Hilt v Carpentieri
2017 NY Slip Op 30891(U)
May 3, 2017
Supreme Court, Nassau County
Docket Number: 10589/11
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 13**
GRACE HILT, as Administratrix of the Estate of JOSEPH HILT, and GRACE HILT, individually, **Plaintiff(s),**	**INDEX # 10589/11**
-against-	**Mot. Seq. 2, 3** **Mot Date 1.18/3.17/17** **Submit Date 3.17.17**
ADAM CARPENTIERI, D.O., MAURO GASPARINI, M.D., MAURO GASPARINI, M.D., P.C. JOSEPH S. REISS, M.D. and JOSEPH REISS, M.D., P.C.,	
Defendant(s). ----------X	

The following papers were read on this motion: Papers Numbered

Notice of Motion, Cross-Motion Affidavits (Affirmations), Exhibits Annexed.....1, 2
Answering Affidavit 2
Reply Affidavit..... 3, 4

Before this court are a post-trial motion and cross-motion seeking orders of this court, pursuant to Rule 4404(a) of the CPLR.

By motion, the defendants, Joseph S. Reiss, M.D. and Joseph S. Reiss, M.D., P.C., seek an order setting aside the jury's verdict in this medical malpractice and wrongful death action and directing a verdict in favor of the movants on the grounds (1) that there were no injuries proximately caused by Dr. Reiss' failure to communicate with Dr. Adam Carpentieri, (2) that the plaintiff failed to demonstrate a departure by Dr. Reiss from good and accepted standards of medical practice that was a proximate cause of the plaintiffs' injuries, and (3) that the verdict is contrary to the weight of the evidence. In the alternative, the moving defendants seek an order setting aside the jury's verdict and ordering a new trial on the grounds that the plaintiffs' counsel's conduct during the trial was so inflammatory and prejudicial that the verdict was tainted.

The plaintiffs cross-move for an order increasing the jury's award of $250,000 for five (5) days of pain and suffering as inadequate, pursuant to CPLR Section 5501(c) [sic][1], as it deviates materially from what would be reasonable compensation.

This action arises out of the death of Joseph Hilt on January 2, 2010. At the time of his death, Mr. Hilt was 62 years old and his primary care physician was defendant Adam Carpentieri, D.O. Mr. Hilt first presented to defendant Joseph S. Reiss, M.D., an allergist, on November 30, 2009. Mr. Hilt died at North Shore University Hospital where he had been admitted on January 1, 2010. Mr. Hilt apparently died of anaphylactic shock and/or reaction to the medication lisinopril.

Dispositive of both the motion and cross-motion is the pattern of inappropriate behavior of the plaintiffs' attorney during the entire course of the trial.

One significant example of counsel's improper conduct is memorialized on page 1306 of the trial transcript, wherein it the court reporter informed the court that Mr. Goldfarb was attempting to communicate with the members of the jury:

> The Court: Counsel, at the time that I asked counsel to approach for a side-bar, as counsel was approaching, I was already standing waiting for you to come out the door, my court reporter in essence told Mr. Goldfarb to stop and made some sort of exclamation at that point, and I would like her now to tell us exactly what happened.
>
> Ms. Tauber: As you were all walking over to the far side of the courtroom from me Mr. Goldfarb is approaching to come through where – in front of the jury, and he's looking at the jury and shrugging his shoulders and making faces. This is not the first time that has happened. I'm not sure if he was speaking today, but there have been other occasions where something was coming out of his mouth I could not hear. So at the time all I said was, counsel, counsel, counsel, and I more or less indicated with my hands that he should be proceeding over to where you were.
>
> The Court: The record shall also reflect at that point I had brought counsel outside, I asked my court reporter to come outside and to, in essence, tell me what happened.
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> . . .

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[1]CPLR Article 55 solely addresses appeals and CPLR Section 5501(c) solely references the scope of review of the Appellate Division.

> Well, this particular alleged incident here that Ms. Tauber has stated I did not see because, you know, I was in essence, walking up. . . .
>
> As I said, I didn't see – I saw you at time make what I thought were nervous habits, so I never took it any further than that, but I never knew about – certainly, there's no talking to jurors, absolutely none. We will not have that in this courtroom. . . .

Plaintiffs' counsel does not dispute the above described event but posits that it was an isolated "nervous reaction" that did not deprive the defendants of a fair trial.

Moreover, in his summation, plaintiffs' counsel suggested that defense counsel and witnesses had lied or manipulate the truth, vouched for the veracity of the plaintiffs' witnesses and went on to offer his personal opinion and interpretation of the facts and certain medical records without the benefit of supporting testimony. The following excerpts from plaintiffs' counsel's summation reflect his continued pattern of disrespect for the trial process.

> Mr. Goldfarb: The tragedy of this is not only the tragedy of what happened to this family but the tragedy is they defended this case. And when you see what I'm going to show you now, based only the records alone, and their own testimony, to put them through this again, how horrific. How horrific.
>
> (Trial transcript, p. 1588).
>
> . . .
>
> Mr. Goldfarb: This is the medication reconciliation list. First time you're seeing it here from New Island Hospital. They showed it to you from North Shore, showed it to you from Plainview. First time you're seeing it here. This is – these are the medications the hospital was told that he was on.
>
> [Objection]
>
> The Court: Ladies and gentlemen, first of all what counsel say during summation does not control. What controls is what was testified to from this witness stand or what you read in the records, but not – what counsel says does not control. And if there's anything you want read back to you, all you have to do is send us a note, we'll be glad to have it read back.
>
> . . .

Mr. Goldfarb: Once again, trying to make an excuse or explain away what's actually in the records. I rely on the record. He said point to the record, he said point to the record. Something they neglected to do. I'm pointing. Here's the record.

He came in, 12/19, medication. Here are the medications. The whole list of medication which we've seen in Dr. Reiss' records. Most importantly going to the number 6. Do you see what number 6 is? Lisinopril. Lisinopril. He does what he's told. He stops it when he's told to stop it, he takes it when he's told to take it.

[Objection].

The Court: Ladies and gentlemen, as I told you before – two things I want to tell you. First of all, counsel are entitled to raise inferences if there's support for those inferences. If you find from the testimony that you hear or from what's in evidence that you have looked at, that you can look at . . . . If you can find a basis in the testimony or in the evidence, counsel are entitled to raise inferences from which you – which he can argue that he wants you to draw from the evidence. But there has to be a basis for it.

(Trial transcript, p. 1591-1593).

. . .

Mr. Goldfarb: You heard it here, it's the number one killer. Do you really believe that he would just let him out of the office with uncontrolled hypertension, without speaking to Dr. Carpentieri or doing something to address it?

[Objection].

The Court: No, as I told you before, ladies and gentlemen, I'm not going to keep repeating it. You heard what I said with respect to what counsel's recollection is and also with respect to inferences that counsel want you to draw from the evidence. You don't necessarily have to agree with it or you can agree with it. That's your decision. Okay?

(Trial transcript, pp. 1602-1603).

. . .

Mr. Goldfarb: This is the North Shore record. . . . So Dr. Murphy was called in as a neuro consult. . . . They asked for a consult. Consult comes in. What did the consult do? He reviews the entire record, gets the information, then writes this consult note. Accurate, as accurate as accurate could be, based on all of the information in the hospital, based on everything that's gone before, at that time, accurate. . . .

"Followed by allergy specialist who put him back on brand prescription of Lisinopril."

Questionnaire. Did Dr. Joseph Reiss put Mr. Hilt back on Lisinopril on or after December 21st, 2009? I, ladies and gentlemen of the jury, are pointing to the records, that trail of truth. How dare they. All kind of manipulations, all kinds ever manipulations, attempted manipulations of the truth.

Mr. Kelly: Judge, I'm going to object to that characterization, if your Honor please.

The Court: Yes, sustained.

Mr. Goldfarb: Once again, Dr. Reiss' deposition from years ago, before they came in to say to you or try to convince you that this wasn't true, that he wasn't back on Lisinopril, that maybe it was some latent effect. They tried to say he had this reaction that he had which killed him even after they stopped it. That's lawyering.

[Objection].

The Court: Ladies and gentlemen, again, what counsel says is not necessarily what was testified to. You are the collective people who will make that determination. Again, our reporters have taken down every word. You don't have to take any of the attorneys' word in this courtroom because that's their recollection . . . . It's you, the collective jury, whose recollection controls.

(Trial transcript, pp. 1607-1609).

. . .

Mr. Goldfarb: You heard Brian Hilt, the police detective from New York City, come onto the stand. He was grilled quite a bit by Mr. Kelly, but you saw the genuine emotion that he was experiencing, as his father being his best friend, confidant I mean, you saw the legitimacy of that. And it was a while, ago already, so it maybe is fuzzy. But I don't think that image of Brian Hilt could possibly be fuzzy. He was the salt of the earth.

Mr. Kelly: Judge, he's vouching for witnesses.

The Court: Yes, sustained.

(Trial transcript, pp. 1614-1615)

. . .

Mr. Goldfarb: – why that was asked, I don't know. Why that's an issue, I don't know. But the reality is that the record speaks for itself. Their expert speaks about the record, saying that the record speaks for itself. That's what that means. And then you get this very question by them, and I actually never heard any of this – I didn't even know –

Mr. Kelly: Judge, can he stop giving his opinion? Objection, if your Honor please.

The Court: Just comment on the evidence, please, Mr. Goldfarb.

(Trial transcript, p. 1620).

Plaintiffs' counsel argues that the above-described excerpts from his summation were "within the broad bounds of rhetorical comment" and did not deprive the defendants of a fair trial.

The court's frustration with counsel's behavior during summation resulted in the following exchange upon the moving defendants' motion for a mistrial:

Mr. Kelly: Now we see during the course of the plaintiff's summation he apparently had blown up an excerpt from the North Shore University Hospital record that is . . . January 1,

2010. . . . And he reads to the jury his interpretation of this note. And I'm going to read it right from the record from what he said it was. And I've shown it to the Court with counsel present. And the court had said three times, I can't interpret it. . . .

Now again, this is the plaintiff's attorney's interpretation of an unintelligible, undecipherable note that he never presented to the Court, to defense counsel, and not to any of the six or more witnesses who have testified. There's been absolutely no reference to this throughout a three-week-plus trial.

. . .

The Court: – there's no indication of who is this person in this consult. We don't know. There are words here that are illegible in my opinion. And you may have mischaracterized a very important word. I can't say that. I'm not about to. But I'm about to say the word between "on" and "off" is very important in this case. You know.

Annoying, also is that when Dr. DaCunha was on the stand if he knew about this record he could have testified to this and given both Mr. Kelly and Mr. Leto an opportunity to cross-examine him on that very issue. We didn't have that. All we have is you now standing in front of a jury with documents saying this is what it says. You're not a doctor. You're not the person who wrote this down. You're not the histori[an] either. You're just an attorney who reads from a record your interpretation. That's the problem I'm having.

(Trial transcript, pp. 1641, 1652).

. . .

Mr. Kelly: I don't believe that was ever – if that exists – I'm not even sure it exists in [Mrs. Hilt's] deposition but I can tell the Court I certainly did not read that. And I was the one that read her deposition. And he is barred from reading his own client's deposition.

When I finished reading Mrs. Hilt's testimony he didn't approach the Court and say, Mr. Kelly took something out of context, or I want to show . . . he never did that. So now he's introduced in his summation on a critical issue that's on the verdict sheet about the referral, where Mrs. Hilt had testified that the patient was referred by a family friend. I'm not even sure it exists that she gave two versions in the deposition. But if it does exist, there was an opportunity at the appropriate time to say, Wait a minute. There's another version here. I want to read that to the jury. . . .

The Court: Let me tell you what can happen here if I deny a mistrial and I issue a curative instruction. And I'm not sure exactly what I would say. This will go up to the Appellate Division if there's a plaintiff's verdict. I know that as sure as we're all standing and sitting here. Then the Appellate Division will either send it back, or reverse it, or sustain it. Now I'm looking at that. But what gets me is the way it was presented to this jury. And I'm not saying – I'm not saying anything other than I suppose you can do things if you want to, if it was in evidence subject to redaction, but it was in evidence. You know, it seemed like you were holding this document up for the first time in this two-week trial that nobody, including me – I didn't know about it. And I know counsel didn't know about it. You know. They knew about that it existed perhaps, but they didn't know that you were going to use it at that point.

(Trial transcript, pp. 1653-1654, 1657-1658).

. . .

The Court: My query is this: Why wasn't Dr. DaCunha asked about this particular record? We might not be sitting here today and having this problem if he was asked about that, especially in light of where he said the basis for his determination that he was put back on Lisinopril was the hospital and medical records. This is the only one that seems to have that indication, if you want to call it that. But he wasn't asked that, and the record will bear that out.

(Trial transcript, p. 1660).

Thereafter, the court issued a curative instruction regarding counsel's use of his own interpretation of the meaning of the hospital record.

Rule 4404(a) of the CPLR provides, in pertinent part, "upon the motion of any party or on its own initiative, the court may set aside a verdict . . . or it may order a new trial . . . in the interest of justice. . . ." Thus, under Rule 4404(a), the court has the discretion to order a new trial "in the interest of justice." (*See Lariviere v. New York City Transit Authority*, 131 AD3d 1130 [2d Dept 2015] citing *Micallef v. Miehle Co. Div of Michle-Gross Dexter*, 39 NY2d 376 381 [1976]). In considering whether a new trial is warranted the court "must decide whether substantial justice has been done, whether it is likely that the verdict has been affected . . . and must look to its own common sense, experience and sense of fairness rather than to precedents in arriving at a decision." (*Laviriere*, at 1132 [citations and quotations omitted]).

Viewing the pattern of plaintiffs' counsel's conduct in the context of the entire trial, the court finds that counsel engaged in inappropriate behavior in the presence of the jury and that the cumulative effect of counsel's conduct during trial and in his summation to the jury was prejudicial to the outcome of the trial and created an atmosphere that deprived the defendants of a fair trial. (*See Ortiz v. Jaramillo*, 84 AD3d 766 [2d Dept 2011][granting a new trial based on counsel's repeated denigration of the veracity of defense witnesses and his vouching for the credibility of plaintiffs' witnesses]; *Rodriguez v. City of New York*, 67 AD3d 884 [2d Dept 2009] [granting a new trial where defense counsel, among other things, repeatedly accused plaintiff's witnesses of lying]; *see also Caraballo v. City of New York*, 86 AD2d 580 [1st Dept 1982] [reversing judgment on jury verdict where, among other things, plaintiff's attorney charged defense witnesses with perjury, defense counsel with subornation of perjury and asserted his personal knowledge and opinion as to the case and the credibility of the witnesses]).

Therefore, in the exercise of this court's discretion, the jury's verdict in the instant action is herewith set aside and a new trial is ordered as to defendants Joseph S. Reiss, M.D. and Joseph S. Reiss, M.D., P.C. in the interest of justice.

In light of this determination and order, the court does not address the balance of the defendants' motion or the cross-motion of the plaintiffs.

Counsel for all parties are directed to appear before the Calendar Control Part at 9:30 a.m. on **June 5, 2017** for a scheduling conference.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 3, 2017

ENTER:

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J.S.C.

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