

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

D22878
O/kmg

_____AD3d_____

Submitted - March 18, 2009

REINALDO E. RIVERA, J.P.
MARK C. DILLON
JOSEPH COVELLO
RANDALL T. ENG, JJ.

2009-00977

DECISION & ORDER

Alice Silverberg, respondent, v Anamaria
Guzman, etc., et al., appellants.

(Index No. 24076/06)

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, N.Y. (Richard E.
Lerner and Judy C. Selmecci of counsel), for appellants.

Beck & Strauss, PLLC, Uniondale, N.Y. (Leland Stuart Beck of counsel), for
respondent.

In an action to recover damages for medical malpractice, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Rosenberg, J.), dated January 6, 2009, as denied that branch of their motion which was to compel the plaintiff to submit to a neuropsychological examination.

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

The Supreme Court did not improvidently exercise its discretion in denying that branch of the defendants' motion which was to compel the plaintiff to submit to a neuropsychological examination, made more than six months after the note of issue had been filed. The record supports the conclusion that the defendants were aware from the outset of the litigation that the mental state of the 80-year-old plaintiff was at issue, yet they did not request a neuropsychological examination until the instant motion. Moreover, on their motion, they failed to make any showing that "unusual or unanticipated circumstances" developed subsequent to the filing of the note of issue (22 NYCRR

April 28, 2009

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202.21[d]; *see* 22 NYCRR 202.21[e]; *Marks v Morrison*, 275 AD2d 1027; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 138).

RIVERA, J.P., DILLON, COVELLO and ENG, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive style with a large, sweeping initial "J".

James Edward Pelzer
Clerk of the Court