

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

1016

CA 08-02328

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

TIMOTHY SUPHANKOMUT, AS ADMINISTRATOR OF
THE ESTATE OF AMPHAN PHETDUM, DECEASED,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CHI-TEH YU, M.D., MICHAEL HOCKO, M.D.,
JEAN G. HAAR, D.D.S., M.D., BUFFALO MEDICAL
GROUP, P.C., RAYMOND V. PAOLINI, JR., M.D.,
AND BUFFALO OTOLARYNGOLOGY GROUP, P.C.,
DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (AMY C. MARTOCHE OF COUNSEL), FOR
DEFENDANT-APPELLANT CHI-TEH YU, M.D.

RICOTTA & VISCO, BUFFALO (JOHN BLAND OF COUNSEL), BUFFALO, FOR
DEFENDANT-APPELLANT MICHAEL HOCKO, M.D.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MATTHEW J. BATT OF
COUNSEL), FOR DEFENDANTS-APPELLANTS JEAN G. HAAR, D.D.S., M.D. AND
BUFFALO MEDICAL GROUP, P.C.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS RAYMOND V. PAOLINI, JR., M.D. AND BUFFALO
OTOLARYNGOLOGY GROUP, P.C.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered October 3, 2008 in a medical malpractice action. The order, insofar as appealed from, denied defendants' motions to vacate the note of issue and certificate of readiness and denied defendants' application to conduct two nonparty depositions.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions are granted and the note of issue and certificate of readiness are vacated, and the second ordering paragraph is vacated.

Memorandum: Supreme Court erred in denying defendants' motions seeking to vacate the note of issue and certificate of readiness. Defendants sought the relief within 20 days after service of the note of issue and certificate of readiness, and they provided affidavits

establishing that discovery was incomplete when the note of issue and certificate of readiness were filed. Thus, "a material fact in the certificate of readiness [was] incorrect" (22 NYCRR 202.21 [e]; see *Shoop v Augst*, 305 AD2d 1016, 1017; see also *Aviles v 938 SCY Ltd.*, 283 AD2d 935). We therefore reverse the order insofar as appealed from, grant defendants' motions and vacate the note of issue and certificate of readiness, and vacate the second ordering paragraph to permit the further discovery sought by defendants.