceps tendon tear and ordered an MRI which revealed a ruptured right triceps tendon.

The movants further argue that it is purely speculative and that there is no evidence to reasonably infer that the triceps tendon was ruptured at any time from July 16, 2012 until the

time of Dr. MacGillivray's examination of Mr. Pittelli on August 6, 2012, and no legally sufficient evidence to support Plaintiffs' claim for loss-of-chance.

The movants also argue in substance that Mr. Pittelli's alleged injuries from his falls in 2016 in Punta Cana and in 2020 in Aruba are not proximately caused by Defendants MacGillivray's or HSS' alleged departures on August 6, 2012. They argue that the alleged causal link between the alleged departures in 2012 and the accidents in 2016 and 2020 in the Caribbean are so attenuated by time and space as to be barred by public policy and such subsequent accidents and additional injuries are not foreseeable to Defendants. The movants argue that Mr. Pittelli slipped and fell because of wet floors and not because he had weakness in his arm caused by Defendants' alleged departures.

Therefore, they argue that there was no proximate cause for any of Mr. Pittelli's alleged injuries.

B. Defendants Dr. Chale's, Stony Brook's and UFPC's Summary Judgment Motion

Defendants Dr. Chale, Stony Brook and UFPC now move under motion sequence 004 for summary judgment dismissal of Plaintiffs' complaint, or in the alternative, to strike Plaintiffs' supplemental Bill of Particulars alleging additional injuries from alleged unrelated falls. The movants rely on the expert affirmation of Dan Wiener, M.D., an emergency medicine expert. They argue in substance that the movants' treatment of Mr. Pittelli was well within the standard of emergency medicine care and that they did not cause, exacerbate or contribute in any way to Mr. Pittelli's alleged injuries. The movants also argue that Dr. Chale did not depart from accepted standards of emergency room care by failing to diagnose Mr. Pittelli with a ruptured triceps tendon, because there was no evidence that a ruptured triceps tendon existed when he saw Dr. Chale. They also argue that Dr. Chale did not depart by failing to order an MRI, because

there was no reason for him to suspect that Mr. Pittelli had a ruptured triceps tendon and it was not within the standards of practice for an emergency room physician to order an MRI.

The movants further argue that Mr. Pittelli was treated by Dr. Chale on one occasion in Stony Brook Hospital's emergency room on July 16, 2012, and that Dr. Chale conducted a thorough and proper examination, took an accurate history, properly documented the examination and appropriately discharged Mr. Pittelli with proper discharge instructions and a prescription for appropriate medications.<sup>1</sup> Although Plaintiffs allege that Dr. Chale failed to refer Mr. Pittelli to an orthopedist, Dr. Chale advised Mr. Pittelli to follow up with his doctor and Mrs. Pittelli testified that Dr. Chale advised Mr. Pittelli to follow up with an orthopedic. However, the movants argue that it does not matter since Mr. Pittelli called for an orthopedic consult three days after his emergency room visit, he followed up with his primary care physician, Dr. Mantia, eight days after his visit, and he was examined by an orthopedist, Dr. MacGillivray, within three weeks of his visit. The movants argue that this is an acceptable length of time to have surgery if a ruptured triceps tendon existed and there is nothing that they did or failed to do to proximately cause Mr. Pittelli's alleged injuries.

Dr. Chale noted that Mr. Pittelli had swelling and pain to his lateral elbow, but not to his triceps area, he had full range of motion with pain, and no pain on rotation or while bending and extending his elbow. Additionally, Dr. Chale palpated Mr. Pittelli's triceps tendon and determined that it was not ruptured. The movants argue that Dr. Chale properly ordered x-rays to rule out fracture and effusion, which were negative for fracture. All of these factors indicated that there was no triceps tendon tear. The movants further argue that although MRIs are not typically performed in the emergency room, the standard of care in the emergency room is not to

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<sup>1</sup> Although counsel for the movants referred to Mr. Pittelli's left elbow, the records clearly demonstrate that he was treated for an injury to his right elbow.

order an MRI to rule out a tendon rupture unless there is a strong suspicion from the clinical examination, which was not present in this situation.

The movants argue in substance that Mr. Pittelli was not diagnosed with a ruptured triceps tendon until September 12, 2012, which was almost two months after he was examined by Dr. Chale. Furthermore, in the interim, Dr. Mantia examined Mr. Pittelli eight days after the accident and Dr. MacGillivray examined Mr. Pittelli three weeks after the accident and neither of them found a ruptured triceps tendon or ordered an MRI.

The movants further argue that Dr. Bazos conducted the IME on Mr. Pittelli on January 20, 2022, and he noted that the initial accident caused Mr. Pittelli to sustain at most, a minor, soft tissue strain to the right elbow and that there were no clinical objective findings consistent with a triceps tendon rupture, nor weakness in the triceps from July 16, 2012 until August 6, 2012. Dr. Bazos opines in substance that the triceps tendon rupture resulted from long-standing changes to the tendon as a result of Mr. Pittelli's history of heavy lifting and full-contact martial arts.

The movants further argue in substance that Mr. Pittelli's alleged injuries suffered in his two subsequent slip and fall accidents have no connection with the Defendants' alleged negligence as the subsequent accidents were not foreseeable. The movants argue that the accidents were caused by wet floors and there was no connection to the ruptured triceps injury from 2012. Therefore, the falls were not a natural consequence of the initial injury, nor a foreseeable consequence. Additionally, Plaintiffs allege that Mr. Pittelli injured parts of his body other than his right triceps, so the falls involve separate and distinct injuries and are unrelated to the alleged departures in this case. Therefore, the movants argue that there is no proximate cause.

C. Plaintiffs' Combined Opposition to Defendants' Summary Judgment Motions

Plaintiffs oppose both motions and argue in substance that Defendants failed to satisfy their initial burden of establishing a prima facie basis to dismiss Plaintiffs' complaint because their expert opinions were speculative and conclusory, they failed to address crucial facts and they improperly based their opinions on uncertified, inadmissible medical records and Plaintiff's unsigned deposition transcript. Alternatively, Plaintiffs argue that their experts contradicted Defendants' experts and raised several material issues of fact which preclude dismissal of their complaint.

Plaintiffs further argue that Defendants' departures involving their failure to timely diagnose and surgically treat Mr. Pittelli's right triceps tendon rupture caused a two-month delay in corrective surgery that deprived him of a substantial chance for a cure and worsened his injury. The delay caused atrophy and retraction of the triceps which required him to undergo a complicated reconstruction surgery, instead of a repair surgery, and prevented him from regaining full range of motion, full strength in his right arm and caused additional injuries.

Plaintiffs rely on the expert affirmations of Ronald Paynter, M.D., an emergency medicine expert, and Jeffrey Zilberfarb, M.D., an orthopedic expert. They argue in substance that the medical records and Mr. Pittelli's testimony leave no doubt that Mr. Pittelli's accident on July 16, 2012, caused a ruptured right distal triceps tendon, which should have been diagnosed by Dr. Chale and Dr. MacGillivray during their respective examinations. They argue that both Defendants departed from good and accepted medical practice and such departures were the proximate cause of Mr. Pittelli's injuries.

Plaintiffs argue that Dr. Chale failed to properly consider Mr. Pittelli's history and mechanism of trauma, in that he fell on his right arm while it was extended, failed to properly

conduct an examination, including necessary range of motion and strength testing, failed to order a timely orthopedic consult, failed to order an MRI, misdiagnosed the injury and misled Mr. Pittelli to believe his complaints would resolve without further medical or surgical intervention. Plaintiffs further argue in substance that Dr. Chale failed to consider a medical student's note that contradicted Dr. Chale regarding Mr. Pittelli's strength, range of motion and location of swelling on the back of Mr. Pittelli's elbow.

Plaintiffs further argue in substance that Dr. MacGillivray failed to properly consider Mr. Pittelli's history of trauma, failed to properly examine him and conduct necessary range of motion and strength testing, failed to order an MRI, improperly dissuaded Mr. Pittelli from obtaining an MRI elsewhere and misled him to believe that his complaints would resolve in five weeks without further medical or surgical intervention. Plaintiffs further argue in substance that accepted practice required Dr. MacGillivray to test Mr. Pittelli's elbow for its strength and range of motion and to document the results of such tests, even if the results were normal. However, since Dr. MacGillivray did not document these test results, the medical understanding under accepted practice is that he did not perform the required tests.

Additionally, Plaintiffs argue that Dr. MacGillivray ignored Mr. Pittelli's inability to extend his elbow beyond ninety degrees, that he fell on his outstretched arm, that the x-rays indicated swelling over the distal triceps insertion, and that there was swelling in the posterior elbow, which must have inhibited palpation of the tendon and any defect. Therefore, the movants question Dr. MacGillivray's testimony that he felt the tendon. Plaintiffs further argue that Dr. MacGillivray's examination, documentation, failure to properly diagnose the injury, failure to order an MRI and misdiagnosis with improper advice were all departures from accepted practice.

They argue that such departures caused the delay in surgical treatment and deprived Mr. Pittelli of a significant opportunity for a cure and any chance for a better outcome.

Plaintiffs further argue in substance that Dr. Mantia's examination was insufficient to definitively rule-out a triceps tendon rupture and that the CPK results did not rule-out a tendon injury.

They also argue that Dr. Bezos generated two reports, one in 2019 and the other in 2022, but Defendants failed to submit the first report. Plaintiffs argue that Dr. Bezos ignored the substantial atrophy of Mr. Pittelli's right triceps, which was documented in his first report and which supports Mr. Pittelli's claims that he had severe weakness in extension of the elbow, as the atrophy leads to weakness. Additionally, Dr. Bezos failed to record any strength testing on the elbow or Mr. Pittelli's claims that he lost strength in the extension of the elbow.

Additionally, Plaintiffs argue that there is no evidence to support Defendants' arguments that intervening trauma caused Mr. Pittelli's ruptured tendon. Plaintiffs argue that Mr. Pittelli's right arm impairment caused by Defendants' malpractice was a significant factor in causing the subsequent injuries sustained in the two falls.

Therefore, Plaintiffs argue that Defendants failed to meet their prima facie burdens and that they have raised questions of fact regarding liability, causation and Mr. Pittelli's injuries. Additionally, Plaintiffs contend that Defendants' expert opinions were conclusory, speculative and ignored crucial facts. They argue that the Defendants' disregarded that Mr. Pittelli testified that he had no strength and could not move his elbow when he was examined by Dr. Chale and Dr. MacGillivray and that he heard a "pop" when he landed after being struck by the tree. They also disregarded the location of the swelling, the significant atrophy found during the surgery and Plaintiffs' expert's examination.

Thus, Plaintiffs argue that questions of fact remain to be tried.

#### D. Discussion

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 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 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 [1<sup>st</sup> Dept 2003] [internal quotations omitted]; see *Cregan v Sachs*, 65 AD3d 101, 108 [1<sup>st</sup> 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 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 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 [1<sup>st</sup> 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]).

To prove that a defendant is responsible for a plaintiff’s injuries sustained in a subsequent accident, the plaintiff must demonstrate that the injury sustained in the first accident was caused by the defendant’s negligence, that despite the plaintiff’s exercise of ordinary and reasonable diligence in the treatment of his or her injuries, the plaintiff’s subsequent accident was caused by the injuries that the plaintiff sustained in the first accident (*Daliendo v Johnson*, 147 AD2d 312, 318 [2d Dept 1989]).

Here, the court grants both summary judgment motions and dismisses Plaintiffs’ complaint against all defendants. The court finds that Defendants demonstrated their prima facie entitlement to judgment in their favor as a matter of law and Plaintiffs failed to raise any disputed issues of material facts based on competent evidence sufficient to defeat the motions.

Defendants MacGillivray and HSS demonstrated that based on Mr. Pittelli’s history, the mechanism of trauma and his complaints as reported to them, the results from the x-ray and Dr.

MacGillivray's findings after the physical examination, there was no evidence of a ruptured right triceps tendon and no reason to order an MRI. Dr. MacGillivray testified in substance that he conducted active and passive range of motion tests and strength tests and there was no evidence of bulging or significant weakness, which would be consistent with a ruptured triceps tendon. Additionally, Dr. MacGillivray testified in substance that consistent with his practice, he tested Mr. Pittelli's motor strength, but did not write down his findings because they were not significant. The court agrees with Defendants MacGillivray and HSS and finds that based on the record, there can be no reasonable inference that Mr. Pittelli's tendon was ruptured between July 16, 2012 and August 6, 2012.

The court also finds that Defendants Dr. Chale, Stony Brook and UFPC demonstrated that based on the information provided to them regarding Mr. Pittelli's history, the mechanism of trauma, and his complaints as reported to them, the results of Dr. Chale's examination, including palpating the elbow/triceps area, and the x-rays demonstrated that there can be no reasonable inference that Mr. Pittelli had a ruptured right tendon at the time of Dr. Chale's examination and there was no reason for Dr. Chale to order an MRI or refer him to an orthopedist. Dr. Chale noted that Mr. Pittelli was injured from a fall onto his elbow, that he performed range of motion tests and Mr. Pittelli had full range of motion, albeit with pain, and no pain with rotation. Dr. Chale testified that he always conducts a strength test as part of his range of motion exam and that he did not document it because it was not abnormal. As such, the court agrees with Defendants Dr. Chale, Stony Brook and UFPC and finds that there is no evidence to dispute that Mr. Pittelli had a ruptured right triceps tendon at the time of Dr. Chale's examination and that an MRI should have been ordered at this time.

Additionally, the court finds that Defendants demonstrated that they cannot be held responsible as a matter of law for Mr. Pittelli's injuries sustained in his subsequent slips and falls while vacationing in the Caribbean in January 2016 and February 2020. Plaintiffs alleged in substance that in both accidents, Mr. Pittelli slipped and fell on wet floors. The court finds that Plaintiffs failed to raise a material issue of fact as to whether the injuries that he sustained in both subsequent accidents were proximately caused by Defendants' alleged departures. As a matter of law, it is clear that the injury to Mr. Pittelli's right triceps tendon was not a substantial factor in causing either of the subsequent accidents and that the accidents were not foreseeable. They were too remote in time to be proximately caused by Defendants' alleged departures. Mr. Pittelli fell and became injured because he slipped on wet floors and not because the weakness to his right triceps caused his slip and fall. Therefore, the alleged departures and loss-of-chance arguments were not a substantial factor in causing Mr. Pittelli's subsequent falls or injuries.

Furthermore, Plaintiffs' claims regarding proximate causation are purely speculative at best. This is particularly true since Plaintiff's injuries in the initial matter do not involve any injuries to his lower extremities, which could have caused him to lose his balance and slip and fall. Considering all of the facts in the light most favorable to Plaintiffs, there is simply no evidence from which to reasonably infer that Mr. Pittelli would not have injured himself in his subsequent accidents if Defendants had properly and timely diagnosed a ruptured right triceps tendon, ordered an MRI, or done anything differently four and eight years earlier. Both accidents are too remote in time and the injuries alleged have nothing to do with the ruptured triceps tendon. This is true even assuming Plaintiffs prevail on their loss-of-chance arguments. Thus, there is no evidence to support Plaintiffs' claims that such departures were the proximate cause of Plaintiff's alleged injuries in his subsequent slip and fall accidents.

Additionally, the court finds that Plaintiffs' experts' opinions are conclusory, speculative and not sufficiently based on the record. Here, Mr. Pittelli was examined by three doctors who all examined him and did not find a ruptured right triceps tendon. Additionally, none of them saw the need to order an MRI based on their findings. It was not until approximately two months after the accident that Mr. Pittelli reported additional symptoms, including weakness in the triceps, to Dr. Ilizarov and she suspected that there may be a ruptured triceps tendon. Therefore, she ordered an MRI, which confirmed that he had a ruptured triceps tendon. The condition of Mr. Pittelli's injury two months after the accident, during the surgery 2 ½ months after the accident, or during examinations by Plaintiffs' expert several years later, do not indicate that the rupture was present at the time of Defendants' examinations. Plaintiffs' experts' opinions that the rupture was present during Defendants' examinations and that Defendants' departed from the accepted standards of emergency medicine and orthopedic care are purely speculative and contrary to the record.

Additionally, Plaintiffs' experts' opinions that Drs. Chale, Mantia and MacGillivray failed to conduct complete examinations with appropriate strength and range of motion tests is contradicted by the testimony and/or medical records. It is pure conjecture that the physicians misrepresented that they palpated the area and did not find a ruptured triceps tendon, even when the court considers all reasonable inferences in Plaintiffs' favor regarding the location of the swelling, Mr. Pittelli's complaints and the nature of the examinations and tests conducted. Additionally, Plaintiffs failed to demonstrate that Defendants' alleged departures caused the delay in the surgery, which caused Mr. Pittelli to lose his chance at a full recovery. Although the retraction occurred over time, there is no evidence that Mr. Pittelli would have had a full

recovery with full use of his arm had the surgery occurred sooner. There is simply no evidence to support Plaintiffs' claims.

Furthermore, there is no evidence that Mr. Pittelli advised Dr. Chale, Dr. Mantia, or Dr. MacGillivray that he landed with his arm outstretched or that he heard a "pop" when he fell, since it is not noted in the medical records and Mr. Pittelli did not testify that he told them. Even if he had told them, then there is no evidence to determine that the doctors failed to appreciate the mechanism of trauma, or that it would have changed their diagnosis or determination that there was not a ruptured right triceps tendon. Such change would be in complete disregard for the overwhelming evidence to the contrary.

Since the court dismisses Plaintiffs' medical malpractice claims, Ms. Pittelli's derivative action fails as well.

Therefore, the court grants both motions and dismisses Plaintiffs' complaint against all defendants.

The court has considered any additional arguments raised by the parties, which were not specifically addressed herein and the court denies any additional requests for relief, which were not specifically granted herein.

As such, it is hereby

ORDERED that the court grants Defendants John MacGillivray's and Hospital for Special Surgery's motion for summary judgment, filed under motion sequence 003, and the court dismisses Plaintiffs' Frank Pittelli's and Elizabeth Pittelli's complaint as against Defendants John MacGillivray and Hospital for Special Surgery; and it is further

ORDERED that the court grants Defendants Stuart Chale's, Stony Brook Emergency Physicians' and University Faculty Practice Corporation's motion for summary judgment, filed

under motion sequence 004, and the court dismisses Plaintiffs' Frank Pittelli's and Elizabeth Pittelli's complaint as against Defendants Stuart Chale, Stony Brook Emergency Physicians and University Faculty Practice Corporation; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of all defendants as against both Plaintiffs, without costs to any party.

This constitutes the decision and order of the court.

  
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4/12/2023

DATE

CHECK ONE:

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CASE DISPOSED

☒

GRANTED

☐

DENIED

APPLICATION:

☐

SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

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SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

ERIKA M. EDWARDS, J.S.C.