

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)