

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

D29677
W/kmb

_____AD3d_____

Argued - December 2, 2010

JOSEPH COVELLO, J.P.
ANITA R. FLORIO
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2009-11041
2011-00032

DECISION & ORDER

Marie Sammartino Guzzi, et al., appellants,
v Ilene Gewirtz, etc., respondent, et al.,
defendants.

(Index No. 26858/06)

Catherine Sammartino, East Islip, N.Y., for appellants.

Martin Clearwater & Bell LLP, New York, N.Y. (Ellen B. Fishman, John L.A. Lyddane, and Stewart Milch of counsel), for respondent.

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Suffolk County (Gazzillo, J.), dated September 21, 2009, which granted the motion of the defendant Ilene Gewirtz for summary judgment dismissing the complaint insofar as asserted against her, and (2) a judgment of the same court entered November 4, 2009, which, upon the order, is in favor of the defendant Ilene Gewirtz and against them dismissing the complaint insofar as asserted against that defendant.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is reversed, on the law, the motion of the defendant Ilene Gewirtz for summary judgment dismissing the complaint insofar as asserted against her is denied, and the order is modified accordingly; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs.

March 8, 2011

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The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

“The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury” (*DiMitri v Monsouri*, 302 AD2d 420, 421; *see Wexelbaum v Jean*, 80 AD3d 756, 757; *Roca v Perel*, 51 AD3d 757, 758). Where a defendant in a medical malpractice action, in moving for summary judgment, makes only a prima facie showing that he or she did not deviate or depart from accepted medical practice, the plaintiff, in order to defeat summary judgment, need only raise a triable issue of fact as to the alleged deviation or departure, and need not address the issue of proximate cause (*see Stukas v Streiter*, _____AD3d _____ [decided herewith]).

Here, the defendant Ilene Gewirtz established her prima facie entitlement to judgment as a matter of law on the issue of deviation or departure from accepted medical practice by submitting, inter alia, an expert affirmation that she did not depart from accepted standards of care. In opposition, however, the plaintiffs, by the submission of an affidavit of their medical expert, raised a triable issue of fact as to whether Gewirtz’s treatment of the plaintiff Marie Sammartino Guzzi departed from accepted standards of medical practice (*see generally Johnson v Queens-Long Is. Med. Group, P.C.*, 23 AD3d 525, 527; *Zarzana v Sheepshead Bay Obstetrics & Gynecology*, 289 AD2d 570, 571; *Walker v Mount Vernon Hosp.*, 272 AD2d 468).

Therefore, the Supreme Court erred in granting Gewirtz’s motion for summary judgment dismissing the complaint insofar as asserted against her.

COVELLO, J.P., FLORIO, ENG and CHAMBERS, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court