

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

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CA 21-00781

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND WINSLOW, JJ.

TERI ELLIS, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

NATA PARNES, M.D., TRI-COUNTY ORTHOPEDICS AND
CARTHAGE AREA HOSPITAL, INC.,
DEFENDANTS-APPELLANTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (ANTHONY R. BRIGHTON OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

SNYDER LAW FIRM, PLLC, SYRACUSE (DAVID B. SNYDER OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County
(James P. McClusky, J.), entered May 11, 2021. The order, insofar as
appealed from, denied in part the motion of defendants for summary
judgment.

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

Memorandum: In this medical malpractice action, defendants
appeal from an order to the extent that it denied their motion for
summary judgment insofar as it sought the dismissal of the first cause
of action. We affirm. Although plaintiff acknowledges that
defendants met their initial burden on the motion, we conclude that,
contrary to defendants' contention, plaintiff raised a triable issue
of fact regarding the first cause of action in opposition to the
motion (*see Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]).
Defendants failed to preserve their further contention that defendant
Tri-County Orthopedics lacks capacity to be sued (*see Fischer v Chevra
Machziket H'Shechuna*, 295 AD2d 227, 228 [1st Dept 2002]; *cf. Admiral
Ins. Co. v Marriott Intl., Inc.*, 67 AD3d 526, 526 [1st Dept 2009]).
Defendants' remaining contention does not warrant modification or
reversal of the order insofar as appealed from.

Entered: April 29, 2022

Ann Dillon Flynn
Clerk of the Court