

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

1570

CA 08-02612

PRESENT: CENTRA, J.P., PERADOTTO, GREEN, AND PINE, JJ.

THERESA HALLER, ADMINISTRATRIX OF THE
ESTATE OF JEAN DIEJOIA, DECEASED,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GERALD M. GACIOCH, M.D., CYNTHIA R.
REDDECK, M.D., AND ROCHESTER
CARDIOPULMONARY GROUP, P.C.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CARL L. FEINSTOCK, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered December 12, 2008 in a medical malpractice action. The judgment in favor of defendants and against plaintiff was entered upon a jury verdict of no cause of action.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff appeals from a judgment entered upon a jury verdict finding that, although defendant Gerald M. Gacioch, M.D. was negligent in leaving a cardiac sheath in plaintiff's decedent without administering systemic anticoagulation medication, that negligence was not a substantial factor in causing decedent's injuries. On appeal, plaintiff contends that Supreme Court erred in refusing to permit the prior testimony of her expert adduced at a *Frey* hearing to be read to the jury pursuant to CPLR 4517 (a) (4). We reject plaintiff's contention, because that testimony does not constitute "prior trial testimony" within the meaning of CPLR 4517 (a) (4). In addition, plaintiff failed to object to the verdict as inconsistent before the jury was discharged and thus failed to preserve for our review her present contention with respect to the alleged inconsistency of the verdict (*see Lahren v Boehmer Transp. Corp.*, 49 AD3d 1186, 1188), despite having raised that objection in a post-trial motion (*see generally Barry v Manglass*, 55 NY2d 803, 806,

rearg denied 55 NY2d 1039).

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court