

**Madison v Sama**

2014 NY Slip Op 31555(U)

June 18, 2014

Supreme Court, New York County

Docket Number: 103066/08

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

**ALICE SCHLESINGER**

PRESENT: \_\_\_\_\_

PART **IA** PART 16

Index Number : 103066/2008  
MADISON, MICHAEL  
vs  
SAMA, ANDREW A.  
Sequence Number : 004  
VACATE STAY/ORDER/JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is by plaintiff to set aside the jury verdict is denied in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
JUN 20 2014  
NEW YORK  
COUNTY CLERKS OFFICE

JUN 18 2014

Dated: \_\_\_\_\_

*Alice Schlesinger*  
**ALICE SCHLESINGER** J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
MICHAEL MADISON,

Plaintiffs,

Index No. 103066/08  
Motion Seq. No. 004

-against-

ANDREW A. SAMA, M.D., and THE HOSPITAL FOR  
SPECIAL SURGERY,

**FILED**

Defendants.

-----X  
SCHLESINGER, J.:

JUN 20 2014

NEW YORK  
COUNTY CLERKS OFFICE

Before the Court is a motion by plaintiff Michael Madison to set aside a jury verdict reached against him and in favor of the defendant doctor Dr. Andrew A. Sama on February 24, 2014. The motion is made pursuant to CPLR §4404(a) for judgment notwithstanding the verdict and to set aside the verdict in the interests of justice.

The action was tried before this Court and a jury from February 10, 2014 to February 24, 2014. It concerned spinal surgery performed on Mr. Madison by Dr. Sama on October 24, 2005. The surgery was a spinal fusion from L1 to S1, in other words, very extensive surgery. In fact, it was that issue, how far down from L1 would the fusion go and how complicated a surgery it would be, that were the central issues in the case. The plaintiff's position was that the surgery should not have extended past L3-L4 at the most. But the fusion in fact went 2 levels further, to L4-L5 and L5-S1.

Several days before the operation, Dr. Sama ordered a discogram, to be performed by Mr. Madison's physiatrist, Dr. Peter Moley. Dr. Sama testified that the result obtained from this test would help him decide how extensive a fusion would need to be done. The test was performed on Friday, October 21, 2005. Dr. Sama said that he relied in part on the findings and informed Mr. Madison before he went into surgery that the fusion would

go down to the S1 level and that the surgery would be done by cutting into Mr. Madison's body from the front and then the back. In other words, while Mr. Madison had expressed a desire for minimally invasive surgery and while Dr. Sama had said that he would consider this fact, the doctor's ultimate decision was for the more extensive fusion surgery. Mr. Madison did sign a consent for this surgery and that was not an issue in the case.

What was an issue, however, was Sama's reliance on the discogram, without a control disc. The second issue was whether Dr. Sama committed malpractice by performing the more extensive fusion. Those were the two questions submitted to the jury. The panel, by a vote of 5-1 in favor of Dr. Sama, answered the first question that Dr. Sama did not depart from accepted standards "by ordering and relying upon a discogram ... that was performed without a control." On the second question, the jury was unanimous in finding that no malpractice had occurred by Dr. Sama's having extended the fusion to L5/S1.

During the trial, counsel for the plaintiff called one expert, a neurosurgeon, Dr. Gregory J. Przybylski, who testified as to the above two issues. As to the use of discograms, he explained in detail what the test consisted of and why a control disc was not only important to have but absolutely necessary in order to obtain a reliable result. The test involves various needles being placed in the patient's discs. The idea is to simulate the kind of pain the patient feels when a particular disc is bothered. A control disc is one, that is not believed to be diseased. If the patient responds with pain to that one disc from the test needle, it makes the entire test suspect because doubt is cast on the simulation technique.

Here, a control disc was not used. Therefore, Dr. Przybylski testified that the results indicating disease in the lower discs, L5 and S1, were not trustworthy and should not have been relied upon by the surgeon in making a decision as to the extent of the surgery. Specifically, the discogram revealed that only two discs, L4-L5 and L5-S1, had been injected. Based on this information, Dr. Przybylski opined that this approach had rendered the discogram ineffective for determining which discs were causing the pain.

This expert also testified that Dr. Sama should not have fused past L4 and that it was malpractice to do that. He opined that those discs, the lower ones, were not involved and, for a variety of reasons, should not have been interfered with. It was his opinion that Dr. Sama's extensive surgery caused Mr. Madison nerve damage including a dropped foot. The verdict sheet given to the jury contained two questions on liability. The first one question 1(a) pertained to the use of the discogram in these circumstances and read as follows:

Did Dr. Andrew Sama depart from accepted standards of medical care by ordering and relying upon a discogram for Michael Madison that was performed without a control?

By a vote of 5-1, the jury answered "NO" to that question.

As to the second part of Dr. Przybylski opinions, question 2(a) addressed the malpractice to which he had testified. It reads as follows:

Did Dr. Andrew Sama depart from accepted standards of medical care by performing a multi-level fusion surgery at the L-4/L-5 and L-5/S-1 levels on Michael Madison on October 24, 2005?

All six jurors answered "NO" to this question.

Significantly different opinions were provided on the defense case by neurosurgeon George DiGiacinto and by the defendant himself. The first time Dr. Sama testified was for the defense on its case.

During the course of Dr. DiGiacinto's direct testimony, the Court ruled, causing some unhappiness on the defense side, that this expert would not be allowed to testify about the use and efficacy of the discogram without using control discs. Plaintiff's counsel had objected to a question asked of Dr. DiGiacinto which pertained to the discogram where only the two lower disc were injected (p. 431 of transcript). After the Court sustained an objection, plaintiff's counsel asked first at the Bench and then in the Robing Room on the record, to preclude any testimony by this expert on the use of the discogram without controls. He argued that his own §3101(d) Notices had clearly put the defense on notice that this would be a claim but the defendant's Neurosurgeon's §3101(d) Notice in response did not address it.

I read through the Notice pertaining to Dr. DiGiacinto, said that it was close, and then gave plaintiff's counsel a choice (p. 435). The choice was that while I would sustain the objection and preclude this expert from discussing performance of the discogram without controls due to the lack of specific notice, at the same time I would allow Dr. Sama to discuss it. My rationale was that the defendant, under such circumstances, would be explaining why he relied on the results of the discogram and that testimony would not be duplicative to Dr. DiGiacinto's testimony.

Counsel opted for that procedure. He said (on page 436): "I would preclude the expert from testifying to it and allow Dr. Sama to try and explain." Defense counsel "absolutely object(ed)". As the argument continued, I said: "I am allowing him now to

explain why he made that choice and why he did not make the other choice, and then discuss why controls are not necessary" (p. 439).

This ruling then was a predicate for some of the testimony that Dr. Sama gave. I also included in my charge to the jury at the conclusion of the trial an instruction referred to as "error in judgment". This is a controversial charge, one favored by the defense for obvious reasons and for those same reasons greatly disliked by plaintiffs. I only gave it as to the second question. All of this was discussed at length in the charge conference held the day before summations.

During that conference, I cited what I believed was the applicable law on this subject and why I believed that the testimony by Dr. Sama was sufficient to entitle him to the instruction. As cited in defendant's opposition to this motion (on page 1042 of the transcript), during the charge conference, I stated the following:

I am convinced, by Dr. Sama's testimony, both on direct and on cross examination, that error in judgment is warranted here because -- but only warranted with regard to the second question, not the first question, because it is supposed to be given when there are several alternative treatments or alternative ways of dealing with a surgical situation, and a doctor chooses one which turns out, perhaps not to be a good choice. That's when it is supposed to be given.

So as a predicate, you need testimony, essentially from the defendant, showing that there were alternative ways of treating, in this case surgical care, and that the doctor considered those, and then chose one or the other. I think that the evidence supports that. It's really as simple as that.

[\* 7]

I then went on to cite specific testimony from Dr. Sama (pgs. 791-794), primarily relating to a conversation that he had had with Michael Madison on September 22, 2005, about one month before the surgery on October 24. I pointed out that this testimony dealt with options that the defendant was considering, which I believed was justification for the error in judgment charge. That charge (PJI 2:150) states as follows:

A doctor is not liable for an error in judgment if he or she does what he or she decides is best after careful evaluation, if it is a judgment that a reasonably prudent doctor could have made under the circumstances.

Counsel for the plaintiff urges that this very powerful instruction was not warranted here. As is pointed out in his moving papers, he had earlier, during the trial, made strong objection to it. The argument was that the basis for the charge — the testimony that there were two alternative surgeries that were both considered by the defendant — relied exclusively on Dr. Sama's trial testimony, which simply was not credible. It was not credible because that testimony was at variance with the defendant's contemporaneous records and his deposition testimony.

However the problem, or at least one of them, in the argument counsel makes relates to the credibility of Dr. Sama. That area is exclusively in the jury's domain, a jury that was instructed on what items to consider in determining such matters.

Also, there was testimony given by defendant's expert neurosurgeon, Dr. DiGiacinto, that Dr. Sama did comport with standards of medical care in his treatment of Mr. Madison. He elaborated on this opinion on his direct testimony (on page 430) when he specifically noted all of the items Dr. Sama considered in finally coming to a decision that extensive spinal surgery was called for. Some of the items he named included taking a history from



the patient, his clinical examination, MRI scans, and the discography at levels L4-5 and L5-S1. This doctor ended this part of his testimony by stating (p. 430):

He (referring to the defendant) then concluded, based on all this gathering of information, that it would be most appropriate and most likely to help the patient by performing what clearly was a significant operation, fusion that basically ran from the first lumbar vertebra to the sacrum. And that is the surgery that he undertook after fully evaluating the patient and gathering the information I have mentioned.

Moving counsel is correct that Dr. Sama's own testimony, not surprisingly, supported his position that he considered these two methods of surgery. But it was not the exclusive evidence in this regard, though it may have been the most powerful.

This brings me to the Reply wherein counsel appeared to change the focus of his argument. Wherein the moving papers emphasized my error in giving the error in judgment charge which arguably deprived Madison of a fair trial, in the Reply, the Court was accused of having intervened too much in this area and that in itself, together with this charge, deprived Mr. Madison of a fair trial. For example, counsel stated in these papers, after alluding to certain questions and answers of Dr. Sama posed by the Court: "It was the Court who gave the defendant the opportunity to testify to his memory of discussions with plaintiff that are not reflected in the records" (p.3).

Counsel was even stronger in his comments, criticizing the Court for taking over the defense role in questioning Dr. Sama and forcing him (counsel) into a Hobson's choice as to whether he should object to such questions, which he urged elicited non-admissible testimony. Therefore, the plaintiff's argument expanded from improperly giving the error in judgment charge to the alleged interference by the Court in bolstering Dr. Sama's testimony. Both arguments urge that Michael Madison was deprived of a fair trial.

Counsel is wrong. Michael Madison very definitely received a fair trial, perhaps not a perfect one, but certainly a fair one. When one cherry picks certain testimony and takes it out of the context in which it was given, a particular result can be obtained and argued. That is what I believe counsel has done. While the Court did ask the questions cited, in later reviewing Dr. Sama's entire testimony, the record supports that the inquiries made by the Court had already been brought out by defense attorney in his direct examination. Therefore, this inquiry was simply an attempt by the Court to summarize that earlier testimony and move on to other areas. But the record clearly shows that Dr. Sama had already testified to his consideration of a full spinal fusion, the discogram merely being one part of that consideration. This Court emphatically was not biased in defendant's favor and did not display any such bias at the trial.

As stated earlier, finding certain witnesses credible or not is a primary function of the jury. Here, by the answers to the two questions posed, questions acceded to by moving counsel, the jury found that ordering and relying upon the discogram without controls was not malpractice and that extending the levels of the spinal surgery was also not malpractice. There was opinion testimony by Doctors Przybylski, DiGiacinto and Sama on both of these issues. Therefore, a verdict finding for either party had support in the record. The Court's minimal interference did not change that fact. Further, the decision to give the controversial error in judgment charge was the correct one based on that same record. Whether or not Dr. Sama's trial testimony was fabricated was not a finding to be made by the Court. However, it was a proper predicate, together with Dr. DiGiacinto's testimony, that two alternative surgeries existed and were considered, thereby justifying the error in judgment charge.

Finally, verdicts reached by juries, are treated very seriously and are rarely set aside. That is as it should be. When people on a jury take the time and make the effort to consider issues outside of their own lives, that is an important and praiseworthy thing. Beyond that, we have found that it is the best way, albeit not a perfect way, to resolve controversies.

Moving counsel undoubtedly believes strongly that plaintiff's position is and was an irresistible one, based on his perception of the credible evidence. But, Mr. Madison's jury believed otherwise. Before the jury came to that decision, Mr. Madison had a full opportunity to present his own case and an opportunity to examine the defendant's witnesses. Though the jury's verdict was unfavorable to him, I find that the trial preceding that verdict was in all aspects fair. Therefore, I would be loathe to set the verdict aside.

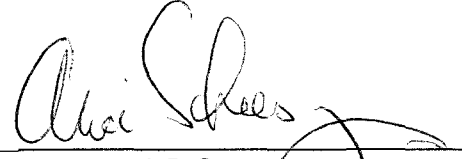
Accordingly, it is hereby

ORDERED that plaintiff's motion to set aside the jury verdict is in all respects denied.

Dated: June 18, 2014

JUN 18 2014

**FILED**  
JUN 20 2014  
NEW YORK  
COUNTY CLERKS OFFICE

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**