

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 24-01438

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

VINCENTO DEPALMA AND JEANNINE DEPALMA,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

WESTERN NEW YORK UROLOGY ASSOCIATES AND
BRIAN D. RAMBARRAN, M.D., DEFENDANTS-RESPONDENTS.

VANDETTE LAW PLLC, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (J. MARK GRUBER OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Kelly A. Vacco, J.), entered February 16, 2024. The judgment dismissed plaintiffs' complaint upon a jury verdict in favor of defendants.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: In this medical malpractice action, plaintiffs appeal from a judgment dismissing the complaint upon a jury verdict rendered in favor of defendants. We affirm.

We reject plaintiffs' contention that the verdict is against the weight of the evidence (*see generally McClain v Lockport Mem. Hosp.*, 236 AD2d 864, 865 [4th Dept 1997], *lv denied* 89 NY2d 817 [1997]). Conflicting expert testimony presents a credibility issue and resolving "that conflict is a matter peculiarly within the province of the jury" (*Regelski v Weber*, 209 AD2d 965, 965 [4th Dept 1994] [internal quotation marks omitted]). It cannot be said that the evidence so preponderated in favor of plaintiffs that the verdict could not be reached upon any fair interpretation of the evidence (*see Peevey v Unity Health Sys.*, 196 AD3d 1139, 1141 [4th Dept 2021]; *Root v DiRaddo*, 302 AD2d 987, 988 [4th Dept 2003], *lv denied* 100 NY2d 504 [2003]). Contrary to plaintiffs' further contention, Supreme Court did not abuse its discretion in refusing to admit in evidence a photograph offered by plaintiffs (*see Graney v Ryan*, 19 AD3d 1172, 1172-1173 [4th Dept 2005]). Additionally, plaintiffs failed to preserve their contention with respect to the jury's receipt and use of revised verdict sheets (*see Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828 [4th Dept 2000], *lv denied* 96 NY2d 710 [2001]). We also reject plaintiffs' contention that the jury's receipt and use of

revised verdict sheets is a fundamental error that warrants reversal despite the alleged lack of preservation (*see id.*; *see generally Breitung v Canzano*, 238 AD2d 901, 902 [4th Dept 1997]). Nothing in this record indicates that the jury was confused or prevented from fairly considering the issues (*see Aguilar v New York City Tr. Auth.*, 81 AD3d 509, 510 [1st Dept 2011]; *Klein-Bullock v North Shore Univ. Hosp. at Forest Hills*, 63 AD3d 536, 537 [1st Dept 2009]; *cf. Breitung*, 238 AD2d at 902).