

Penceal-Cruse v West
2008 NY Slip Op 33764(U)
December 11, 2008
Supreme Court, New York County
Docket Number: 114665/04
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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GAIL PENCEAL-CRUSE and OTIS CRUSE,

Plaintiffs,

-against-

Index No. 114665/04
Mot. Seq. 002

STANLEY T. WEST, M.D., F.A.C.O.G. and
ST. VINCENT'S MEDICAL CENTER,

Defendants.

SCHLESINGER, J.:

FILED
DEC 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

On September 23, 2008, the jury hearing this controversy, so ~~and~~ in medical malpractice, returned a verdict in favor of the defendant, Dr. Stanley T. West. Because of the circumstances of the case and the arguments proffered by counsel, it was decided to ask the jury a factual question as the first interrogatory, as opposed to the more usual one, asking whether or not the named defendant had departed from accepted standards of medical/surgical care. Here the question posed was

During the myomectomy that Dr. Stanley T. West performed on Gail Penceal-Cruse on August 6, 2002, did he cause an injury to Ms. Penceal-Cruse's bowel?

The jury, by a vote of 5-1, answered this "NO". This then, pursuant to instructions, concluded their deliberations.

The above question dealt directly with the central issue in the case, whether during Dr. West's surgery to remove fibroid tumors from the plaintiff, did he create a hole in the rectal-sigmoid colon and then fail to properly repair it. It was the plaintiff's position that he did and such constituted negligence.

The defendant argued that the hole did not occur until August 12, six days later, as a result of an enema ordered by Dr. West. In other words, Dr. West's surgery had nothing to do with the hole and the injury suffered by the plaintiff.

Both gynecological experts that testified for the parties, Dr. Irving Spodek for the plaintiff and Dr. Gary Mucciolo for the defense, agreed that, while the creation of a hole under circumstances such as existed here, was not malpractice, a failure to inspect the surgical field and repair such a hole, did constitute a departure from accepted surgical standards.

Plaintiff has now brought a motion pursuant to CPLR §4404(a) to set aside the verdict and direct that a judgment be entered in her favor as a matter of law or alternatively set the matter down for a new trial. Counsel argues that the jury's finding had no "scientific basis in fact according to the proof adduced." (Paragraph #3). On this point, while defense counsel in opposition is correct when he states that plaintiffs' counsel did not include portions of the transcript from Dr. Spodek vis-a-vis the damage that could occur from the administration of an enema, he is wrong when he suggests that there was not such testimony on the record. On page 300 of the trial transcript, Dr. Spodek did opine that an enema with an ordinary flow of water could not perforate the muscular layer of the colon (to cause a hole).

However, as defense counsel does argue, there was other evidence in the record, including the opinion of their expert, Dr. Mucciolo that an enema, this enema, did produce the hole in the colon. Further, the defense argues this evidence clearly supports the jury's verdict.

In this regard, counsel points to the medical record, placed in evidence before the jury. Here it is pointed out that despite the plaintiff's hospitalization from August 9, 2002 until the 12th, the day the enema was administered, there was no evidence consistent with an earlier bowel perforation. But within hours after the enema was given, Mrs. Penceal-Cruse's complaints changed dramatically.

Also the significance of Dr. James Pacholka's role and opinions was debated in the motion papers. Dr. Pacholka, a surgeon, was called in as a consultant by Dr. West on August 10. He was the surgeon who later discovered and repaired the hole on August 13.

He was not called as a witness at the trial. However, he was deposed before the trial and at that time expressed his opinion that the cause of the hole "was likely an injury from the prior myomectomy." This, together with other parts of his testimony, was read to the jury as part of plaintiff's case.

Moving counsel argues this was unrefuted testimony from an unbiased witness who actually saw the injury during his own surgery. However, opposing counsel points out that Dr. Pacholka concurred with Dr. West in a pre-August 12th probable diagnosis of ileus versus obstruction, as well as in the administration of the enema. Therefore, it could be argued, he had a reason to opine that the cause of the injury was unrelated to treatment decisions he was involved in making.

Finally, the defense points to their expert, Dr. Macciolo's explanation for the mechanism of the injury, the enema administered on August 12th.

Plaintiffs' counsel presented the same arguments to the jury that he presents in this motion. The fact finders, by their verdict obviously rejected those arguments, finding that Dr. West did not create and fail to repair the hole in the colon.

I am unable to say that this verdict was erroneous as a matter of law or alternatively that it did not have support in the evidence.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is denied. The Clerk is directed to proceed to enter judgment in defendants' favor based on the jury's verdict.

This constitutes the decision and order of this Court.

Dated: December 11, 2008
DEC 11 2008



J.S.C.
ALICE SCHLESINGER

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