51 A.D.3d 430, 857 N.Y.S.2d 102, 2008 N.Y. Slip Op. 04149

Javier Pol, Appellant
v
Our Lady of Mercy Medical Center et al., Defendants, and Kamran Tabaddor, M.D., Respondent.

Supreme Court, Appellate Division, First Department, New York
May 1, 2008

CITE TITLE AS: Pol v Our Lady of Mercy Med. Ctr.

HEADNOTE

Physicians and Surgeons
Malpractice

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.
Schiavetti, Corgan, DiEdwards & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for respondent.
Order, Supreme Court, Bronx County (Stanley Green, J.), entered January 9, 2007, which, in an action for medical malpractice, granted defendant-respondent's motion for judgment notwithstanding the verdict, unanimously affirmed, without costs. ***431**

Viewing the evidence in the light most favorable to plaintiff and affording him the benefit of every favorable inference, there is no competent, nonspeculative expert evidence that defendant, who was the assistant surgeon and played no direct role in plaintiff's care, committed any departures from accepted medical practice or could have prevented the alleged departures committed by the lead surgeon, with whom plaintiff has settled. Although plaintiff's expert testified that defendant had a duty to advise the lead surgeon during the operation that his methods were not in accordance with accepted practice, the expert conceded that the lead surgeon had ultimate responsibility for making all decisions with respect to the operation and could not have been compelled to follow any such advice. In the absence of evidence that defendant exercised any control over the lead surgeon (*see generally Kavanaugh v Nussbaum*, 71 NY2d 535, 546-547 [1988]), no valid line of reasoning (*see* ****2** *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]) could have led a rational jury to conclude that any such advice, if given, would have been followed. Concur—Mazzarelli, J.P., Friedman, Sweeny and Moskowitz, JJ.