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SHORT FORM ORDER

INDEX NO. 13064-2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-24-11
ADJ. DATE ____
Mot. Seq. # 005 - MD

MARY ANNE FUSCO, as Executrix of the Estate of VINCENT T. GUCCIONE, Deceased, Plaintiff(s), - against - STEVEN R. GOLDFARB, M.D., Defendant(s).	**Sullivan Papain Block McGrath & Cannavo, PC** Attorney for Plaintiff 120 Broadway New York, New York 10271 **Kelly, Rode & Kelly, LLP** Attorney for Defendant 330 Old Country Road, Suite 305 Mineola, New York 11501

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated April 25, 2011, and supporting papers; (2) Affirmation in Opposition by the defendant, dated May 13, 2011, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the plaintiff, dated April 25, 2011, for an order setting aside the verdict and direct a verdict in favor of plaintiff is decided as follows.

Plaintiff brings this application pursuant to CPLR 4404 (a) to set aside a verdict in favor of the defendant, on the grounds that the verdict was against the weight of the credible evidence, and directing a verdict as to liability in favor of the plaintiff and granting a new trial as to the issue of damages. CPLR §4404 (a) states in pertinent part:

> After a trial of a cause of action...the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action ...where the verdict is contrary to the weight of the evidence, in the interest of justice...

The plaintiff's request asks to set aside the verdict as contrary to the weight of the evidence *and* direct a verdict of liability in favor of the plaintiff. The remedy for setting aside a verdict as contrary to the weight of the evidence is to remand the matter for a new trial. The remedy for directing a verdict is simply an entry of judgment in favor of the moving party and setting the matter for a damages trial. The Court will treat the motion as one seeking any of either of the available remedies under CPLR 4404(a).

The plaintiff herein brought this action for the wrongful death and conscious pain and suffering of the deceased , Vincent Guccione resulting from the alleged inappropriate renewal of a prescription of the medication Hytrin by the defendant and his staff. In support of this claim, the plaintiff submitted evidence that the decedent had discontinued the use of Hytrin pursuant to the defendant's orders in June of 2004 and that in August of 2004 the defendant's daughter submitted a list of medications that her father was on which did not include the medication Hytrin. They further alleged that the defendant and his staff failed to update the decedent's medication list, failed to check the decedent's medical chart and failed to check the decedent's medication refill record to ascertain whether or not the decedent had continuously been taking this medication as of June 2005. As a result of these alleged failures, it was claimed that an erroneous medication list was sent to a visiting nursing service on June 6, 2005. Thereafter, at the request of the visiting nurse service a prescription for Hytrin was phoned in to a local pharmacy by a member of the defendant's staff. Upon receiving the prescription the deceased ingested a dose of Hytrin on June 11 which, allegedly, caused the decedent's death on June 12, 2005.

Specifically, the jury answered the following questions in the negative.

> 1) Did the defendant, Stephen Goldfarb, M.D. and/or his staff depart from good and accepted standards of medical practice by renewing a prescription for the medication Hytrin for Vincent Guccione on June 10, 2005?
>
> 2) Did the defendant, Stephen Goldfarb, M.D. and/or his staff, depart from good and accepted standards of medical practice by failing to maintain an accurate medication list for Vincent Guccione from May 2004 through June 10, 2005?

The evidence revealed that the defendant is a primary care physician who treated the decedent from approximately September 1998 up until the time of his death on June 12, 2005. There was a gap in treatment from approximately October, 2000 until August 23, 2003 as the decedent was living in New York City.

During the course of decedent's treatment, the defendant prescribed the medication Hytrin, which was used to treat the decedent's enlarged prostate. Hytrin is in a class of medications called alpha blockers that can cause a drop in blood pressure by dilating the blood vessels. Because it can cause a precipitous drop in blood pressure it was not considered to be within the standard of care to start a patient with a 5 milligram dose. Good practice requires that the patient be started on a much lower dose and slowly worked up to the 5 milligram dose. Therefore the doctor must know that the patient is and has been continuously on the medication before renewing the prescription.

The decedent was a 93 year old man who also suffered from a heart condition which caused his heart to have to pump harder. Introducing a medication that could cause a marked drop in blood pressure would put additional pressure on the heart. Notwithstanding this condition, the patient also had a history of hypertension.

The defendant's medical chart for the patient contained inconsistent entries regarding the patient's use of Hytrin. There was evidence that the defendant wanted the deceased off the Hytrin as of June, 2004. However, the chart entry for July 30, 2004 indicates that the patient was still taking 5 milligrams of Hytrin daily. The defendant testified that he saw the patient that day and he was told directly by the patient that he was taking the Hytrin. Thereafter, on August 8, 2004 Mary Ann Fusco, the defendant's daughter, sent in a list of her father's medications which did not include Hytrin. The defendant again saw the deceased on June 4, 2005 as the deceased was suffering a bout of congestive heart failure the onset of which began in May 2005. The defendant maintained that the deceased was still on Hytrin at this time.

At the June 5 visit it was determined that the deceased could benefit from a visiting nurse service. Therefore, on June 6, 2005 the defendant's office faxed a medication list for the deceased to the Dominican Sisters(visiting nurse service) which contained Hytrin which, it was alleged, was erroneous. The list was generated at the defendant's office predicated on a note entered in the chart in March 2005.

On June 10, 2005 another staff member of Dr. Goldfarb's office called the Sag Harbor Pharmacy as a result of a request from the Dominican Sisters and renewed a prescription for Hytrin for the deceased. The staff member testified that she had checked the deceased's chart and deemed the refill to be a normal one because she had concluded that's what the chart revealed. She did not pick up June 8, 2004 instruction sheet for the patient discontinuing Hytrin or the August 8, 2004 note from the deceased's daughter.

On June 11, 2005, the deceased ingested 5 milligrams of Hytrin and experienced a drop in blood pressure. He was given medications and fluids to increase his blood pressure. He died on June 12, 2005 as the multiple medications and attempts to raise his blood pressure failed.

The plaintiff's expert opined that the defendant departed from good and accepted standards of medical practice by renewing the prescription for 5 milligrams of Hytrin on June 10, 2005 as well as failing to maintain an accurate, updated medication list in a separate location in the patient's chart. He further opined that these departures were substantial factors in Mr. Guccione's death.

The trial evidence included the defendant's chart which also contained reference to the July 30 note indicating that the patient told him he was still taking Hytrin as well as a note as of June 4, 2005 that all the patient's medications were unchanged. This entry was made as a result of a physical examination of the deceased and the conversation that took place between them during said examination. The plaintiff impeached the defendant when the defendant acknowledged that he indulged in a "working assumption" that the decedent was still taking Hytrin on June 5, 2005.

Also in the trial transcript, however, is testimony from the defendant doctor, originally given during his EBT, that it is his custom and practice or routine to always ask if the patient is on all the individual medications previously listed. In the instant case, the previous list referred to was the July 30, 2004 list.

Thus, the entry in the patient's chart that the medications were unchanged arguably meant that those that were unchanged were the drugs listed during the July 30, 2004 visit, and that this was confirmed in conversation between the defendant and the deceased on June 5, 2005.

The evidence also shows that, during the July 30, 2004 visit the deceased failed a simple memory test thus arguably raising doubt as to the deceased's ability to accurately remember his medications. Distinct from this evidence, however, was the testimony of the deceased's daughter and the home health aid that the decedent never manifest any memory problems and was completely alert and oriented up until the time of his death, including his ability to recall his medications that he took on a daily basis. Further, the list provided on July 30 was not just based on a routine history but rather on a conversation the defendant had with the deceased regarding the risks and benefits of Hytrin. As the defendant said, in a 92 year old, sometimes comfort trumps risk.

On June 8 and/or June 10, 2005, it was alleged that the Dominican Sisters had received extremely low blood pressure readings from the deceased and prescribing Hytrin to the deceased under these circumstances would be contraindicated and beneath the standard of care. The defendant's staff Patricia Brown and Claire Weston testified that they received no notice from the Dominican Sisters as to these readings and, had they been advised, they would have reported it to Dr. Goldfarb, the defendant. Both witnesses understood the significance of blood pressure readings below 100. The defense expert made clear that any registered nurse should know that a patient would not be a candidate for Hytrin with blood pressure readings below 100. He further opined that if the registered nurse (Dominican Sisters) had not communicated the decreased blood pressure readings to Dr. Goldfarb, such failure would have been a departure from the standard of care. For this reason, the Dominican Sisters were put on the verdict sheet so the jury could determine the degree of fault, if any, of the Dominican Sisters if they had found Dr. Goldfarb negligent.

Finally, Ms. Fusco testified that when a particular medication that her father took was discontinued she would remove the actual bottle from her parent's home so as to preclude any error in taking medications. This evidence was in significant contrast to the testimony of the nurse from the Dominican Sisters Nursing Service that she saw a empty bottle of Hytrin at the deceased's residence on June 8, 2005 thus giving rise to the inference that the deceased was still taking Hytrin as of June 2005.

Although the motion is requesting the Court to set aside the findings of the jury on the question of negligence, it's appropriate to comment on causation. An autopsy was performed and the cause of death was cardiac failure with myocardial ischemia due to acquired aortic valve stenosis and atherosclerotic cardiovascular disease. There is no suggestion by the plaintiff's pathologist that the death was caused by or related to the ingestion of Hytrin 24 hours before the decedent's death.

The power to set aside a jury verdict and order a new trial is an inherent one, which is codified in CPLR. Sec. 4404(a)(*see McCarthy v Port of N.Y. Authority*, 21 AD2d 125, 127, 248 NYS2d 713; *Siegel NY Practice, Sec.* 406). The statute provides that a Court may order a new trial"when the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree."

Whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual

determination(*Nicastro v Park* 113 AD2d 129, 495 NYS2d 184). This question is distinguished from the assessment of whether a jury verdict, as a matter of law, is supported by sufficient evidence. (*Cohen v Hallmark Cards*, 45 NY2d 493, 410 NYs2d 282, *accord, Dominguez v Manhattan & Bronx Surface Tr. Operating Authority*, 46 NY2d 528, 415 NYS2d 634). To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissable inferences which could possibly lead rational fact finders to the conclusion reached by the jury on the basis of the evidence presented at trial (*Cohen v Hallmark Cards, supra*). The result of such a determination leads to a directed verdict in favor of the movant.

The criteria to set aside a jury verdict as against the weight of the evidence is less stringent as such a determination results in a new trial and does not deprive the parties of their right to ultimately have all disputed facts resolved by a jury. Setting aside a verdict as against the weight of the evidence requires a discretionary balancing of many factors(*Cohen v Hallmark Cards, supra at* 499). The discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution as a successful litigant is entitled to the benefits of a favorable verdict. Fact finding is, in general, the province of the jury, not the trial court. (*Nicastro v Park, supra; Ellis v Hoelzel,* 57 AD2d 968, 394 NYS2d 91).

Particular deference has traditionally been accorded to jury verdicts in favor of defendants in tort cases because the jury need not necessarily find that a defendant has prevailed by a preponderance of the evidence but rather may simply conclude that the plaintiff has failed to meet the burden of proof required (*Nicastro v Park, supra; Siegel, NY Practice, Sec.* 406). Thus, it has been said that a jury verdict in favor of a defendant should not be set aside unless "the jury could not have reached the verdict on any fair interpretation of the evidence." (*Tripoli v Tripoli,* 83 AD2d 764, *aff'd* 56 NY2d 684; *Cubeta v York international* 30 AD3d 557, 818 NYS2d 136).

The court has examined the trial record as presented by the parties to the action and concludes that the trial evidence is sufficient to deny the request for a directed verdict in favor of plaintiff and against the defendant.

The court also finds that sufficient factual questions in the trial evidence regarding the departures alleged against the defendant Dr. Goldfarb were presented and that the answers given by the fact finders to the departure questions cannot be said to be against the weight of the evidence. For these reasons, the court concludes that the verdict as reported fairly reflects an evaluation of the evidence and is not against the weight thereof.

Accordingly, the motion is denied.

This constitutes the decision and order of the Court.

Dated: April 9, 2012

PETER H. MAYER, J.S.C.

[X] FINAL DISPOSITION

[ ] NON FINAL DISPOSITION