

**Scarpati v Kim**

2013 NY Slip Op 30013(U)

January 3, 2013

Sup Ct, Richmond County

Docket Number: 101118/2008

Judge: Philip G. Minardo

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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DENISE SCARPATI,

Plaintiff(s),

-against-

HELEN H. KIM, M.D., CLOVE LAKES ENT, P.C.,  
and STATEN ISLAND UNIVERSITY HOSPITAL,

Defendant(s).

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DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 101118/2008

Motions Nos. 2236-002  
2333-003

The following papers numbered 1 to 6 were fully submitted on the 25<sup>th</sup> day of October, 2012.

	Papers Numbered
Defendant STATEN ISLAND UNIVERSITY HOSPITAL's Notice of Motion, dated July 19, 2012, with Supporting Papers and Exhibits _____	1
Plaintiff DENISE SCARPATI's Affirmation in Opposition, dated August 3, 2012 _____	2
Defendant STATEN ISLAND UNIVERSITY HOSPITAL's Reply Affirmation, dated August 13, 2012, with Exhibit _____	3
Defendants HELEN H. KIM, M.D.'s and CLOVE LAKES E.N.T., P.C.'s Affirmation in Partial Opposition, dated August 13, 2012, with Exhibit _____	4
Plaintiff DENISE SCARPATI's Cross Motion, dated July 26, 2012, with Supporting Papers _____	5
Defendant STATEN ISLAND UNIVERSITY HOSPITAL's Affirmation in Opposition, dated August 13, 2012 _____	6

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In this medical malpractice action, defendant STATEN ISLAND UNIVERSITY HOSPITAL

(“SIUH”) moves, pursuant to CPLR §4404, to set aside the jury verdict in favor of plaintiff DENISE SCARPATI (“SCARPATI”) on the grounds that the jury returned a verdict in favor of SIUH on the issue of causation; that the verdict was against the weight of the evidence; and/or that SCARPATI failed to establish a *prima facie* case of malpractice. SCARPATI cross-moves, pursuant to CPLR §4404, to set aside that part of the verdict which failed to award SCARPATI money damages for future pain and suffering and directing a new trial on that issue. The jury attributed no liability to defendants HELEN H. KIM, M.D. and CLOVE LAKES E.N.T., P.C. (hereinafter collectively “KIM”).

SCARPATI, who was initially diagnosed with laryngeal cancer in June, 2004, claimed at trial that defendants KIM and DR. JONATHAN BEITLER of SIUH (hereinafter “BEITLER”) were negligent as a result of their failure to diagnosis recurrent laryngeal cancer subsequent to SCARPATI’s radiation therapy which had been completed in August, 2004. SCARPATI maintained that, rather than relying solely on fiberoptic laryngoscopies, KIM and BEITLER should have ordered radiologic imaging studies on the affected areas during the period from November, 2004 through June, 2005. She contends that these studies would have revealed the recurrence of cancer. She also asserted that the failure of KIM and/or BEITLER to perform an imaging study such as a CT scan during the post-radiation treatment resulted in her having to undergo a total laryngectomy rather than a partial laryngectomy.

The defendants jointly claimed that the failure to perform imaging studies was not a departure from accepted standards of medical care. In addition, the defendants further maintained that the failure to conduct the imaging studies was not a substantial factor in causing plaintiff to have a total laryngectomy as there was no evidence presented which established that the recurrence of cancer

would have been detected by any such studies.

The jury verdict sheet contained the following questions with respect to the alleged failure of KIM to perform the imaging studies:

Did the defendant, Dr. HELEN H. KIM, depart from accepted standards of medical care in not ordering radiologic imaging studies for plaintiff, DENISE SCARPATI, from November, 2004 through June, 2005?

Was that departure a substantial factor in causing plaintiff, DENISE SCARPATI, to undergo a total laryngectomy in June, 2006?

The jury unanimously answered the first question in the negative resulting in a verdict that KIM did not depart from accepted standards of care which absolved her from any liability in this matter.

The verdict sheet contained the same questions with regard to BEITLER:

Did the defendant, Dr. JONATHAN BEITLER, depart from accepted standards of medical care in not ordering radiologic imaging studies for plaintiff, DENISE SCARPATI, from November, 2004 through June, 2005?

Was that departure a substantial factor in causing plaintiff, DENISE SCARPATI, to undergo a total laryngectomy in June, 2006?

In this instance, the jury unanimously found that BEITLER had departed from accepted standards of medical care in not ordering the imaging studies. However, the jury unanimously answered the second question in the negative finding that the departure by BEITLER was not a substantial factor in causing SCARPATI to undergo a total laryngectomy.

As a consequence of the jury finding that KIM did not depart from accepted standards of

medical care and that BEITLER did depart from accepted standards of medical care but such departure was not a substantial factor in causing the injury, the Court believed that a verdict in favor of defendants had been rendered. Thereafter, the Court inquired whether the jury had followed the instructions contained in the verdict sheet to not continue further if they found no liability against both defendants and was told by the jury foreman that they had proceeded to answer additional questions despite the clear instructions to the contrary (Scarpati tr at 1384, lines 4-7). The jury foreman confirmed that the jury had answered questions related to the comparative fault of the parties as well as past and future damages (Id., at 1384, lines 6-7).

With respect to the issue of comparative fault, the foreman stated that the jury determined that there was “no fault to Helen Kim but all fault to Dr. Jonathan Beitler” (Id., at 1384, lines 12-13). The foreman stated that the jury did not sign the response to the comparative fault question because the jury had believed that they had made a “mistake” (Id., at 1386, lines 22-23). The Court inquired whether the jury had found that the departure by BEITLER was a substantial factor in SCARPATI having to undergo a total laryngectomy and was told by the foreman that the jury’s unanimous answer was “No.” (Id., at 1388, lines 17-21). The foreman responded “Yes” when asked by the Court if that was what they had intended to do (Id., at 1390, lines 8-10). However, in spite of the confirmation that the jury had answered “No” to the substantial factor question, they went on to answer the next two questions on the verdict sheet and awarded SCARPATI the sum of \$1,000,000 for past pain and suffering and the loss of enjoyment of life and no award for future damages.

The inconsistent verdict caused the Court to poll each juror on two occasions to determine whether it was their intent to find that the departure by BEITLER was not a substantial factor in

causing SCARPATI's total laryngectomy. Each juror stated that they had intended to answer "No" on the issue of substantial factor. Upon request by SCARPATI's counsel and over the objections of defense counsel, the jury was polled again by the Court. On this occasion, Juror #3 apparently expressed the sentiment of the jury by stating that "[W]e intended to award her money because of the fact that she did not get a radiologic imaging study for that time" despite their consensus that such failure was not a substantial factor in causing SCARPATI to have undergone a total laryngectomy (Id., at 1399, lines 4-6). Claiming they were "confused", the jurors asked and were granted permission to resume deliberations (Id., at 1400, lines 7-20). At no time did the jury foreman or any other juror request any clarification or additional instructions especially a further explanation of the meaning of "substantial factor".

Shortly thereafter, the jury returned a verdict in favor of SCARPATI as a consequence of five of the six jurors changing their answer and now finding that the departure by BEITLER was a substantial factor in causing SCARPATI to receive a total laryngectomy. When polled, each of the five jurors confirmed their changed response.

"When a jury's verdict is internally inconsistent, the trial court must direct either reconsideration by the jury or a new trial" (*Kelly v. Greitzer*, 83 AD3d 901, 902 [2011], quoting *Palmer v. Walters*, 29 AD3d 552, 553 [2006], *citations omitted*). "On reconsideration, the jury [is] free to substantively alter its original statement so as to conform to its real intention, and [is] not bound by the terms of its original verdict inasmuch as that verdict was not entered by the court" (*Kelly v. Greitzer*, 83 AD3d at 902, quoting *Ryan v. Orange County Fair Speedway*, 227 AD2d 609, 611 [1996] [internal quotation marks omitted] *citations omitted*). "Even after reconsideration by the jury, 'a trial court has discretion to set aside a verdict which is clearly the product of substantial

confusion among the jurors (*Kelly v Greitzer*, 83 AD3d at 902, quoting *Palmer v. Walters*, 29 AD3d at 553). “‘ A new trial should be granted where . . . the record demonstrates substantial confusion among the jurors in reaching a verdict’” (*Kelly v. Greitzer*, 83 AD3d at 903 quoting *Cortes v. Edo*, 228 AD2d 463, 466 [1996]).

Prior to its final verdict, each juror had responded “No” when individually questioned on at least two separate occasions on the issue of whether BIETLER’s departure was a substantial factor in causing the plaintiff’s laryngectomy. The record is replete with statements by jurors confirming this determination. For example, Juror #3 stated “[W]e do not think it was the cause of the laryngectomy” and the Jury Foreman stated “We still feel that he did depart from standards of care from radiology imaging studies but we still also feel that didn’t have a departure - - substantial factor in causing her to have a total laryngectomy”.

When polled after the final verdict, the jury justified its change to the “substantial factor” question by claiming that they did not know that it was related to the “departure” question. However, the record is devoid of any prior request by the jury to explain or clarify any questions on the verdict sheet. When confronted with the realization that they could not provide a monetary award to SCARPATI, five out of the six jurors simply changed their answer to the “departure” question.

However, when questioned after the final verdict, Juror #5 stated that she changed her answer on the “departure” question, “[B]ecause I felt that if they didn’t give the CAT scan to her I wasn’t 100 percent sure that it didn’t cause the laryngectomy. So I’m not – we’re confused about the two questions. We just feel – we’re confused about them, to be honest. We’re going to sit here – to be honest, we’re confused. We are confused”.

Under the circumstances of this case, there is ample reason to believe that the jury remained confused even after their reconsideration as there is significant doubt that its “actual determination” was that BEITLER’s departure from accepted medical standards of medical care was a proximate cause or substantial factor in causing SCARPATI to have a total laryngectomy even though the final verdict was not internally inconsistent (*cf.*, *Kelly v. Greitzer*, 83 AD3d at 903). It is unquestioned that the jury had repeatedly determined that BIETLER’s departure was not a substantial factor in causing SCARPATI’s laryngectomy and it is evident that the jury, although remaining “confused”, disregarded their stated intention in order to provide a monetary award to the plaintiff. It would be inappropriate to allow the verdict to stand in light of the expressed confusion of the jury in this case.

Accordingly, it is

ORDERED, that the jury verdict in this matter is set aside as to defendant STATEN ISLAND UNIVERSITY HOSPITAL; and it is further

ORDERED, that a new trial is granted to plaintiff DENISE SCARPATI as against defendant STATEN ISLAND UNIVERSITY HOSPITAL; and it is further

ORDERED; that the jury verdict in this matter as to defendants HELEN H. KIM, M.D., and CLOVE LAKES ENT, P.C. is not set aside; and it is further

ORDERED; all of the remaining matters are rendered moot as a result of the granting of a new trial in this matter.

This shall constitute the decision and order of the Court.

Dated: January 3, 2013

/s/ Philip G. Minardo  
J. S. C.



