Scan

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

ANGELO CUCUZZO, Administrator of the Estate of THERESA CUCUZZO, Deceased, and ANGELO CUCUZZO, Individually,	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 12087-07
Plaintiffs,	MOTION SUBMISSION DATE: 4-12-12
-against-	
GARY FRIEDMAN, M.D.,	MOTION SEQUENCE NO. 1
Defendant.	

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibit	X
Affirmation in Opposition and Exhibits	X

Plaintiff has moved for an order pursuant to CPLR 4404(a) setting aside the jury's verdict in favor of defendant as against the weight of the credible evidence. Defendant opposes all of the requested relief.

This was an action for medical malpractice and wrongful death tried before this Court and a jury between March 13, 2012 and March 21, 2012. The jury found that defendant provided appropriate information before obtaining consent to the cardiac catheterization procedure and that defendant did not depart from accepted medical practice in performing the procedure.

Plaintiff specifically challenges the finding as to informed consent, although she somewhat less forcefully (and without substantial support in the moving papers) also requests the malpractice finding be set aside.

Pursuant to CPLR 4404(a), a trial court has the discretionary authority to set aside a jury verdict. However, it should only be exercised where a jury could not have reached the verdict on any fair interpretation of the evidence (see, Lolik v. Big V Supermarkets, 86 NY2d 744, 746 [1995]; Cohen v. Hallmark Cards, 45 NY2d 493, 498-499 [1978]; Harris v. Marlow, 18 AD3d 608, 610 [2005]; Ruscito v. Early, 253 AD2d 461, 462 [1998]; Abrahams v. King St. Nursing Home, 245 AD2d 251 [1997]).

The parties agree that the issue for the Court is whether "there is simply no valid line of reasoning and permissible inferences which could possibly (have) lead rational men (and women) to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen, 45 NY2d at 499; see also, Adamy v. Ziriakus, 92 NY2d 396, 400 [1998]; Lolik, 86 NY2d at 746). "In considering such a motion, the evidence must be construed in the light most favorable to the nonmoving party, and the motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of the witnesses is in question" (Cathey v. Gartner, 15 AD3d 435, 436 [2005]; see also, Cameron v. City of Long Beach, 297 AD2d 773, 774 [2002]).

It is plaintiff's contention that based on defendant's own testimony, there is no fair interpretation of the evidence that justifies the jury's finding that defendant provided appropriate information for an informed consent. See, e.g., Mintz v. Festa, 29 AD2d 689 (2d Dept.) aff'd 23 NY2d 750 (1968). Plaintiff essentially argues that the testimony of defendant Dr. Friedman on the issue of informed consent conceded that he never

informed the plaintiff's decedent of the option to "do nothing" and he never inquired as to whether that option was provided to the plaintiff's decedent by anyone else. Further, there was no other proof that any other physician advised plaintiff's decedent of the option to "do nothing". (Trial Transcript, p. 61-64). Plaintiff's position is that in order to meet the standard of care for an informed consent defendant was required to advise plaintiff's decedent that "doing nothing" was an alternative.

The testimony of defendant's expert, Dr. James Slater, directly contradicted plaintiff's position that it is necessary to tell a patient of the option of "doing nothing". (Trial Transcript, p. 450-451). Moreover, Dr. Slater testified that the information provided to plaintiff's decedent by Dr. Friedman was an appropriate informed consent. Additionally, Dr. Friedman never testified that it was a deviation from the standard of care to fail to mention "doing nothing" as an alternative. In fact, he did testify that it was not standard or usual to offer "doing nothing" as an alternative.

Defendant contends that plaintiff's expert witness, Dr. Howard Prusack, an anesthesiologist, never directly stated that failing to offer "nothing" as an alternative was a departure from the standard of care. (Trial Transcript, pps. 282-83). He also never testified that the lack of informed consent was a proximate cause of the injuries. Considering all of this, together with the cross-examination as to Dr. Prusack's lack of relevant experience and credentials in interventional cardiology, as well as other credibility issues set forth therein, it is evident that the jury could have reached its determination on a fair and rational interpretation of the evidence adduced at trial. There were differing opinions offered by the experts and it was for the jury to determine

the relevance and weight of such testimony. In addition, it was for the jury to determine the credibility of that testimony as well as the testimony of the defendant Dr. Friedman.

The Court refers to the language used by the Second Department in 1985 in the seminal case of Nicastro v. Park, 113 A.D.2d 129 (2d Dept., 1985). In writing for the Court, Justice Lazer noted:

> The fact that determination of a motion to set aside a verdict involves judicial discretion does not imply, however, that the Trial Court can freely interfere with any verdict that is unsatisfactory or with which it disagrees. A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Fact finding is the province of the jury, not the Trial Court, and a Court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and unnecessarily interfere with the fact finding function of the jury to a degree that amounts to a usurpation of the jury's duty (citations omitted). This is especially true if a verdict is contested solely on weight of the evidence grounds and interest of justice factors have not intervened to flavor the judicial response to the motion. Absent such complications, the challenge is directed squarely at the accuracy of the jury's fact finding and must be viewed in that light. 113 AD2d at 133-134.

It is the jury's province to evaluate credibility of the various witnesses and to accept or reject all or part of a witness' testimony. In determining a motion to set aside a verdict, the court should act only if there is no fair or rational basis for the jury's conclusion based upon a review of all the evidence.

In Johnson v. Jacobowitz, 65 A.D.3d 610 (2d Dept. 2009), which involved a patient who failed to wake up following heart surgery and died five days later, the Appellate Division upheld the Trial Court's denial of a motion to set aside the plaintiff's verdict. The Court noted:

> "When both the plaintiff and the defendants presented party, eyewitness and expert testimony in support of their respective positions, it is within the province of the jury to determine the credibility of the witnesses (citations omitted). 65 AD3d at 613.

Plaintiff cites the decision in Tullo v. Tartack, 2002 NY Slip Op 40507(U), 2002 WL 31925590 (Sup. Ct. Kings Co. 2002) in support of its position. In that case, a jury returned a verdict on behalf of the plaintiff on the issue of informed consent. At trial, the plaintiff testified that the defendant never informed her of the risks or alternatives to multiple cortisone shots and that had she known the risks she would not have undergone the prescribed treatment. The defendant testified that it would be good practice to tell the patient before she receives Cortisone injections of the benefits and risks of such treatment but did not dispute plaintiff's testimony. He testified that he had no independent recollection of telling her about the risks of such treatment. Given this testimony, the Trial Court instructed the jury in its final charge as a matter of law that the defendant had not provided the appropriate information.

Defendant argues, and the Court agrees, that the Tullo case is inapposite. First, plaintiff did not request such a charge herein. Second, it is clear from a review of the testimony of the defendant and the experts presented by the parties that the jury's determination on the issue of appropriate information for an informed consent was appropriate based on the totality said evidence.

As in Cameron, supra, there were facts in dispute which were decided by this jury, there were different inferences that could have been drawn from the evidence, and certainly the credibility of witnesses was in question, most notably that of the plaintiff's expert, Howard Prusack, M.D. Here, Dr. Friedman testified he discussed numerous risks of the catheterization with Mrs. Cucuzzo or her daughter, Vita. Additionally, unlike in Tullo, there was no testimony by Vita Cucuzzo, or anybody on Theresa Cucuzzo's behalf, that had she been informed of the option of "doing nothing", she would have chosen the same.

As the Nicastro Court noted, fact finding is the jury's province and setting aside a jury verdict must be exercised with considerable caution. On the evidence adduced at this trial, this jury's finding as to question number 1 is supported by the totality of the evidence, when viewed in the light most favorable to the non movant.

To the extent plaintiff seeks to set aside the verdict as to the claim of medical malpractice, the motion is denied for lack of proof.

Accordingly, plaintiff's motion is denied.

Dated: May 18, 2012

STEVEN M. JAEGER, A.J.S.C.