

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

Ford v. Litvak

Ford, 2026 NY Slip Op 01492 (Supreme Court of the State of New York Appellate Division Second Judicial Department 2026) · No. 2021-02177 · Decided March 18, 2026

SUMMARY

The Appellate Division, Second Department, affirmed an order denying the defendant physician's motion for summary judgment in an action alleging medical malpractice and lack of informed consent. The court held that conflicting expert opinions raised triable issues of fact regarding the failure to confirm that the plaintiff had a gallbladder before surgery and regarding informed consent.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Francesca E. Connolly, J.P.; Valerie Brathwaite Nelson, J.; Phillip Hom, J.; Elena Goldberg Velazquez, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Department
DECIDED	March 18, 2026
DOCKET	2021-02177
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendant appealed from an order denying his motion for summary judgment dismissing the complaint in an action alleging medical malpractice and lack of informed consent.
STANDARD OF REVIEW	On a motion for summary judgment, a physician-defendant must make a prima facie showing that there was no departure from good and accepted medical practice or that the physician's acts were not a proximate cause of injury. If that showing is made, the burden shifts to the plaintiff to raise a triable issue of fact. Summary judgment is inappropriate where the parties submit conflicting medical expert opinions.
PRECEDENTIAL VALUE	published

TOPICS

medical malpractice

informed consent

summary judgment

standard of care

appellate procedure

PRACTICE AREAS

medical malpractice

personal injury

health law

civil procedure

QUESTIONS PRESENTED

1. Whether the defendant was entitled to summary judgment on the medical-malpractice claim after submitting expert evidence that his treatment complied with accepted medical practice and did not cause injury.
2. Whether the plaintiff raised a triable issue of fact on the medical-malpractice claim through contrary expert evidence.
3. Whether the defendant was entitled to summary judgment on the lack-of-informed-consent claim based on expert evidence, deposition testimony, and a signed consent form.
4. Whether the plaintiff raised a triable issue of fact on the lack-of-informed-consent claim through a contrary expert affirmation.

HOLDINGS

1. The defendant established a prima facie entitlement to summary judgment on the medical-malpractice claim, but the plaintiff's expert affirmation raised a triable issue of fact concerning whether the defendant departed from the standard of care and whether that departure caused injury. Summary judgment was therefore properly denied.
2. The defendant established a prima facie entitlement to summary judgment on the lack-of-informed-consent claim, but the plaintiff's expert affirmation raised triable issues of fact. The claim therefore could not be dismissed on summary judgment.

KEY QUOTATIONS

"To establish a physician's liability for medical malpractice, the "plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries"" ([*1])

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions"" ([*1])

"Lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence"" ([*2])

"The mere fact that the plaintiff signed a consent form does not establish the [defendant's] prima facie entitlement to judgment as a matter of law"" ([*2])

FACTUAL BACKGROUND

In February 2015, Stephen Litvak performed laparoscopic cholecystectomy surgery on Joshua Ford but was unable to locate Ford's gallbladder. A subsequent MRI revealed that Ford did not have a gallbladder. Ford alleged that Litvak committed malpractice and lacked informed consent by failing to review his medical records and failing to obtain preoperative CT or MRI imaging that could have revealed the absence of a gallbladder. Both sides submitted expert affirmations concerning the applicable standard of care, causation, and informed consent.

PROCEDURAL HISTORY

Joshua Ford commenced an action against Stephen Litvak after Litvak performed laparoscopic gallbladder-removal surgery despite being unable to locate a gallbladder, which a subsequent MRI showed Ford did not have. Litvak moved for summary judgment dismissing the complaint. The Supreme Court, Queens County, denied the motion, and the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- *Abruzzi v. Maller*, 221 AD3d 753, 755
- *Paglinawan v. Ing-Yann Jeng*, 211 AD3d 743, 744
- *Templeton v. Papathomas*, 208 AD3d 1268, 1270
- *Ortiz v. Wyckoff Hgts. Med. Ctr.*, 149 AD3d 1093, 1094
- *Xiao Yan Ye v. Din Lam*, 191 AD3d 827, 828
- *Mirshah v. Obedian*, 200 AD3d 868, 871
- *Gupta v. Lescale*, 224 AD3d 668, 669
- *Ruiz v. Opsha*, 192 AD3d 1055
- *Godel v. Benjy Goldstein & George Freud, D.D.S., PLLC*, 155 AD3d 939, 941
- *Jolly v. Russell*, 203 AD2d 527, 528
- *Pirri-Logan v. Pearl*, 192 AD3d 1149, 1151
- *Williams v. Levine*, 238 AD3d 960, 962
- *Friedberg v. Rodeo*, 193 AD3d 825, 826
- *Schussheim v. Barazani*, 136 AD3d 787, 789
- *Williams v. Levine*, 238 AD3d 960, 963
- *Pirri-Logan v. Pearl*, 192 AD3d 1149, 1152
- *Friedberg v. Rodeo*, 193 AD3d 825, 826-827
- *Godel v. Benjy Goldstein & George Freud, D.D.S., PLLC*, 155 AD3d 939, 942

OPINION

PER CURIAM.

Ford v Litvak (2026 NY Slip Op 01492) Ford v Litvak 2026 NY Slip Op 01492 Decided on March 18, 2026 Appellate Division, Second 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 on March 18, 2026 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department FRANCESCA E. CONNOLLY, J.P.

VALERIE BRATHWAITE NELSON PHILLIP HOM ELENA GOLDBERG VELAZQUEZ, JJ. 2021-02177 (Index No. 710558/17) [*1]Joshua Ford, respondent, v Stephen Litvak, etc., appellant. Dorf Nelson & Zauderer, LLP, Rye, NY (Jonathan B. Nelson of counsel), for appellant. Koss & Schonfeld, LLP, New York, NY (Jacob J. Schindelheim of counsel), for respondent. DECISION & ORDER In an action, inter alia, to recover damages for medical malpractice and lack of informed consent, the defendant appeals from an order of the Supreme Court, Queens County (Peter J. O'Donoghue, J.), dated February 22, 2021.

The order denied the defendant's motion for summary judgment dismissing the complaint. ORDERED that the order is affirmed, with costs. In February 2015, the defendant performed a laparoscopic cholecystectomy, or gallbladder removal surgery, on the plaintiff. During the procedure, the defendant was unable to locate the plaintiff's gallbladder. A subsequent MRI revealed that the plaintiff did not have a gallbladder.

The plaintiff commenced this action, inter alia, to recover damages for medical malpractice and lack of informed consent, alleging, among other things, that the defendant failed to perform a preoperative CT scan or MRI that could have revealed that the plaintiff did not have a gallbladder.

The defendant moved for summary judgment dismissing the complaint, and the plaintiff opposed. In an order dated February 22, 2021, the Supreme Court denied the motion. The defendant appeals. To establish a physician's liability for medical malpractice, the "plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries" (*Abruzzi v Maller*, 221 AD3d 753, 755 [internal quotation marks omitted]; see *Paglinawan v Ing-Yann Jeng*, 211 AD3d 743, 744). "[O]n a motion for summary judgment, a defendant doctor must make a prima facie showing that there was no departure from good and accepted medical practice or that [their] acts were not a proximate cause of any injury to the plaintiff" (*Templeton v Papathomas*, 208 AD3d 1268, 1270; see *Ortiz v Wyckoff Hgts.*

Med. Ctr., 149 AD3d 1093, 1094). "When a defendant makes a prima facie showing, the burden shifts to the plaintiff to raise a triable issue of fact with respect to the element of the cause of

action or theory of nonliability that is the subject of the moving party's prima facie showing" (*Xiao Yan Ye v Din Lam*, 191 AD3d 827, 828; see *Templeton v Papathomas*, 208 AD3d at 1270).

"Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions" (*Mirshah v Obedian*, 200 AD3d 868, 871 [internal quotation [*2]marks omitted]; see *Gupta v Lescale*, 224 AD3d 668, 669).

Here, the defendant established his prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging medical malpractice by submitting, inter alia, an expert affirmation of a board-certified physician who opined with a reasonable degree of medical certainty that the treatment the defendant rendered to the plaintiff was in accordance with good and accepted medical practice and did not proximately cause any injuries.

In opposition, the plaintiff raised a triable issue of fact by submitting an expert affirmation of a board-certified physician who opined that the defendant departed from the standard of care and caused the plaintiff's injuries by failing to consider the plaintiff's medical records and to confirm that the plaintiff had a gallbladder through a preoperative CT scan or MRI (see generally *Ruiz v Opsha*, 192 AD3d 1055).

Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging medical malpractice. "Lack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" (*Godel v Benjy Goldstein & George Freud, D.D.S., PLLC*, 155 AD3d 939, 941 [alteration omitted], quoting *Jolly v Russell*, 203 AD2d 527, 528).

"To establish a cause of action for malpractice based on lack of informed consent, [the] plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if [they] had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury" (*Pirri-Logan v Pearl*, 192 AD3d 1149, 1151 [internal quotation marks omitted]; see *Williams v Levine*, 238 AD3d 960, 962). "The mere fact that the plaintiff signed a consent form does not establish the [defendant's] prima facie entitlement to judgment as a matter of law" (*Friedberg v Rodeo*, 193 AD3d 825, 826, quoting *Schussheim v Barazani*, 136 AD3d 787, 789).

Here, the defendant demonstrated his prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging lack of informed consent. Among other things, the defendant's expert affirmation, the parties' deposition testimonies, and the plaintiff's signed

consent form, established that the plaintiff was properly informed about the subject surgery, including alternatives and reasonably foreseeable risks attendant thereto (see Williams v Levine, 238 AD3d at 963; Pirri-Logan v Pearl, 192 AD3d at 1152).

In opposition, the plaintiff's expert affirmation raised triable issues of fact (see Friedberg v Rodeo, 193 AD3d at 826-827; Godel v Benjy Goldstein & George Freud, D.D.S., PLLC, 155 AD3d at 942). Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging lack of informed consent.

CONNOLLY, J.P., BRATHWAITE NELSON, HOM and GOLDBERG VELAZQUEZ, JJ., concur.
ENTER: Darrell M. Joseph Clerk of the Court