

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

D23237
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_____AD3d_____

Argued - April 6, 2009

WILLIAM F. MASTRO, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
LEONARD B. AUSTIN, JJ.

2007-11507

DECISION & ORDER

Edward Ryan, et al., appellants, v St. Francis
Hospital, et al., respondents, et al., defendants.

(Index No. 5579/03)

Kelner & Kelner, New York, N.Y. (Gerard K. Ryan, Jr., of counsel), for appellants.

Geisler & Gabriele, LLP, Garden City, N.Y. (Guido Gabriele and Jeffrey P.
DeGeorges of counsel), for respondent St. Francis Hospital.

Keller, O'Reilly & Watson, P.C., Woodbury, N.Y. (Scott C. Watson and Denine C.
Pagano of counsel), for respondent Andrew E. Lituchy.

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal from a judgment of the Supreme Court, Nassau County (O'Connell, J.), dated November 26, 2007, which, upon granting the separate motions of the defendant St. Francis Hospital and the defendant Andrew E. Lituchy pursuant to CPLR 4401 for judgment as a matter of law, is in favor of those defendants and against them dismissing the complaint insofar as asserted against those defendants.

ORDERED that the judgment is affirmed, with one bill of costs.

The Supreme Court providently exercised its discretion in precluding the testimony of the plaintiffs' proposed expert on the subject of whether the defendant Andrew E. Lituchy was the attending physician of record and in charge of the injured plaintiff's care during the entire hospitalization on the ground that there were no facts in the record to support the expert's opinion

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(see *Cassano v Hagstrom*, 5 NY2d 643, 646; *Martinez v Mullarkey*, 41 AD3d 666, 670; *Simo v New York City Tr. Auth.*, 13 AD3d 609, 611).

Under the circumstances, the Supreme Court also providently exercised its discretion in precluding the testimony of the plaintiffs' proposed expert as to purported departures from the standard of care by certain nonparty physicians. The plaintiffs failed to give notice prior to trial of the specific subject matter of the expert's testimony setting forth a different theory of recovery not readily discernable from the plaintiffs' bill of particulars and the statements in their CPLR 3101(d) responses (see *Durant v Shuren*, 33 AD3d 843, 844; *Dalrymple v Koka*, 2 AD3d 769, 771).

The plaintiffs' remaining contentions are either academic or without merit.

MASTRO, J.P., COVELLO, BALKIN and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court