| **Militello v Violante** |
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| 2023 NY Slip Op 35340(U) |
| November 6, 2023 |
| Supreme Court, Niagara County |
| Docket Number: Index No. E170369/2019 |
| Judge: Edward A. Pace |
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

JOHN MILITELLO,

Plaintiff

vs. **DECISION AND ORDER**

Index #: E170369/2019

JUDE S. VIOLANTE, D.P.M.,

Defendant

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Appearances of Counsel

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For JOHN MILITELLO Plaintiff

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McCarthy & Gruber, P.C.
For Jude S. Violante, D.P.M. Defendant

PACE, J.S.C.

Preliminary Statement

Pending before this Court is a motion, pursuant to CPLR sec. 3212(b), for summary judgment dismissing plaintiff's complaint. Defendant JUDE S. VIOLANTE, D.P.M. ("Dr. Violante") by and through his attorneys, McCarthy & Gruber, P.C., Meghann N. Roehl, Esq. of counsel, moves this Court, pursuant to CPLR §3212, for Order granting Summary Judgment on behalf of Defendant and dismissing the Plaintiff's Complaint in its entirety. NYSCEF Documents Nos. 21-44, 50-51 were reviewed and considered by the Court.

Plaintiff JOHN MILITELLO ("Plaintiff"), by and through his counsel, BLACK, LYLE & HABBERFIELD, LLP, Jeffrey A. Black, Esq., oppose Dr. Violante's motion submitting, NYSCEF Nos. 45-49, 52, all of which was reviewed by this Court. Oral argument was heard August 3, 2023, and both parties submitted letters clarifying one or more of their arguments. Both letters (NYSCEF Nos. 51 & 52), were reviewed and considered by the Court.

**DECISION**

In this medical malpractice action, Plaintiff alleges that Dr. Violante was negligent in his care and treatment. Plaintiff asserts that subsequent to a surgery performed by Dr. Violante in October 2015, he developed avascular necrosis ("AVN") of the head of the right first metatarsal and that said condition was not diagnosed until March 2017. Plaintiff does not allege any negligence or malpractice in the genesis of the AVN, rather, that actionable here is the substantial delay in Dr Violante's diagnosis of the condition. Plaintiff further asserts that due to this alleged delay in diagnosis, he suffered injuries which, inter alia, resulted in multiple surgical procedures.

Defendant doctor denies that he deviated from accepted standards of podiatric care in caring for the plaintiff and now motions for, inter alia, an Order granting to Defendant, Jude S. Violante, D.P.M., summary judgment pursuant to CPLR § 3212(b) dismissing the Complaint of Plaintiff, John Militello.

Defendant has submitted the affidavit of Charles M. Lombardi, D.P.M. ("Dr. Lombardi") wherein Dr. Lombardi opined that Dr Violante did not deviate from accepted standards of podiatric care and that there is no causal nexus between Dr Violante's care and treatment of plaintiff, and the injuries alleged. Dr. Lombardi's explains in his opinion that AVN can occur in the absence of negligence, that it is often idiopathic, and that there is virtually nothing that can be done to slow its progression. He further opines that, based upon plaintiff's complaints of pain and swelling, as described in the medical records, as well as the x-rays ordered and reviewed by Dr Violante, it was reasonable that Dr. Violante did not diagnose the AVN prior to March 2017.

It would appear that plaintiff does not dispute Dr. Violante's assertions that AVN can occur in the absence of negligence and that it is often idiopathic. Plaintiff instead bases his claim upon the defendant's alleged deviation from

accepted standard of podiatric care, which led to the failure to diagnose plaintiff's AVN prior to March 17, 2017. This failure to diagnose and resulting progression of the necrosis was avoidable and caused injury to plaintiff. He further alleges that the progress of the necrosis was slowed through the appropriate intervention of another surgeon.

Plaintiff alleges, in his amended bill of particulars the negligence and malpractice of defendant Jude S. Violante, D.P .M., consists of the following:

1. Carelessly and negligently failing to perform a proper and thorough medical examination;
2. carelessly and negligently failing to diagnose the plaintiffs medical condition in a timely fashion;
3. carelessly and negligently failing to re-examine plaintiff when he repeatedly called complaining of his condition;
4. carelessly and negligently deviating from accepted orthopaedic care and treatment standards;
5. carelessly and negligently failing to recognize the development of the disease (namely avascular necrosis);
6. carelessly and negligently delaying treatment to halt the spread of the disease (namely avascular necrosis); and
7. carelessly and negligently failing to recognize apparent cystic changes in available imaging (NYSCEF No. 39).

Dr. Lombardi addresses each of these allegations, concluding that "Dr. Violante met the standards of care and treatment applicable to podiatrists in rendering care and treatment to Plaintiff. His care and treatment of Plaintiff, before, during, and after Plaintiff's surgery of October 30, 2015, was appropriate." (NYSCEF No. 44 at para. 13)

It is one of the fundamental duties of a physician to make a properly skillful and careful diagnosis of a patient's disease or disorder. If the physician fails to bring to that diagnosis the proper degree of skill or care, and makes an incorrect diagnosis, the physician may be held liable to the patient for the damage caused.

In a medical malpractice action, the requisite elements of proof are "a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage" (Hamilton v. Good Samaritan Hosp.

of Suffern, N.Y., 73 A.D.3d 697, 698, 900 N.Y.S.2d 368; see Olgun v. Cipolla, 82 A.D.3d 1186, 1187, 920 N.Y.S.2d 175; Rebozo v. Wilen, 41 A.D.3d 457, 458, 838 N.Y.S.2d 121). When moving for summary judgment, "a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (Rebozo v. Wilen, 41 A.D.3d at 458, 838 N.Y.S.2d 121; see Olgun v. Cipolla, 82 A.D.3d at 1187, 920 N.Y.S.2d 175). "[A] plaintiff opposing a defendant physician's motion for summary judgment must only submit evidentiary facts or materials to rebut the defendant's prima facie showing" (Stukas v. Streiter, 83 A.D.3d 18, 30, 918 N.Y.S.2d 176). The applicable standard of care may differ depending on the skills and expertise of the provider involved. A nonspecialist physician generally is expected to have the same skill and knowledge usually possessed by physicians in the same or a similar locality, at the time of the treatment. Specialists, such as podiatrists, are expected to exercise that degree of skill, learning, and care normally possessed and exercised by an average physician who devotes special study and attention to the diagnosis and treatment of diseases and injuries within that specialty.

This standard of care usually is established by expert medical testimony. Dr. Violante met his prima facie burden of establishing his entitlement to judgment as a matter of law by submitting an expert affirmation which demonstrated that he did not depart from good and accepted medical practice as alleged in the complaint (see Olgun v. Cipolla, 82 A.D.3d at 1187, 920 N.Y.S.2d 175). " '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' " (Leigh v. Kyle, 143 A.D.3d 779, 781, 39 N.Y.S.3d 45, quoting Gillespie v. New York Hosp. Queens, 96 A.D.3d 901, 902, 947 N.Y.S.2d 148; see Stukas v. Streiter, 83 A.D.3d 18, 24, 918 N.Y.S.2d 176).

In opposition to Dr. Violante's motion, however, the affidavit of the plaintiff's expert raised triable issues of fact as to whether Dr. Violante deviated from accepted medical practice (see Stukas v. Streiter, 83 A.D.3d at 30, 918 N.Y.S.2d 176).

The defendant contends that plaintiff's expert failed to offer an adequate foundation for their qualifications to render an opinion about the standard of care to be followed by a doctor of orthopedic or podiatric medicine. This Court disagrees that plaintiff's expert failed to lay such a foundation for podiatric medicine and also appreciated that, while the error in plaintiff's Bill of Particulars, claiming orthopedic expertise may have been a scrivener's error, "any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony" (Stradtman v. Cavaretta [appeal No. 2], 179 A.D.3d 1468, 1471, 118 N.Y.S.3d 828 [4th Dept. 2020] [internal quotation marks omitted]). Here, plaintiff's opposing papers included an expert affidavit which stated that the expert is a board-certified doctor of podiatric medicine (D.P.M.) with over 30 years of experience.

This D.P.M. also states,

> "I obtained my Doctorate of Podiatric Medicine from a prestigious College in the Northeast. I completed a foot and ankle surgical residency through a well-known hospital in the Mid-West. I have been board certified in podiatric surgery for almost 30 years. I have admitting privileges at various hospitals and am a member of various professional organizations in the field of podiatric medicine. I have published peer reviewed articles and papers in the field of podiatric medicine and maintain a private practice in the State of New York. I am familiar with the standard of care as it pertains to podiatrists practicing in the State of New York. I am experienced and familiar with the standard of care as it relates to the proper diagnosis and treatment of podiatric conditions including avascular necrosis (AVN). I am also experienced and familiar with the appropriate treatment of said condition and surgical interventions in the treatment of podiatric condition."

Contrary to the contentions of Dr. Violante, however, the Court concludes that plaintiff raised triable issues of fact sufficient to defeat this motion, by submitting, inter alia, an expert affirmation from a board-certified podiatrist with over 30 years of experience practicing in New York State, establishing both that

Dr. Violante "deviated from the applicable standard of care and that such deviation was a proximate cause of plaintiff's injuries. See, Leberman v. Glick, 207 A.D.3d 1203, 1205, 171 N.Y.S.3d 677 [4th Dept. 2022]. Plaintiff's expert explained that decedent presented to Dr. Violante post-surgey with continued complaints of pain and swelling several months after the bunionectomy. These signs, according to plaintiff's expert should have alerted Dr. Violante that plaintiff was in the early stages of AVN. This expert also stated that "there are several non-surgical treatments available for avascular necrosis that have been found to be successful including activity modification, immobilization, anti-inflammatory medications, blood thinners, injections, compression therapy and as healing occurs, physical therapy and then orthotics. The goal of all these treatments is to prevent further bone loss and prevent bone collapse and the need for surgery."

Plaintiff's expert opined, with a reasonable degree of medical certainty, that Dr. Violante breached the appropriate standard of care in failing to recognize the significance of those symptoms and in failing to order appropriate testing or appropriate conservative care, which in turn delayed diagnosis and treatment and "diminished [decedent's] chance of a better outcome" (Clune v. Moore, 142 A.D.3d 1330, 1331, 38 N.Y.S.3d 852 [4th Dept. 2016] [internal quotation marks omitted]; see Leberman, 207 A.D.3d at 1206, 171 N.Y.S.3d 677; Jeannette S. v. Williot, 179 A.D.3d 1479, 1481, 118 N.Y.S.3d 329 [4th Dept. 2020]). Thus, the conflicting expert opinions submitted by plaintiff and defendant "presented a 'classic battle of the experts' precluding summary judgment," (Jeannette S., 179 A.D.3d at 1481, 118 N.Y.S.3d 329; see Leberman, 207 A.D.3d at 1206, 171 N.Y.S.3d 677; Stradtman v. Cavaretta [appeal No. 2], 179 A.D.3d 1468, 1471, 118 N.Y.S.3d 828 [4th Dept. 2020]).

With the credentials listed and described in the affidavit of plaintiff's expert (NYSCEF No. 46), this Court can conclude that plaintiff's expert "had the requisite skill, training, education, knowledge or experience from which it can be assumed that [the expert's] opinion[ ] ... [is] reliable" (Leberman v. Glick, 207 A.D.3d 1203, 1205, 171 N.Y.S.3d 677 [4th Dept. 2022] [internal quotation marks omitted]; see Stradtman, 179 A.D.3d at 1470-1471, 118 N.Y.S.3d 828; Payne, 96 A.D.3d at 1629-1630, 947 N.Y.S.2d 282). Moreover, although defendant met his initial burden of establishing entitlement to judgment as a matter of law, we conclude that "the affirmation of plaintiff's expert submitted in opposition to the motion ... raised

triable issues of fact sufficient to defeat the motion" (Payne, 96 A.D.3d at 1630, 947 N.Y.S.2d 282; see Leberman, 207 A.D.3d at 1205, 171 N.Y.S.3d 677).

The conflicting medical opinions in this case, that there was a causal connection between the alleged failure to timely diagnose AVN and the onset of subsequent injuries and surgeries raises a question of fact more appropriately to be decided at trial. Here, neither doctor presented medical literature expressly accepting or rejecting a causal nexus between the alleged untimely diagnoses and plaintiff's claimed injuries. However, neither expert claimed the opposing expert was espousing a novel theory of causation or was deviating from generally accepted scientific principles and methodology in evaluating the cited medical data to reach their conclusions. It seems, from the papers submitted, the Court is simply "presented a 'classic battle of the experts' precluding summary judgment" in favor of Dr. Violante with respect to the claims against him (Jeannette S., 179 A.D.3d at 1481, 118 N.Y.S.3d 329; Leberman, at 1206; Stradtman v. Cavaretta [appeal No. 2], 179 A.D.3d 1468, 1471, 118 N.Y.S.3d 828 [4th Dept. 2020]; Heinrich V. Serens, 217 A.D.3d 1320191 N.Y.S.3d 236, [4th Dept. 2023]).

Counsel for defendant also asserts that relevant x-rays were (mis)labeled after they were obtained by plaintiff, causing confusion and uncertainty, and asks that spoliation sanctions be imposed against plaintiff. There is however no proof, in evidentiary form presented to this Court to support this assertion, and so the Court will not consider it here. Nevertheless, the expert for the defendant offered an opinion without complaint that he either resisted or succumbed to the purported (mis)labelling.

In accordance with the above Decision, it is hereby:

ORDERED, that Defendant's motion for an order granting summary judgment pursuant to CPLR § 3212 dismissing plaintiff's complaint in its entirety (Motion sequence No. 1, Doc. 21, et seq.) is DENIED, without costs.

Dated: November 06, 2023
Lockport, New York

Hon. Edward A. Pace, J.S.C.