

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

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CA 10-00225

PRESENT: MARTOCHE, J.P., CARNI, GREEN, PINE, AND GORSKI, JJ.

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TRISHA BROWN, INDIVIDUALLY AND AS CO-EXECUTOR  
OF THE ESTATE OF LOYOLA MCCORMICK, DECEASED,  
AND GREG MCCORMICK, INDIVIDUALLY AND AS  
CO-EXECUTOR OF THE ESTATE OF LOYOLA MCCORMICK,  
DECEASED, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ARNOT MEDICAL CENTER, ET AL., DEFENDANTS,  
AND KEVIN D. O'SHEA, M.D., DEFENDANT-APPELLANT.

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SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (BRANDON R. KING OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF  
COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered November 9, 2009 in a medical malpractice action. The order denied the motion of defendant Kevin D. O'Shea, M.D. for summary judgment dismissing the complaint.

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

Memorandum: Kevin D. O'Shea, M.D. (defendant) appeals from an order denying his motion for summary judgment dismissing the complaint in this medical malpractice action. We affirm. Even assuming, arguendo, that defendant met his initial burden on the motion, we conclude that plaintiffs raised issues of fact to defeat the motion by submitting the affidavit of their medical expert (*see Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436; *Ferlito v Dara*, 306 AD2d 874; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Among those issues of fact raised by the expert's affidavit are whether defendant deviated from the accepted standards of medical care by failing to take decedent's vital signs or to order a urinalysis test in a timely fashion, failing to ensure that decedent's care was transferred to another doctor when defendant left the hospital, and failing to have decedent's CT scan results reviewed and interpreted by a radiologist (*see Latona v Roberson*, 71 AD3d 1498; *Selmensberger*, 45 AD3d at 1436).

Entered: October 1, 2010

Patricia L. Morgan  
Clerk of the Court