SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Frey v. Itzkowitz

2026 NY Slip Op 00973 · No. Index No. 805014/18; Appeal No. 5897; Case No. 2025-03326 · Decided February 19, 2026

SUMMARY

The Appellate Division, First Department unanimously affirmed an order denying defendants' motion for summary judgment in a medical malpractice action. The court held that defendants made a prima facie showing through expert affidavits, but plaintiff's expert raised triable issues concerning the failure to perform an immediate colectomy and related treatment decisions.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Manzanet-Daniels, J.P.; Friedman, J.; Chan, J.; Hagler, J.
JURISDICTION	New York Supreme Court, Appellate Division, First Department
DECIDED	February 19, 2026
DOCKET	Index No. 805014/18; Appeal No. 5897; Case No. 2025-03326
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order denying their motion for summary judgment dismissing the medical malpractice complaint.
STANDARD OF REVIEW	Review of an order denying summary judgment; the court considered whether defendants established prima facie entitlement to judgment as a matter of law and whether plaintiff raised a triable issue of fact.
PRECEDENTIAL VALUE	Published and precedential New York Appellate Division decision
PARTIES	Steven Itzkowitz, et al. v. Cindy Frey, etc.

TOPICS

medical malpractice · summary judgment · standard of care · appellate procedure · preservation of error

PRACTICE AREAS

medical malpractice · health law · civil procedure · appellate procedure

QUESTIONS PRESENTED

1. Whether defendants established prima facie entitlement to summary judgment in a medical malpractice action through expert affidavits.
2. Whether plaintiff's expert raised triable issues of fact concerning departure from the standard of care and causation.
3. Whether plaintiff's gastroenterology expert was qualified to opine that an immediate colectomy should have been performed.
4. Whether an objection that defendants' expert affirmations failed to use the language required by CPLR 2106 was preserved for appellate review.
5. Whether the lower court's mistaken reference to a lack-of-informed-consent cause of action warranted reversal.

HOLDINGS

1. Defendants established a prima facie showing of entitlement to summary judgment through expert affidavits opining that their treatment complied with appropriate standards of care and did not cause or contribute to the decedent's pneumonia or death.
2. Plaintiff's expert raised questions of fact for a jury by opining that defendants departed from good and acceptable medical practice, that they should have ordered an immediate colectomy and informed the decedent of the risks and alternatives of continuing medication, and that the failure to perform immediate surgery deprived the decedent of a chance at recovery.
3. A gastroenterologist was qualified to opine on the treatment provided by the defendant gastroenterologist, including whether an immediate colectomy should have been ordered, because the opinion did not concern a particular surgical technique.
4. The objection that defendants' expert affirmations did not employ the language of CPLR 2106 was unpreserved because plaintiff raised it for the first time at oral argument, depriving defendants of an opportunity to cure the alleged defect.
5. The lower court's mistaken statement that plaintiff had pleaded a lack-of-informed-consent cause of action did not warrant reversal because the allegations under discussion were valid in connection with plaintiff's medical malpractice cause of action.

KEY QUOTATIONS

> *"The court was also correct in finding that plaintiff's expert raised questions of fact that are for a jury to decide"* ([*1])

FACTUAL BACKGROUND

Plaintiff's decedent received treatment for a medical condition and later was diagnosed with pneumonia and died. Defendants' experts opined that defendants' treatment complied with good and appropriate standards of care and did not cause or contribute to the pneumonia or death. Plaintiff's gastroenterology expert opined that

defendants departed from the standard of care by failing to order an immediate colectomy and failing to inform the decedent of the risks and alternatives of continuing medication rather than undergoing the colectomy.

PROCEDURAL HISTORY

The Supreme Court, New York County, denied defendants' motion for summary judgment dismissing the complaint. The Appellate Division, First Department, unanimously affirmed without costs.

DISPOSITION

affirmed

CASES CITED

- Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986)
- Matter of Colletti v. Schiff, 98 A.D.3d 887, 888 (1st Dep't 2012)
- Poivan-Traub v. Chaglassian, 187 A.D.3d 653, 653 (1st Dep't 2020)
- Stewart v. Goldstein, 175 A.D.3d 1214, 1215 (1st Dep't 2019)
- Diaz v. New York Downtown Hosp., 99 N.Y.2d 542, 544 (2002)
- Cregan v. Sachs, 65 A.D.3d 101, 108-109 (1st Dep't 2009)
- Johnson v. Harlem Hosp., 238 A.D.3d 412, 413 (1st Dep't 2025)

OPINION

Frey v. Itzkowitz 2026 NY Slip Op 00973
PER CURIAM.
Frey v Itzkowitz (2026 NY Slip Op 00973) Frey v Itzkowitz 2026 NY Slip Op 00973 Decided on February 19, 2026 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: February 19, 2026 Before: Manzanet-Daniels, J.P., Friedman, Chan, Hagler, JJ. Index No. 805014/18|Appeal No. 5897|Case No. 2025-03326| [*1]Cindy Frey, etc., Plaintiff-Respondent, v Steven Itzkowitz, et al., Defendants-Appellants. Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Nicholas Tam of counsel), for appellants. The Turkewitz Law Firm, New York (Eric Turkewitz of counsel), for respondents. Order, Supreme Court, New York County (Kathy J. King, J.), entered April 2, 2025, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Supreme Court correctly found that defendants made out a prima facie showing of entitlement to summary judgment through the expert affidavits of a gastroenterologist, infectious disease specialist, and critical care specialist, all of whom opined that the course of treatment of plaintiff's decedent's medical condition comported with good and appropriate standards of care and did not cause or contribute to the diagnosis of pneumonia or death (see Alvarez v Prospect Hosp ., 68 NY2d 320, 324 [1986]; Matter of Colletti v Schiff , 98 AD3d 887,

888 [1st Dept 2012]). While the affirmations did not employ the verbiage of CPLR 2106, this issue is unpreserved because plaintiff did not raise this issue until oral argument, depriving defendants of the opportunity to cure the defect (see Poivan-Traub v Chaglassian , 187 AD3d 653, 653 [1st Dept 2020]; Stewart v Goldstein , 175 AD3d 1214 , 1215 [1st Dept 2019]). The court was also correct in finding that plaintiff's expert raised questions of fact that are for a jury to decide (see generally Diaz v New York Downtown Hosp ., 99 NY2d 542, 544 [2002]; Cregan v Sachs , 65 AD3d 101, 108-109 [1st Dept 2009]). Specifically, plaintiff's expert gastroenterologist opined that the course of treatment was not within the standard of care and departed from good and acceptable medical practice because defendants failed to order an immediate colectomy and failed to inform decedent of the risks and alternatives of continuing the medication as opposed to doing the colectomy. The affirmation detailed, based on medical records, why that care was a deviation and opined that the failure to perform immediate surgery deprived decedent of a chance at recovery. Defendants' argument that plaintiff's expert is not qualified to opine that surgery should have been performed is unpersuasive. The expert is a gastroenterologist opining on the treatment of defendant gastroenterologist, not on any particular surgical technique (see Johnson v Harlem Hosp. , 238 AD3d 412 , 413 [1st Dept 2025]). Furthermore, defendants are correct that the court mistakenly stated, during oral argument, that plaintiff had a lack of informed consent cause of action, however, this mistake does not warrant reversal because the allegations being discussed were nevertheless valid in connection with plaintiff's medical malpractice cause of action. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: February 19, 2026

PER CURIAM.

Frey v Itzkowitz (2026 NY Slip Op 00973) Frey v Itzkowitz 2026 NY Slip Op 00973 Decided on February 19, 2026 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: February 19, 2026 Before: Manzanet-Daniels, J.P., Friedman, Chan, Hagler, JJ. Index No. 805014/18|Appeal No. 5897|Case No. 2025-03326| [*1]Cindy Frey, etc., Plaintiff-Respondent, v Steven Itzkowitz, et al., Defendants-Appellants. Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Nicholas Tam of counsel), for appellants. The Turkewitz Law Firm, New York (Eric Turkewitz of counsel), for respondents. Order, Supreme Court, New York County (Kathy J. King, J.), entered April 2, 2025, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Supreme Court correctly found that defendants made out a prima facie showing of entitlement to summary judgment through the expert affidavits of a gastroenterologist, infectious disease specialist, and critical care specialist, all of whom opined that the course of treatment of plaintiff's decedent's medical condition comported with good and appropriate standards of care and did not cause or contribute to the diagnosis of pneumonia or death (see Alvarez v Prospect Hosp ., 68 NY2d 320, 324 [1986]; Matter of Colletti v Schiff , 98 AD3d 887,

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