

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - March 6, 2007

HOWARD MILLER, J.P.
WILLIAM F. MASTRO
DAVID S. RITTER
RUTH C. BALKIN, JJ.

2006-00830

DECISION & ORDER

Charles Austin, etc., et al., appellants, v Lynnea
Carstens-Elliot, et al., respondents.

(Index No. 2100/03)

Dankner & Milstein, P.C. (Alexander J. Wulwick, New York, N.Y., of counsel), for
appellants.

Westermann, Hamilton, Sheehy, Aydelott & Keenan, LLP, White Plains, N.Y.
(Christopher P. Keenan and Tom Kullen of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal
from a judgment of the Supreme Court, Rockland County (Sherwood, J.), entered December 12,
2005, which, upon a jury verdict, is in favor of the defendants and against them dismissing the
complaint.

ORDERED that the judgment is affirmed, with costs.

The Supreme Court providently exercised its discretion in denying the plaintiffs' request for a missing witness charge. Even if the plaintiffs satisfied their initial burden of establishing a prima facie case of medical malpractice, testimony sought from that witness would have been cumulative (*see Gardiner v Wertheimer*, 256 AD2d 381; *Clements v Lindsey*, 237 AD2d 557; *Klombers v Lefkowitz*, 131 AD2d 815, 816).

April 3, 2007

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The plaintiffs' remaining contention is unpreserved for appellate review, as it was not the subject of a timely objection at trial (*see* CPLR 4017; CPLR 5501[3]; *Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d 326, 332-333; *Pieniewski v Benbenek*, 56 AD2d 710; *Farhart v Matuljak*, 283 App Div 977, 978).

MILLER, J.P., MASTRO, RITTER and BALKIN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court