

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

D28689
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_____AD3d_____

Argued - September 27, 2010

FRED T. SANTUCCI, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
LEONARD B. AUSTIN, JJ.

2009-06335

DECISION & ORDER

Jean Spagnole, appellant, v Staten Island University
Hospital, et al., respondents.

(Index No. 10761/04)

Levine & Gilbert, New York, N.Y. (Harvey A. Levine of counsel), for appellant.

Kopff, Nardelli & Dopf LLP, New York, N.Y. (Martin B. Adams and P. Bruin
Hays III of counsel), for respondents.

In an action to recover damages for medical malpractice, the plaintiff appeals from a judgment of the Supreme Court, Richmond County (Giacobbe, J.), entered May 18, 2009, which, upon a jury verdict, is in favor of the defendants and against her dismissing the complaint.

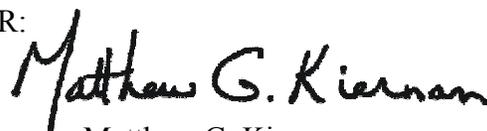
ORDERED that the judgment is affirmed, with costs.

Jury interrogatories must be based on claims supported by the evidence (*see Marzuillo v Isom*, 277 AD2d 362, 363). Here, the Supreme Court properly declined to submit to the jury the proposed interrogatory regarding whether the defendants departed from the standard of care and proximately caused the plaintiff's injuries by failing to order a CT scan on November 20, 2002, as that theory of recovery was not based on evidence adduced at trial (*see Murray v Maniatis*, 21 AD3d 1012, 1013; *cf. Beizer v Schwartz*, 15 AD3d 433, 434).

The plaintiff's remaining contention is raised for the first time on appeal and is not properly before this Court.

SANTUCCI, J.P., BALKIN, LEVENTHAL and AUSTIN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court

October 19, 2010

SPAGNOLE v STATEN ISLAND UNIVERSITY HOSPITAL