

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

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CA 23-00280

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

ROBIN HARBINGER AND MATTHEW HARBINGER,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

HIROSHI KATO, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL),
FOR DEFENDANT-APPELLANT.

ROBERT F. JULIAN, P.C., UTICA (ROBERT F. JULIAN OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered February 6, 2023. The order, among other things, denied the motion of defendant Hiroshi Kato, M.D. for summary judgment dismissing plaintiffs' complaint and any cross-claims against him.

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

Memorandum: Plaintiffs commenced this medical malpractice action alleging, inter alia, that Hiroshi Kato, M.D. (defendant) was negligent in the care and treatment that he rendered to Robin Harbinger (plaintiff) and that, as a result of the negligence, plaintiff suffered serious and permanent injuries. Defendant appeals from an order that, inter alia, denied his motion for summary judgment dismissing the complaint and all cross-claims against him. Contrary to defendant's contention, Supreme Court properly denied the motion. "It is well settled that a defendant moving for summary judgment in a medical malpractice action has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; see *Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1036 [4th Dept 2020]). Here, defendant met his initial burden of establishing that he did not deviate or depart from the accepted medical standard of care in his treatment of plaintiff by presenting factual evidence, including a detailed affidavit of his expert, with accompanying medical records, that " 'address[ed] each of the specific factual claims of negligence raised in plaintiffs['] [amended] bill of particulars . . . and was detailed, specific and factual in nature' " (*Pasek*, 186 AD3d at 1036).

We conclude, however, that defendant did not meet his initial burden on the issue of causation, and thus the burden shifted to plaintiffs to raise an issue of fact on the issue of deviation only (see *Allen v Grimm*, 208 AD3d 1589, 1590 [4th Dept 2022]). We further conclude that plaintiffs raised an issue of fact in opposition by submitting, inter alia, a detailed expert affirmation that "squarely oppose[d]" the opinion of defendant's expert (*id.* [internal quotation marks omitted]). The result is "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]). We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court