

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

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Argued - January 29, 2008

DAVID S. RITTER, J.P.  
ANITA R. FLORIO  
EDWARD D. CARNI  
JOHN M. LEVENTHAL, JJ.

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2006-10776

DECISION & ORDER

Rosemary McNamara, et al., appellants, v Kathleen  
Droesch, et al., respondents.

(Index No. 29243/02)

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Lawrence Levine, New York, N.Y., for appellants.

Vardaro & Helwig, LLP, Smithtown, N.Y. (Kelly Nagosky of counsel), for  
respondents.

In an action, inter alia, to recover damages for fraud and medical malpractice, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Doyle, J.), dated September 8, 2006, as granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging fraud.

ORDERED that the order is affirmed insofar as appealed from, with costs.

Where a fraud claim gives rise to damages which are not separate and distinct from those flowing from an alleged medical malpractice cause of action, it must be dismissed (*see Bellera v Handler*, 284 AD2d 488, 490). Here, the defendants established their prima facie entitlement to judgment as a matter of law with respect to the cause of action alleging fraud, and the plaintiffs failed to raise a triable issue of fact. The plaintiffs failed to demonstrate that the injuries arising from the

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alleged fraud differed from those caused by the alleged malpractice. Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging fraud.

RITTER, J.P., FLORIO, CARNI and LEVENTHAL, 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