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The Medical Malpractice Expert

By Hillary Frommer

An expert physician is like any other expert witness. She can be a testifying witness or a litigation consultant. Under New York law, the expert testifying physician is a necessary witness in a medical malpractice claim. A plaintiff cannot sustain a case without one. The New York Court of Appeals has held that "in a medical malpractice action, expert medical opinion evidence is required to demonstrate merit."[1] A medical malpractice plaintiff needs an expert from the get-go, and may not wait until discovery has progressed to determine whether an expert is needed. Compare this to many commercial actions, where an expert testifying witness is not often used at all.

The complaint need not contain allegations concerning the expert's opinion; and a plaintiff does not have to allege the expert's theories. The complaint can be fairly "bare-bones." However, under CPLR § 3012-a, a complaint alleging medical malpractice must be accompanied by a Certificate of Merit which declares that the plaintiff's attorney either: (1) reviewed the facts and consulted with a physician knowledgeable in the relevant issues involved in the litigation and, based on that review and consultation, believes there is a reasonable basis to commence the action; or (2) that the attorney could not obtain the required consultation because the certificate could not reasonably be obtained before the statute of limitations barring the action would expire; or (3) the attorney made three separate good faith attempts to obtain the certificate but could not do so because the physicians would not agree to the consultation. Even if the plaintiff's certificate of merit contains one of the latter two statements, the plaintiff still must have the expert physician.

To prove a medical malpractice action, a plaintiff must establish that the defendant's conduct deviated or departed from the generally accepted standard of care in the medical community, and proximately caused the plaintiff's alleged injury.2 The plaintiff does this with an expert witness. Typically in medical malpractice actions, defendant physicians or health care providers move for summary judgment by presenting their own expert affidavits or sworn testimony attesting that there was no deviation from the standard of care or that the physician's conduct did not proximately cause the injury.[3] As with any summary judgment motion, the plaintiff opposes the motion with evidence, which creates a genuine issue of fact. In a medical malpractice action, that evidence must be an affidavit or sworn testimony from the plaintiff's expert.[4]


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In *Stukas v Streiter*,[5] the Second Department clarified the standard to be applied in determining motions for summary judgment in medical malpractice actions. In that case, the defendant moved for summary judgment and made only a *prima facie* showing, through the necessary expert affidavit, that the defendant did not depart from good and accepted medical practice. The expert's opinion was silent on the issue of causation. The court questioned whether, in opposing that motion, the plaintiff was required to raise a triable issue of fact with respect to both the deviation from the standard of care and causation. The court answered that question in the negative, reasoning that generally, a plaintiff opposing summary judgment must rebut only the moving defendant's *prima facie* showing, and that burden is not increased simply because the complaint alleges medical malpractice. Thus, because the defendant's only argument was that there was no deviation from the standard of care, the plaintiff needed to raise an issue of fact only on that point. The court stated:

It is clear that where a defendant physician, in support of a motion for summary judgment, demonstrates only that he or she did not depart from the relevant standard of care, there is no requirement that the plaintiff address the element of proximate cause in addition to the element of departure… In the context of any motion for summary judgment, a party's prima facie showing of entitlement to judgment as a matter of law shifts the burden to the nonmoving party, not to prove his or her entire case, as he or she will have the burden of doing at trial, but merely to raise a triable issue of fact with respect to the elements of theories established by the nonmoving party. There is no valid reason for adopting a different rule in medical malpractice cases.[6]

However, the mere submission of an expert opinion is not enough. That expert opinion must be based in facts from the record. A purely conclusory opinion is insufficient to create an issue of fact. A plaintiff who relies solely on such deficient evidence will likely find himself facing dismissal of the action.[7] Similarly, a defendant will not win summary judgment with an expert opinion that concludes without any factual basis that the physician's conduct was not a departure from the generally accepted standard of care.[8]

The less common, but still equally important use of an expert affidavit, is in defending a defendant's motion to dismiss for want of prosecution under CPLR § 3216. The case law makes clear that to defeat such a motion, a plaintiff must present expert medical opinion to establish a "good and meritorious cause of action."[9] The failure to do so can result in dismissal of the action. For example, in *Reed v Friedman*,[10] the court held that the "plaintiff's failure to submit an affidavit of merit by a medical expert competent to attest to the meritorious nature of the claim" was fatal to the plaintiff's defense of a CPLR § 3216 motion and required dismissal of the complaint. Similarly, in *Salch v Paratore*,[11] the Appellate Division dismissed the medical malpractice action because the plaintiff failed to timely serve and file the note of issue. The Court of Appeals affirmed on the grounds that the plaintiff's failure to submit an expert affidavit of merit warranted such dismissal. Similarly, in *Stolowitz v Mount Sinai Hospital*,[12] the defendant moved to dismiss because the plaintiff failed to serve a complaint for a period of nine months. The Court of Appeals held that dismissal was warranted because the plaintiff failed to submit an affidavit of merit.

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1. *Fiore v Galang*, 64 NY2d 999 [1985].
2. *See Gross v Friedman*, 73 NY2d 721 [1988]; Thompson *v Orner*, 36 AD3d 791 [2d Dept 2007];
3. *See Rebozo v Wilen*, 41 AD3d 457 [2d Dept 2007]; *Korcz v Merritt*, 10 Misc3d 1055[A] [Sup Ct Onondaga County 2005] [court noted that sworn deposition testimony itself can be sufficient evidentiary proof to support a defendant's summary judgment motion, but then found that the testimony the defendant presented failed to establish that there was no deviation from the standard of care which warranted dismissal of the action]).
4. *See Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002] [stating "[o]rdinarily, 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"].
5. 83 AD3d 18 [2d Dept 2011].
6. *Id*. at 24-25.
7. *See Rivera v Greenstein*, 79 AD3d 564 [1st Dept 2010] [finding the expert's assertion that the doctor could have identified and treated the condition was speculative and did not support malpractice liability]; *DiMitri v Monsouri*, 302 AD2d 420 [2d Dept 2003]; *McCord v Paksima*, 2012 WL 5682662 [Sup Ct, Kings County Oct. 26, 2012] [granting the defendant's motion for summary judgment upon finding that the plaintiff's expert based his opinion on facts that were not supported by the evidence].
8. *Korcz v Merritt*, *supra*; *Bastin v Soldiers & Sailors Hosp.*, 258 AD2d 922 [4th Dept 1999].
9. *See Moshberg v Elahi*, 80 NY2d 941 [1992]; CPLR § 3216[e].
10. 117 AD2d 661 [2d Dept 1976].
11. 60 NY2d 851 [1983].
12. 60 NY2d 685 [1983].