

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

D21548  
O/kmg

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Argued - November 21, 2008

PETER B. SKELOS, J.P.  
FRED T. SANTUCCI  
MARK C. DILLON  
JOSEPH COVELLO, JJ.

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2007-08749

DECISION & ORDER

Denise James, appellant, v Stephen T.  
Greenberg, etc., respondent.

(Index No. 19958/03)

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Goldstein & Goldstein, P.C., Brooklyn, N.Y. (Arnold J. Goldstein of counsel), for appellant.

Geisler & Gabriele, LLP, Garden City, N.Y. (Stacy Fitzmaurice of counsel), for respondent.

In an action to recover damages for medical malpractice and lack of informed consent, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Patterson, J.), entered August 30, 2007, which, in effect, upon the granting of that branch of the defendant's motion which was pursuant to CPLR 4401 for judgment as a matter of law dismissing the cause of action to recover damages for lack of informed consent, made at the close of the plaintiff's case, and upon a jury verdict, is in favor of the defendant and against her dismissing the complaint.

ORDERED that the judgment is modified, on the law, by deleting the provision thereof in favor of the defendant and against the plaintiff dismissing the cause of action to recover damages for lack of informed consent; as so modified, the judgment is affirmed, that branch of the defendant's motion which was pursuant to CPLR 4401 for judgment as a matter of law dismissing the cause of action to recover damages for lack of informed consent is denied, that cause of action is reinstated, and the matter is remitted to the Supreme Court, Kings County, for a new trial on that cause of action, with costs to abide the event.

December 23, 2008

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The trial court erred in granting that branch of the defendant's motion which was pursuant to CPLR 4401 for judgment as a matter of law dismissing the cause of action to recover damages based on lack of informed consent. To succeed on a cause of action to recover damages for lack of informed consent, a plaintiff must establish, inter alia, that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the reasonably foreseeable risks, benefits, and alternatives to the surgery (*see* Public Health Law § 2805-d[3]; *Innucci v Bauersachs*, 201 AD2d 460). Contrary to the trial court's determination, viewing the evidence in the light most favorable to the plaintiff, and according her every favorable inference that can be reasonably drawn therefrom (*see Bryan v Staten Is. Univ. Hosp.*, 54 AD3d 793, 793-794), the jury could have rationally concluded that a reasonably prudent person in the plaintiff's position would not have undergone the surgery if he or she had been fully informed of the risks attendant thereto. In this regard, the plaintiff testified that she would not have undergone the surgery had she known of those risks (*see Osorio v Brauner*, 242 AD2d 511, 511-512; *Dooley v Skodnek*, 138 AD2d 102, 106-107; *Alberti v St. John's Episcopal Hosp.-Smithtown*, 116 AD2d 612, 613; *Lipsius v White*, 91 AD2d 271, 280). Accordingly, we grant a new trial on the cause of action to recover damages for lack of informed consent.

The plaintiff's remaining contentions concerning certain evidentiary rulings are without merit.

SKELOS, J.P., SANTUCCI, DILLON and COVELLO, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court