

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

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CA 24-01898

PRESENT: CURRAN, J.P., MONTOUR, SMITH, OGDEN, AND DELCONTE, JJ.

ERIC C. BURNS AND HEATHER S. BURNS,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

VOYTEK W. SOBIERAJ, M.D., AND ASSOCIATED
RADIOLOGISTS OF THE FINGER LAKES, P.C.,
DEFENDANTS-RESPONDENTS.

PORTER LAW GROUP, SYRACUSE (MICHAEL S. PORTER OF COUNSEL), FOR
PLAINTIFFS-APPELLANTS.

O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., BINGHAMTON (RACHEL E. MILLER
OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Steuben County
(Jason L. Cook, J.), entered October 16, 2024, in a medical
malpractice action. The judgment dismissed the complaint upon a jury
verdict.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs, the complaint is
reinstated against defendants, and a new trial is granted.

Memorandum: Plaintiffs commenced this action seeking damages for
injuries sustained by Eric C. Burns (plaintiff) as the result of the
alleged malpractice of defendant Voytek W. Sobieraj, M.D. At trial,
plaintiffs' expert testified that Sobieraj deviated from medically
acceptable treatment standards when reviewing a series of X-rays taken
of plaintiff's lungs by failing to identify an abnormality as
potentially cancerous. The jury returned a verdict finding that
Sobieraj was not negligent. We agree with plaintiffs that reversal is
required because Supreme Court improperly gave an error in judgment
charge (see PJI 2:150).

"[A]n error [in] judgment charge is appropriate in a case where
a doctor is confronted with several alternatives and, in determining
appropriate treatment to be rendered, exercises [their] judgment by
following one course of action in lieu of another" (*Anderson v House
of Good Samaritan Hosp.*, 44 AD3d 135, 139 [4th Dept 2007] [internal
quotation marks omitted]; see *Spadaccini v Dolan*, 63 AD2d 110, 120
[1st Dept 1978]). However, such a charge should be given "only in a
narrow category of medical malpractice cases in which there is
evidence that [the] defendant physician considered and chose among

several medically acceptable treatment alternatives" (*Mancuso v Kaleida Health*, 172 AD3d 1931, 1935 [4th Dept 2019], *affd* 34 NY3d 1020 [2019] [internal quotation marks omitted]; see *Nestorowich v Ricotta*, 97 NY2d 393, 399 [2002]; *Martin v Lattimore Road Surgicenter, Inc.*, 281 AD2d 866, 866 [4th Dept 2001]). An error in judgment charge is not warranted where, as here, there was no evidence introduced at trial that the defendant physician "made a choice between or among medically acceptable alternatives" (*Anderson*, 44 AD3d at 140), and the "plaintiffs' [sole] theory of [the] defendant's alleged malpractice ar[ose] from [the] defendant's alleged lack of due care in assessing [the] plaintiff's condition," inasmuch as "the [sole] issue before the jury was [then] whether [the] defendant's failure to diagnose [the] plaintiff's [condition] constituted a deviation from medically accepted standards of care" (*Vanderpool v Adirondack Neurosurgical Specialists, P.C.*, 45 AD3d 1477, 1478 [4th Dept 2007]; see *Lacqua v Silich*, 141 AD3d 690, 692 [2d Dept 2016]). Inasmuch as the error in judgment charge here "create[d] a risk that [the] jury w[ould] find that, because [Sobieraj] exercised his . . . best judgment, there can be no liability despite a failure to adhere to generally accepted standards of care," we conclude that the court's error in giving the charge cannot be deemed harmless (*Anderson*, 44 AD3d at 141; see *Rospierski v Harr*, 59 AD3d 1048, 1049-1050 [4th Dept 2009]; *Vanderpool*, 45 AD3d at 1478), and plaintiffs are thus entitled to a new trial.