

**Johnson v Schechter**

2025 NY Slip Op 33999(U)

April 30, 2025

Supreme Court, Queens County

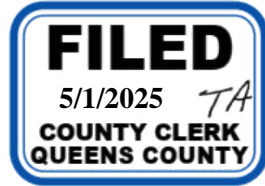
Docket Number: Index No. 709036/2019

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

Short Form Order  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS



-----X  
ANGELA JOHNSON,

Plaintiff,

Index No. 709036/2019  
Part MDP  
Motion Date: March 26, 2025

-against-

Calendar No. 10  
Sequence No. 4

DAVID Z. SCHECHTER, D.P.M.; NEW YORK  
PRESBYTERIAN HOSPITAL QUEENS; VISITING  
NURSE SERVICE OF NEW YORK; ROYAL CARE  
CERTIFIED HOME CARE,

Defendants.

-----X

The following papers numbered EF-92 through EF-184 read on this motion by defendant DAVID Z. SCHECHTER, D.P.M. for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers  
Numbered

Notice of Motion, Affirmation, Exhibits.....	EF92-EF107
Affirmation in Opposition, Exhibits.....	EF151-EF163, EF175-EF176
Reply Affirmation, Memorandum, Exhibits.....	EF179, EF181
Notice of Rejection.....	EF183
Letter.....	EF184

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

Defendant David Z. Schechter<sup>1</sup>, D.P.M.'s motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted. Plaintiff commenced this action against defendants for podiatric care rendered in 2017. Plaintiff filed the Summons and Complaint on May 23, 2019 and issue was joined by defendant Dr. Schechter on July 3, 2019.

Defendant Dr. Schechter argues summary judgment is warranted, as his limited podiatric

<sup>1</sup> Defendant alleges plaintiff misspelled his name in the caption, and it should be David Z. Shechter, D.P.M.

treatment of plaintiff was within the applicable standard of care and he is not liable for plaintiff's injuries. Dr. Schechter presents the pleadings, plaintiff's medical records, the parties' deposition testimony and the expert affirmation of Edwin W. Wolf, D.P.M., M.S. in support of his motion. Dr. Wolf affirmed to be a physician licensed to practice medicine in New York and New Jersey who is board certified in podiatric medicine and podiatric surgery. Dr. Wolf rendered opinions based upon his experience and training and was familiar with the applicable standards of care. He reviewed the pleadings, medical records and parties' deposition testimony and opined within a reasonable degree of podiatric surgery that Dr. Schechter complied with good and accepted medical standards of podiatric medical care in treating plaintiff's feet. Dr. Wolf noted plaintiff presented to Dr. Schechter on four occasions, March 30, 2017, April 6, 2017, April 15, 2017, and May 18, 2017, during which Dr. Schechter's care and treatment was appropriate and within the standard of care.

Dr. Wolf opined Dr. Schechter accurately assessed plaintiff and established a proper treatment plan based upon her pre-existing comorbidities, including kidney disease, peripheral vascular disease and diabetes. He also opined Dr. Schechter properly and timely referred plaintiff to the emergency room due to her underlying conditions of diabetic ulcer, peripheral vascular disease and leukocytosis. Dr. Wolf opined none of Dr. Schechter's actions or inactions proximately caused plaintiff's injuries, as there was no point in his treatment where plaintiff sustained her claimed injuries to her right foot.

Dr. Wolf opined Dr. Schechter appropriately evaluated and treated plaintiff during her March 30, 2017 visit. He opined Dr. Schechter adhered to good and accepted standards by noting plaintiff's prior diagnosis of diabetes, obtaining her medical history and conducting a proper physical examination. Dr. Wolf opined plaintiff was a long standing diabetic patient who had recently undergone a kidney transplant and complained of ulcers on both heels. Dr. Wolf opined at the March 30<sup>th</sup> visit Dr. Schechter performed a thorough and meticulous podiatric examination and noted and documented his observations regarding plaintiff's feet. He opined Dr. Schechter appropriately performed a debridement of plaintiff's feet and properly placed wound cleaning and dressing, including application of Santyl. Dr. Wolf also opined Dr. Schechter appropriately recommended plaintiff undergo a vascular consultation to further assess her vascular condition and its impact on healing her heel ulcers, and appropriately recommended she return to his office in one week.

Dr. Wolf opined Dr. Schechter performed an appropriate exam on April 6, 2017, and properly reviewed plaintiff's medical history and conducted a podiatric physical examination, specifically evaluating plaintiff's heel ulcers. He opined Dr. Schechter appropriately instructed plaintiff utilize a wound care specialist and co-defendant Visiting Nurse Services to perform daily wound cleaning and dressing changes, as plaintiff expressed reluctance to doing it herself. Dr. Wolf opined it was within the standard of care for Dr. Schechter to perform a wound culture on

plaintiff's right heel ulcer to determine if there was bacteria or an infection. He further opined Dr. Schechter properly referred plaintiff at the April 6<sup>th</sup> visit to the hospital, based upon plaintiff's prior health issues, lack of blanching of skin, a warm and erythematous ulcer, and drainage of plaintiff's right heel ulcer, all of which required more aggressive evaluation and treatment. Dr. Wolf further opined plaintiff's presentment on April 6<sup>th</sup> did not require additional treatment efforts beyond direct referral to the hospital, and Dr. Schechter's care and treatment during that visit was appropriate and within the standard of care.

Dr. Wolf opined Dr. Schechter appropriately evaluated and treated plaintiff on her next visit of April 15, 2017, after she had been discharged from the hospital. He opined Dr. Schechter properly examined plaintiff's feet, and appropriately recommended she limit her weight bearing activities. Dr. Wolf further opined she continue with Visiting Nurse Service, and his treatment on that date was within the standard of care. Dr. Wolf opined plaintiff's heel ulcers had been improving and Dr. Schechter appropriately instructed her to continue wound care with Visiting Nurse Care and to return to his office within two weeks.

Dr. Wolf opined Dr. Schechter properly treated plaintiff on her last visit on May 18, 2017, and opined Dr. Schechter appropriately examined plaintiff's feet and right heel ulcers within the standard of care. He opined the debridement Dr. Schechter performed at that visit was an appropriate form of treatment and placement of ointment was appropriate to promote healing and prevent infection. Dr. Wolf opined Dr. Schechter appropriately discussed the use of Apligraf with plaintiff within the standard of care to help accelerate the healing process in plaintiff's diabetic foot ulcers. He further opined Dr. Schechter's instructions for plaintiff to return within two weeks was appropriate and within the standard of care. Dr. Wolf opined Dr. Schechter appropriately and within the standard of care allowed plaintiff's condition to be monitored by co-defendant New York Presbyterian Queens Hospital (NYPQ) and any other medical professional, as she did not present to his office after May 18, 2017.

Dr. Wolf opined none of plaintiff's alleged injuries were proximately caused by Dr. Schechter's limited care and treatment, including necrosis, gangrene, and infection to her right foot. He opined Dr. Schechter appropriately referred plaintiff for a wound consultation on the March 30, 2017 and April 6, 2017 visits based upon his examination, lack of improvement, and plaintiff's noncompliance in dressing changes. Dr. Wolf further opined plaintiff went to NYPQ on April 6<sup>th</sup>, and there was no clinical diagnosis of osteomyelitis or other infection on either foot. He further opined plaintiff was admitted to the hospital for dangerously high blood sugar level and potential ketoacidosis as well as leukocytosis and elevated inflammatory marks that were not related to her heel ulcers but a vaginal abscess. Based upon the above, defendant Dr. Schechter argues his care and treatment of plaintiff was appropriate and within the standard of care and none of his actions or inactions proximately caused plaintiff's injuries.

Plaintiff opposed defendant's motion, arguing there are issues of fact whether Dr. Schechter departed from the standard of care in failing to diagnose and treat plaintiff's heel infection, and whether his departures proximately caused her injuries. Plaintiff presents the medical records, photographs, deposition testimony and an expert affirmation in support of her opposition. Plaintiff argues there are conflicting medical expert opinions that warrant denial of the motion.

Plaintiff presents an affirmation from a physician licensed in Pennsylvania in support of the opposition. Plaintiff's expert affirmed to be a board certified podiatrist and reviewed the parties' deposition testimony and medical records in rendering opinions. The expert opined plaintiff presented to Dr. Schechter with infected heel ulcers based upon signs of necrosis on March 30, 2017 and the wound culture on April 6, 2017. Plaintiff's expert notes Dr. Schechter claims he referred plaintiff to a vascular surgeon but plaintiff testified she did not recall this. The expert opined Dr. Schechter's failure to act on the wound culture result caused plaintiff pain, extensive treatment, hospitalization, surgery and was a departure from good and accepted podiatric practice.

Plaintiff's expert opined Dr. Schechter endorsed NYPQ's decision not to take a wound culture on April 7, 2017, as Dr. Schechter had taken one in the office. The expert further opined Dr. Schechter failed to change plaintiff's antibiotics to required targeted antibiotics that would have helped and was a departure from good and accepted podiatric practice that caused her infection to explode in size. The expert opined Dr. Schechter failed to review the wound culture results with plaintiff on April 15, 2017, and continued plaintiff on an antibiotic that was not covering her infection, which was a departure from good and accepted podiatric practice that caused her injuries.

Plaintiff's expert opined Dr. Schechter failed to inform plaintiff about the April 11, 2017 microbiology report during her office visit on May 18, 2017, and merely debrided her foot, which was a departure from good and accepted podiatric practice. The expert opined as a result of Dr. Schechter's negligence, plaintiff was taken by ambulance to Columbia University Medical Center on May 26, 2017 in unbearable heel pain and a worse infection. Plaintiff's expert opined had Dr. Schechter given plaintiff the right antibiotics in April, her infection would not have worsened, she would not have been hospitalized and needed subsequent surgeries. The expert further opined these departures from good and accepted podiatric practice caused plaintiff's injuries.

Plaintiff's expert disagreed with defense expert Dr. Wolf, and opined Dr. Wolf ignored the heel culture report and wrongly blamed plaintiff's high white blood count on a vaginal abscess that was already healing and was gone by her admission to Columbia. The expert also opined defendant's diagnosis of peripheral artery disease was incorrect and plaintiff's heel infection was all over the tissue culture report. Plaintiff's expert opined Dr. Wolf ignored plaintiff's diagnosis of cellulitis, and Dr. Wolf improperly opined topical ointment was sufficient to clear plaintiff's

deep tissue infection. The expert further opined Dr. Schechter's care and treatment departed from good and accepted podiatric practice and proximately caused plaintiff's injuries, including losing half of her heel. Based upon the above, plaintiff argues there are issues of fact that warrant denial of defendant's motion.

Pursuant to CPLR §3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*) The party moving for summary judgment must make a prima facie showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v. New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a prima facie showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In moving for summary judgment in a medical malpractice action, the defendant must establish a prima facie case that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby, and the plaintiff in opposition must submit evidentiary facts or materials to demonstrate the existence of a triable issue of fact. (*Stukas v. Streiter*, 83 A.D.3d 18, 24 [2d Dept. 2011].) In presenting opposition to raise a triable issue of fact, the plaintiff is required to provide an affidavit of merit by a medical expert, and the failure to submit an affidavit by a medical expert competent to attest to the meritorious nature of the plaintiff's claims requires dismissal of the Complaint. (*Id.* at 28.) Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions. (*Buch v. Tenner*, 204 A.D.3d 635, 638 [2d Dept. 2022].)

Defendant Dr. Schechter established a prima facie entitlement to summary judgment based upon the pleadings, the parties' deposition testimony, medical records and Dr. Wolf's expert affirmation. (See *Longtemps v. Oliva*, 110 A.D.3d 1316 [3d Dept. 2016].) Defendant demonstrated he provided appropriate care and treatment within the applicable standard of care to plaintiff on her four office visits, and none of his acts or omissions proximately caused plaintiff's injuries. Defendant demonstrated through Dr. Wolf's affirmation that he properly examined plaintiff's heels at each visit, properly instructed her with regard to wound dressing and cleaning, and properly applied ointment within the standard of care. Defendant also demonstrated through Dr. Wolf's affirmation that Dr. Schechter appropriately recommended plaintiff work with Visiting Nurse Services after learning plaintiff was not properly and regularly changing wound dressing,

appropriately ordered a wound culture and referred her to the hospital for more aggressive care and treatment of her heel ulcers. Defendant Dr. Schechter further established none of his actions or inactions proximately caused plaintiff's injuries. Defendant further demonstrated his name was improperly spelled in the caption, and should be amended to David Z. Shechter, DPM.

Plaintiff failed to raise a triable issue of fact in dispute. Plaintiff's expert affirmation failed to comply with the requirements of CPLR §2106, and plaintiff failed to explain the failure to tender the report in admissible form. (*Sanchez-Trujillo v. Beach 119, LLC*, 225 A.D.3d 726, 726 [2d Dept. 2024].) Plaintiff's submission of an amended expert affirmation to comply with CPLR §2106 was not considered, as it was submitted after defendant's reply affirmation and without a reasonable explanation for the post-reply submission. Further, plaintiff's expert affirmation was insufficient to raise a triable issue of fact, as the opinions were vague and conclusory, and unsupported by the medical record. (*See Lowell v. Flom*, 195 A.D.3d 801 [2d Dept. 2021].) Plaintiff's expert failed to clearly state a familiarity with the applicable standards of care, and failed to articulate how Dr. Schechter departed from the standard of care and proximately caused plaintiff's injuries.

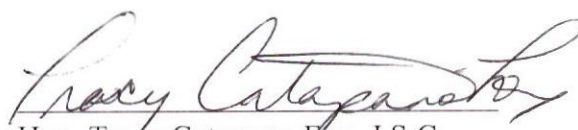
Accordingly, defendant David Z. Schechter, DPM's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, and it is

ORDERED that the caption is amended to reflect defendant David Z. Schechter, DPM's name is David Z. Shechter, DPM, and it is further

ORDERED that plaintiff's Complaint is dismissed as to defendant David Z. Shechter, DPM.

This constitutes the decision and Order of the Court.

Dated: April 30, 2025

  
Hon. Tracy Catapano-Fox, J.S.C.

