

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

D29373
C/kmb

_____AD3d_____

Argued - November 23, 2010

JOSEPH COVELLO, J.P.
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2009-08080

DECISION & ORDER

Phyllis Eisenberg, et al., appellants, v State of
New York, respondent.

(Claim No. 107196)

Smiley & Smiley, LLP, New York, N.Y. (John V. Decolator of counsel), for
appellants.

Andrew M. Cuomo, Attorney General, New York, N.Y. (Andrew D. Bing and Paul
Groenwegen of counsel), for respondent.

In a claim to recover damages for medical malpractice, etc., the claimants appeal from
a judgment of the Court of Claims (Lack, J.), dated August 12, 2009, which, upon a decision of the
same court dated June 12, 2009, made after a nonjury trial on the issue of liability, is in favor of the
defendant and against them dismissing the claim.

ORDERED that the judgment is affirmed, with costs.

To prevail at trial in this claim to recover damages for medical malpractice, etc., the
claimants were required to prove their case by a preponderance of the evidence (*see Burgos v*
Aqueduct Realty Corp., 92 NY2d 544, 550; *Goldberg v Horowitz*, 73 AD3d 691, 694; *Johnson v*
Jacobowitz, 65 AD3d 610, 613; *Speciale v Achari*, 29 AD3d 674). The claimants contend that a new
trial is necessary because the Court of Claims improperly held them to the higher clear and convincing
evidence standard, and the evidence presented otherwise preponderated in their favor. We disagree
with the contention that a new trial is required.

Although the Court of Claims did inaccurately use the phrase “clear and convincing

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evidence,” since this was a bench trial, this Court’s authority is as broad as that of the trial court, and this Court may render the judgment it finds “warranted by the facts” (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499; *see Cohen v Hallmark Cards*, 45 NY2d 493, 498; *Bernardine v City of New York*, 294 NY 361, 366; *Stevens v State of New York*, 47 AD3d 624, 624-625). We find that the evidence preponderated in favor of the defendant (*see Ausch v St. Paul Fire & Mar. Ins. Co.*, 125 AD2d 43, 46). Accordingly, the claim was properly dismissed.

COVELLO, J.P., ANGIOLILLO, DICKERSON and BELEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court