

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

D30930  
G/kmb

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - March 25, 2011

JOSEPH COVELLO, J.P.  
RANDALL T. ENG  
L. PRISCILLA HALL  
SHERI S. ROMAN, JJ.

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2009-09193

DECISION & ORDER

Carol Ann Scicchitano, etc., appellant,  
v Edgar Gerstein, etc., respondent.

(Index No. 7314/05)

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Mitchell L. Perry, Bronx, N.Y., for appellant.

Ivone, Devine & Jensen, LLP, Lake Success, N.Y. (Brian E. Lee of counsel), for respondent.

In an action, inter alia, to recover damages for wrongful death, the plaintiff appeals from a judgment of the Supreme Court, Nassau County (Martin, J.), entered August 24, 2009, which, upon a jury verdict finding that the defendant did not depart from good and accepted medical practice, is in favor of the defendant and against her, in effect, dismissing the complaint.

ORDERED that the judgment is affirmed, with costs.

The plaintiff failed to request a charge regarding spoliation of evidence, and failed to preserve for appellate review any issue regarding the trial court's failure to instruct the jury with respect thereto (*see Chajet v Bronner*, 32 AD3d 527, 527; *Rockowitz v Greenstein*, 11 AD3d 523; *Rossetti v Campanella*, 118 AD2d 552). Moreover, the alleged error was not so fundamental in nature as to warrant a new trial (*see Rockowitz v Greenstein*, 11 AD3d 523; *Schlecter v Abbondadello*, 5 AD3d 582; *Columbia v Horowitz*, 162 AD2d 579; *Makovitzky v Spataro*, 139 AD2d 704, 705).

COVELLO, J.P., ENG, HALL and ROMAN, JJ., concur.

ENTER:

  
Matthew G. Kiernan

April 26, 2011

SCICCHITANO v GERSTEIN

Clerk of the Court

April 26, 2011

SCICCHITANO v GERSTEIN