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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 50
Keith Orsi, &c., et al.,
Appellants,
v.
Susan Haralabatos, &c., et al.,
Respondents,
et al.,
Defendants.

Dana Heitz, for appellants.
Eric M. Kraus, for respondents.

MEMORANDUM:

The order of the Appellate Division should be reversed,
with costs, and so much of the motion of defendants Haralabatos
and Stony Brook Orthopaedic Associates as seeks summary judgment
dismissing the medical malpractice cause of action against them

should be denied.

We agree with the Appellate Division that there are issues of fact as to whether Haralabatos and Stony Brook departed from the applicable standard of care. The Appellate Division erred, however, in granting summary judgment on the issue of proximate cause. Although the issue was preserved for review by being mentioned in an affirmation of counsel, it was not addressed in the experts' affidavits that Haralabatos and Stony Brook submitted in support of their summary judgment motion. These defendants thus failed to meet their initial burden of showing that any departure from the standard of care was not the proximate cause of plaintiff Keith Orsi's osteomyelitis.

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Order reversed, with costs, and so much of the motion of defendants Haralabatos and Stony Brook Orthopaedic Associates as seeks summary judgment dismissing the medical malpractice cause of action against them denied, in a memorandum. Chief Judge Lippman and Judges Graffeo, Read, Smith, Pigott and Rivera concur.

Decided March 26, 2013