

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 19-00684

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

ANTHONY FARGNOLI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MARK WARFEL, D.O., MARK WARFEL, D.O., P.C.,
ST. ELIZABETH'S FAMILY PRACTICE, ST. ELIZABETH'S
MEDICAL CENTER, IMAGING AT ST. ELIZABETH'S
MEDICAL ARTS, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, SYRACUSE (CATHERINE A. GALE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County
(Bernadette T. Clark, J.), entered January 18, 2019. The order denied
in part the motion of defendants-appellants seeking summary judgment
dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: In this medical malpractice action arising from
plaintiff's allegations that, among other things, defendants were
negligent in failing to timely diagnose his breast cancer, defendants-
appellants (defendants) appeal from an order that, inter alia, denied
in part the motion of defendants for summary judgment dismissing the
complaint against them. We affirm.

On a motion seeking summary judgment dismissing a medical
malpractice cause of action, " 'a defendant has the burden of
establishing, prima facie, that he or she did not deviate from the
good and accepted standard of . . . care, or that any such deviation
was not a proximate cause of the plaintiff's injuries' " (*Culver v*
Simko, 170 AD3d 1599, 1600 [4th Dept 2019]; *see Kubera v Bartholomew*,
167 AD3d 1477, 1479 [4th Dept 2018]). Here, as defendants essentially
concede, their submissions in support of the motion with respect to
the medical malpractice causes of action addressed only deviation,
inasmuch as their expert affirmation mentioned causation only in a
fleeting and conclusory manner (*see generally Diaz v New York Downtown*
Hosp., 99 NY2d 542, 545 [2002]; *Occhino v Fan*, 151 AD3d 1870, 1871
[4th Dept 2017]). Thus, because defendants did not meet their initial

burden with respect to causation, we conclude that plaintiff was not required to address that element in his opposition to the motion (see *Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]; *Bhim v Dourmashkin*, 123 AD3d 862, 864 [2d Dept 2014]).

With respect to deviation from the standard of care, however, we conclude that defendants met their initial burden through the submission of the detailed expert affirmation of an internal medicine physician. Defendants' expert opined, in a nonconclusory manner, that defendants' treatment of plaintiff in the two years leading up to his cancer diagnosis was consistent with the accepted standard of care and that defendants took timely action in responding to plaintiff's changing condition during that time (see *Nevarez v University of Rochester*, 173 AD3d 1640, 1641 [4th Dept 2019]; *Boland v Imboden*, 163 AD3d 1408, 1409 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019]; *Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]).

We further conclude that plaintiff raised an issue of fact with respect to deviation in opposition to defendants' motion. Where, as here, a plaintiff's detailed expert affirmation "squarely opposes" the affirmation of a defendant's expert, the result is "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]; see *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Plaintiff's expert affirmation is sufficient to raise an issue of fact, inasmuch as we conclude that it does not "misstate[] the facts in the record" and it is not "'vague, conclusory, [or] speculative'" (*Occhino*, 151 AD3d at 1871; see *Diaz*, 99 NY2d at 544; cf. *Bubar*, 177 AD3d at 1362).