

Jacobs v Madison Plastic Surgery, P.C.

2012 NY Slip Op 33196(U)

February 3, 2012

Supreme Court, New York County

Docket Number: 110094/2009

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT SALIANN SCARPULLA

PART 19

Index Number : 110094/2009

JACOBS, MAGDELENA T.

VS.

MADISON PLASTIC SURGERY

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying memorandum decision

FILED

FEB 06 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/3/12

Saliann Scarpulla
SALIANN SCARPULLA

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
MAGDELENA T. JACOBS,

Plaintiff,

Index No.: 110094/2009
Submission Date: 9/14/11

- against-

MADISON PLASTIC SURGERY, P.C. AND
ROBERT M. TORNAMBE, M.D.,

DECISION AND ORDER

Defendants.
-----X

For Plaintiff:
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New York, NY 10022

For Defendants:
James W. Tuffin
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FILED

FEB 06 2012

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COUNTY CLERK'S OFFICE

Papers considered in review of this motion to set aside the verdict:

Notice of Motion 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for medical malpractice, plaintiff Magdalena T. Jacobs ("Jacobs") moves to set aside the jury's verdict in defendants' favor pursuant to CPLR 4404(a).

Jacobs commenced this action alleging that defendants Madison Plastic Surgery, P.C. and Robert M. Tornambe, M.D. ("Tornambe") (collectively "defendants") committed medical malpractice while performing her breast revision surgery on December 11, 2007. Jacobs had been treating with defendants since 1993, and over that period of time Jacobs had five breast surgeries performed by Tornambe. Jacobs claimed that, with respect to the

December 11, 2007 surgery, Tornambe failed to “properly measure and/or mark [her] left breast pre-operatively, and instead marked the left breast intraoperatively which resulted in a gross deformity of the breast, inclusive of malpositioned nipple areolar complex of the left breast and obliteration of the inframammary fold due to the removal of too much skin during the surgery.”

At trial, Tornambe testified that it is common practice to mark the breasts during surgery by moving patients to the upright position. Defendants’ medical expert Dr. Paula Moynahan (“Moynahan”) opined that the defendants’ surgical planning and procedure was within the standard of care and that Jacobs’ medical condition and history predisposed her to scar formation. Defendants’ witnesses further testified that Jacobs was prone to formation of scar tissue, and not enough time had passed since the surgery for proper healing to occur.

Jacobs’ medical expert, Dr. Jane Petro (“Petro”), testified that Tornambe departed from the applicable standard of care by failing to mark the breast pre-operatively and by removing too much skin during the surgery.

With regard to informed consent for the surgery, Tornambe testified that he discussed all aspects of the surgery with Jacobs and also provided her with extensive literature. Jacobs testified that she signed the comprehensive consent form but did not discuss, read or understand it. Even Petro testified that the consent form signed by Jacobs was “comprehensive and complete.”

After a trial, the jury found in favor of the defendants.

Jacobs now moves to set aside the verdict, first arguing that I erred in permitting defense counsel to cross examine Jacobs' sole medical expert witness Petro about prior medical malpractice lawsuits in which she was named as a party defendant. At trial, defense counsel questioned Petro about the twenty three or twenty four times that she had previously been sued for medical malpractice, and then mentioned those instances again during summation. Jacobs argues that defense counsel's discussion of Petro's prior litigation history was for the sole purpose of impeaching her credibility, was devoid of any probative value and created tremendous prejudice to Jacobs' case.

Jacobs next argues that I erred in declining to charge the jury on *res ipsa loquitur* because defendants offered no non-negligent explanation for Jacobs' claimed injuries. Thus, Jacobs argues, while Tornambe testified that it was his custom and practice to put patients in the upright position during surgery to mark the breast, he did not recall Jacob's particular surgery. Further, the fact that Jacobs sustained scar formation in the past had no bearing on the claimed negligence and defendants' claim that more time was needed for healing was refuted by Jacobs' expert's testimony that the type and nature of the injuries was not going to change with time.

Finally, Jacobs argues that the verdict was against the weight of the evidence. She maintains that defendants never provided a non-negligent explanation for the claimed injuries and there was no basis for the jury to have found that the defendants obtained

Jacobs' informed consent when the consent documentation did not refer to the specific procedure performed.

In opposition, defendants first argue that this motion should be denied as untimely because it was mailed a day after the deadline imposed by the court. Defendants next argue that I did not err in using my broad discretion to determine the scope of defense counsel's cross examination of Petro. Defendants argue that they were properly allowed to question Petro about her prior litigation history as a means of testing her qualifications to render an opinion. Moreover, Jacobs' counsel failed to ask any questions on the matter on redirect.

Defendants next argue that the injuries claimed in this case are to the exact structures that were the subject of the surgery and those circumstances are not appropriate for the implication of *res ipsa loquitur*. They further maintain that Jacobs failed to prove that the event was of a kind that ordinarily would not occur in the absence of negligence. Rather, the evidence demonstrated that Jacobs had underwent multiple procedures to the same breast before the surgery at issue and had experienced problems with scar tissue and other difficulties.

Lastly, defendants argue that the jury correctly found that they obtained informed consent from Jacobs. They maintain that there is no expert testimony to support Jacobs' contention that the consent documentation was insufficient. Petro testified that the consent form signed by Jacobs was "comprehensive and complete." Tornambe testified that he

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had extensive conversations with Jacobs about the procedures and provided her with materials to read as well, and the jury was within its authority to credit this testimony.

Discussion

Initially, to the extent that Jacobs may have served this motion one day after the time limit, I extend the time within which Jacobs had to serve and file the motion, *nunc pro tunc*, by that one day period. I therefore address the motion on its merits.

Defense Counsel's Cross-Examination of Plaintiff's Expert

Jacobs argues that I erred in permitting defendants' counsel to question her expert physician, Petro, concerning the fact that she had been sued for malpractice twenty three or twenty four times prior to testifying in this trial. A trial judge has wide discretion in directing the conduct of the trial, including setting the scope and extent of cross-examination of fact and expert witnesses. *Hoberg v. Shree Granesh, LLC*, 85 A.D.3d 965 (2d Dep't 2011); *Bivona v. Nassau Ophthalmic Services, P.C.*, 276 A.D.2d 455 (2d Dep't 2000). In a trial such as this, where the parties rely heavily on expert testimony, the qualifications of each expert and the weight the jury should give each expert's testimony is of paramount consideration. And, as the Court of Appeals has held, it is on cross-examination where a party has the opportunity to "bring out the weaknesses in the expert's qualifications and foundational support." *Adamy v. Ziriakus*, 92 N.Y.2d 396, 402 (1998).

Here, Jacobs held out Petro as a person of superior knowledge and ability to opine on Tornambe's breast surgery procedure. That her professional competence and

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qualifications had been called into question in many previous medical malpractice lawsuits was relevant to her professional qualifications and competence to give an expert opinion in this case. For this reason I permitted some limited questions concerning these past medical malpractice lawsuits against her. The questions were not extensive, did not unduly delve into details, and, I find, were proper under the circumstances. *See Bivona v. Nassau Ophthalmic Services, P.C.*, 276 A.D.2d 455 (In medical malpractice action, Second Department held that the trial court had “providently exercised its discretion in permitting the defendants to question the qualifications of the plaintiff’s expert witness on cross-examination.”).

The cases cited by Jacobs, which simply iterate the well-settled proposition that “extrinsic evidence may not be used to impeach the credibility of a witness on collateral matters” *Parsons v. 218 East Main Street Corp.*, 1 A.D.3d 420 (2d Dep’t 2003) (citations omitted), are legally and factually dissimilar and not apposite here. *See, e.g., Badr v. Hogan*, 75 N.Y.2d 629 (1990); *People v. Pavao*, 59 N.Y.2d 282 (1983). Here, defense counsel’s questioning of Petro’s professional competence was not done for the purpose of showing that Petro had testified or acted deceitfully in a matter unrelated to the factual matter at issue. Rather, defense counsel’s questioning of Petro’s *professional competence* was for the wholly proper purpose of showing the jury that Petro’s *professional opinion* was not worthy of belief. Thus, I deny Jacob’s request for a new trial on the ground that I

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permitted defense counsel to question Jacobs' expert's professional competence on cross-examination.

Failure to Charge Res Ipsa Loquitur

Jacobs also argues that it was error for me to decline to charge res ipsa loquitur, because Petro testified that Jacob's result would not have occurred but for Tornambe's negligence, the breast revision surgery was in the exclusive control of Tornambe, and Jacobs could not have caused or contributed to her own injuries.

"Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it." *Kambat v. St. Francis Hospital*, 89 N.Y.2d 489, 494 (1997). This doctrine recognizes that some events ordinarily do not occur in the absence of negligence. Prosser and Keeton, Torts § 39, at 247 (5th Ed.).

In the context of medical malpractice suits, the doctrine of res ipsa loquitur is generally applied in a narrow class of cases, falling into either one of two categories: (1) in case of a foreign body inadvertently left behind; or (2) an injury that a patient incurs, while under general anesthesia, to a part of the body unrelated to the procedure. *Kambat*, 89 N.Y.2d at 497 (finding res ipsa loquitur applicable where an 18-by-18-inch laparotomy pad was discovered inside a patient's abdomen following a hysterectomy); see also *States v. Lourdes Hospital*, 100 N.Y.2d 208, 212 (2003) (permitting application of res ipsa loquitur where patient's arm was improperly positioned during surgical removal of ovarian

cyst); *Rosales-Rosario v. Brookdale Univ. Hosp. & Med. Ctr.*, 1 A.D.3d 496, 497 (2d Dep't 2003) (infliction of a blistering burn to patient's right knee during vaginal examination performed under sedation).

A charge of *res ipsa loquitur* is appropriate in those cases where negligence may be inferred simply from the "happening of an event and the defendant's relation to it." *Cho v. Song*, 286 A.D.2d 248, 249 (1st Dep't 2001), quoting *Kambat v. St. Francis Hospital*, 89 N.Y.2d at 494. Unlike those cases in which negligence may be inferred simply from the event, negligence in this case could not have been inferred simply from the surgery, its result, and the fact that Tornambe performed the surgery. Jacobs was required to, and in fact did, submit extensive expert testimony to show that the outcome of the surgery was caused by Tornambe's use of an improper surgery technique and subsequent removal of too much tissue. In contrast, defendants submitted extensive expert testimony to show that Tornambe's performance of the surgery was within the standard of appropriate medical care and Jacobs' outcome was a possible outcome of the surgery, given Jacobs' underlying medical condition. See *Cho*, 286 A.D.2d at 249 (trial court did not err in declining to charge *res ipsa loquitur* where the jury could not have inferred negligence from the injury and defendant's performance of the medical procedure).

Also, unlike those medical malpractice cases where the doctrine of *res ipsa loquitur* was properly applied because the actual or specific cause of plaintiff's injury was unexplained, both Jacobs' and defendants' posited actual and specific causes for the

outcome of Jacobs' surgery. Under these circumstances, Jacobs has failed to show that I improperly declined to charge this doctrine to the jury, and I deny the motion to set aside the jury verdict and order a new trial on this ground.

The Verdict As Against the Weight of the Evidence

Finally, Jacobs argues that I should set aside the jury's verdict in defendants' favor as against the weight of the evidence because defendants' failed to submit evidence of a non-negligent explanation for the results of the surgery, and because no rational jury could have found that Tornambe obtained Jacobs' informed consent to the surgery.

A trial court should only grant a motion for judgment as a matter of law, notwithstanding the jury's verdict, when "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party."

Szczerbiak v. Pilat, 90 N.Y.2d 553, 556 (1997); see also *Alexander v. Eldred*, 63 N.Y.2d 460 (1984). In reviewing a party's request for judgment as a matter of law, the trial court is required to view the testimony at trial in a light most favorable to the non-moving party.

Szczerbiak, 90 N.Y.2d at 556; *Lopez v. New York City Transit Authority*, 60 A.D.3d 529 (1st Dep't 2009). Finally, "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."

Nicastro v. Park, 113 A.D.2d 129, 133 (2nd Dep't 1985); see also *McDermott v. Coffee Beanery, Ltd.*, 9 A.D.3d 195 (1st Dep't 2004).

Here, viewed in a light most favorable to defendants, the jury's verdict was sufficiently supported by the weight of the testimony. Jacobs and defendants submitted substantial conflicting medical testimony concerning the propriety of Tornambe's method of performing the surgery, whether he had removed too much skin during the surgery, and the cause of the outcome of the surgery.

Moreover, both Jacobs' and defendants' experts testified that defendants' consent form was extensive and comprehensive, and defendants' submitted ample evidence that Tornambe discussed with Jacobs the surgery and its risks.

In sum, I found that Jacobs has failed to show that the jury's verdict should be set aside for any of the grounds argued in this motion. Accordingly, Jacob's motion for judgment notwithstanding the jury's verdict or to set aside the jury's verdict and for a new trial is denied in its entirety.

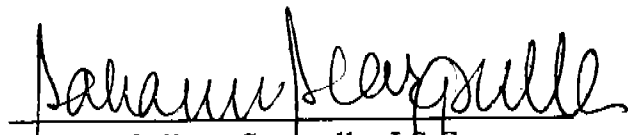
This constitutes the decision and order of the Court.

Dated: New York, New York
February 3, 2012

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Hon. Saliann Scarpulla, J.S.C.