

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH JUDICIAL DEPARTMENT

**Darlene Miller and James Miller v. John Ross McGrath, M.D.,
Kaleida Health, Inc., Buffalo General Medical Center, Gates Vascular
Institute, WNY Radiology Associates, LLC, Carla A. Frederick, M.D.,
and UBMD Internal Medicine**

Miller, 2026 NY Slip Op 00707 (Supreme Court of the State of New York Appellate Division Fourth Judicial
Department 2026) · No. 859 CA 24-01872 · Decided February 11, 2026

SUMMARY

The Appellate Division, Fourth Department, modified an order granting summary judgment in a medical malpractice action arising from a bronchial artery embolization procedure. The court reinstated claims against the interventional radiologist concerning the performance of the procedure without bronchoscopy data, its medical indication, and the untimely post-procedure note, while affirming dismissal of specified claims against the consulting pulmonologist and her practice.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
WRITING FOR THE COURT	Bannister, J.P.; Montour, J.; Smith, J.; Greenwood, J.; Hannah, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department
DECIDED	February 11, 2026
DOCKET	859 CA 24-01872
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiffs appealed from an order granting in part defendants' motions for summary judgment dismissing the complaint and cross-claims. The Appellate Division modified the order by denying summary judgment on specified claims against McGrath and WNY Radiology Associates, LLC, and otherwise affirmed.
STANDARD OF REVIEW	On a defendant's motion for summary judgment in a medical malpractice action, the defendant bears the initial burden of establishing the absence of a departure from good and accepted

	medical practice or that the plaintiff was not injured thereby. The burden then shifts to the plaintiff only as to elements on which the defendant met the prima facie burden; the plaintiff must raise a triable issue of fact through competent expert evidence.
PRECEDENTIAL VALUE	Published New York intermediate appellate opinion
PARTIES	Darlene Miller, James Miller v. John Ross McGrath, M.D., Kaleida Health, Inc., Buffalo General Medical Center, Gates Vascular Institute, WNY Radiology Associates, LLC, Carla A. Frederick, M.D., UBMD Internal Medicine

TOPICS

medical malpractice professional negligence standard of care proximate cause appellate procedure

PRACTICE AREAS

medical malpractice professional negligence civil procedure appellate procedure

QUESTIONS PRESENTED

1. Whether plaintiffs raised triable issues of fact concerning whether McGrath departed from the applicable standard of care by performing the bronchial artery embolization without data that a completed bronchoscopy would have provided and without ensuring that the procedure was medically indicated.
2. Whether plaintiffs raised a triable issue of fact concerning McGrath's alleged failure to prepare a timely post-procedure note and whether that failure was a proximate cause of injury.
3. Whether summary judgment was properly granted to Frederick and UBMD on claims that Frederick failed to coordinate with medical providers before the procedure and failed to follow up with Miller afterward.
4. Whether plaintiffs could appeal claims dismissed on consent.

HOLDINGS

1. Claims dismissed with plaintiffs' counsel's consent were not properly before the Appellate Division because no appeal lies from that portion of the order.
2. Summary judgment was improperly granted on claims that McGrath performed the procedure without first having the data a completed bronchoscopy would have provided and failed to ensure that the procedure was medically indicated.
3. Summary judgment was improperly granted on the claim that McGrath failed to prepare a timely post-procedure note.
4. Summary judgment was properly granted to the UBMD defendants on claims that Frederick failed to coordinate with medical providers before the embolization and failed to follow up with Miller after the procedure.

KEY QUOTATIONS

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (at 2)

"a classic battle of the experts that is properly left to a jury for resolution" (at 2)

FACTUAL BACKGROUND

Darlene Miller presented to Buffalo General Medical Center coughing up blood. Although pulmonologist Carla A. Frederick scheduled a bronchoscopy, Miller was discharged without undergoing it after her condition apparently improved, then returned the next day when her condition worsened. Frederick advocated an urgent bronchial artery embolization, which John Ross McGrath performed without a preceding bronchoscopy; Miller suffered a spinal stroke during or after the procedure. McGrath left immediately after the procedure and had not prepared a post-procedure note before Miller's condition precipitously worsened.

PROCEDURAL HISTORY

Plaintiffs commenced a negligence and medical malpractice action arising from injuries sustained during a bronchial artery embolization procedure. The Supreme Court, Erie County, entered an order on October 24, 2024, granting defendants' summary-judgment motions in part. Plaintiffs appealed, and the Appellate Division modified the order as to three claims against McGrath and affirmed the remainder.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The order was modified by denying the WNYRA defendants' motion as to claims that McGrath performed the bronchial artery embolization without first having data from a completed bronchoscopy, failed to ensure that the procedure was medically indicated, and failed to timely issue a post-procedure note, and by reinstating those claims against McGrath. The order was otherwise affirmed.

CASES CITED

- Matter of Charity M. [Warren M.] [appeal No. 2], 145 AD3d 1615, 1617 [4th Dept 2016]
- Bubar v. Brodman, 177 AD3d 1358, 1359 [4th Dept 2019]
- Stradtman v. Cavaretta [appeal No. 2], 179 AD3d 1468, 1469 [4th Dept 2020]
- Ziemendorf v. Chi, 207 AD3d 1157, 1157-1158 [4th Dept 2022]
- Nowelle B. v. Hamilton Med., Inc., 177 AD3d 1256, 1258 [4th Dept 2019]
- O'Shea v. Buffalo Med. Group, P.C., 64 AD3d 1140, 1141 [4th Dept 2009], appeal dismissed 13 NY3d 834 [2009]

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