

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

D33251  
H/prt

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

Argued - November 28, 2011

PETER B. SKELOS, J.P.  
JOHN M. LEVENTHAL  
ARIEL E. BELEN  
SHERI S. ROMAN, JJ.

2011-00717

DECISION & ORDER

Ira Goldsmith, et al., appellants, v Joseph P. Taverni,  
etc., et al., respondents.

(Index No. 16201/07)

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Alpert, Slobin & Rubenstein, New York, N.Y. (Morton Alpert and Gary Slobin of counsel), for appellants.

Bartlett, McDonough & Monaghan, White Plains, N.Y. (Edward J. Guardaro, Jr., of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Marber, J.), dated November 15, 2010, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff Ira Goldsmith and his wife, suing derivatively, commenced this action to recover damages for medical malpractice, alleging that the defendants failed to diagnose the injured plaintiff's conditions of thoracic outlet syndrome and reflex sympathetic dystrophy. The defendants moved for summary judgment dismissing the complaint, and the Supreme Court granted the motion.

On their motion for summary judgment, the defendants had the burden of establishing either the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see Heller v Weinberg*, 77 AD3d 622, 622-623; *Dolan v Halpern*, 73 AD3d

1117). Here, the defendants met their initial burden by demonstrating that any departures from good and accepted medical practice were not a proximate cause of any alleged injuries. In that respect, the defendants' expert averred that, despite any failure to diagnose the injured plaintiff's conditions, the injured plaintiff nonetheless received two of the treatment modalities prescribed for those conditions, and explained that any delay in surgical treatment of the conditions did not affect the injured plaintiff's prognosis. In opposition, the plaintiffs' expert failed to articulate how the treatment would have been different had the defendant made a timely diagnosis. Furthermore, he failed to articulate, in a nonconclusory fashion, that the injured plaintiff's condition would not have deteriorated had there been a timely diagnosis. The affirmation of the plaintiffs' expert was, therefore, insufficient to raise a triable issue of fact as to causation (*see McLoughlin v Suffolk Obstetrics & Gynecology, LLP*, 85 AD3d 984; *Dunn v Khan*, 62 AD3d 828, 829).

The parties' remaining contentions are without merit or need not be reached in light of our determination.

Accordingly, the defendants' motion for summary judgment dismissing the complaint was properly granted.

SKELOS, J.P., LEVENTHAL, BELEN and ROMAN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court