

<p>Longtin v Miller</p>
<p>2014 NY Slip Op 31571(U)</p>
<p>June 23, 2014</p>
<p>Sup Ct, Albany County</p>
<p>Docket Number: 5316-10</p>
<p>Judge: Joseph C. Teresi</p>
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DEBORAH LONGTIN and LAWRENCE SALVAGNI,

Plaintiffs,
-against-
DECISION and ORDER
INDEX NO. 5316-10
RJI NO. 01-11-102716

JAMES R. MILLER, M.D., ALBANY PLASTIC
SURGEONS, PLLC, BENJAMIN J. SCJALET, M.D.,
and MEMORIAL HOSPITAL, ALBANY, NEW YORK,

Defendants.

Supreme Court Albany County All Purpose Term, May 20, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Upon the conclusion of this medical malpractice trial, the jury found for Defendants with its no cause verdict. Plaintiffs now move, pursuant to CPLR §4404(a), to set the jury's verdict aside. Plaintiffs claim that the jury's answers to three of the special verdict questions (three, five, and seven) were not supported by legally sufficient evidence or, alternatively, were against the weight of the evidence. Plaintiffs seek a directed verdict on liability and causation, with an

inquest on damages, or a new trial. Defendant Miller opposes the motion. Because Plaintiffs failed to demonstrate their entitlement to the relief they seek, their motion is denied.

“Evidence is legally insufficient to support a verdict if there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial.” (Lang v Newman, 12 NY3d 868, 870 [2009], quoting Cohen v Hallmark Cards, 45 NY2d 493 [1978]). This analysis proceeds by “accord[ing] defendant every favorable inference and considering the facts in the light most favorable to [him].” (Juric v Bergstraesser, 105 AD3d 1301, 1303 [3d Dept 2013]; Skelly-Hand v Lizardi, 111 AD3d 1187 [3d Dept 2013]).

Alternatively, “[t]he standard for determining if a verdict is against the weight of the evidence is whether the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence.” (Biello v Albany Mem. Hosp., 49 AD3d 1036, 1037 [3d Dept 2008], quoting Lolik v Big V Supermarkets, 86 NY2d 744 [1995][internal quotation marks omitted]). “[C]onsiderable deference must be accorded to the jury’s interpretation of the evidence and resolution of credibility issues, including those created by the conflicting opinions of medical experts.” (Harris v Parwez, 13 AD3d 675, 677 [3d Dept 2004], quoting Hess v Dart, 282 AD2d 810 [2001]; Skelly-Hand v Lizardi, *supra*).

On this record, Plaintiffs first failed to demonstrate that the jury’s answer to special verdict question three was legally insufficient or against the weight of the evidence. The jury answered “No” to the third special verdict question: “Did the Defendant James R. Miller M.D.

deviate from acceptable standards of medical care by injecting Sculptra into the periorbital¹ areas of Plaintiff Deborah Longtin's face, and/or areas with thin skin and/or prone to inflammation?" The jury based its answer, in part, on Miller's testimony. He testified, "without any doubt in [his] mind," that he injected Sculptra into the "right and left malar² regions" of Ms. Longtin's face. Such testimony was supported with documentary evidence, the Operative Report Miller prepared in connection with his Sculptra injection. Miller also testified, at length, to the ambiguities involved in the applicable medical terminology. His expert agreed. According to Miller, the malar and periorbital areas overlap, with the malar area being "inclusive" of the periorbital area. While Plaintiffs' attorney examined Miller thoroughly about terminology, the location of injection, and the purported record contradictions, Miller consistently explained the contradictions as a "nomenclature issue rather than an absolute area of injection." To paraphrase Miller's testimony, he emphatically explained that he placed Sculptra in Ms. Longtin's upper cheek, not her eyelid.

In addition, Miller offered evidence repudiating Plaintiffs' Sculptra non-migration theory. At trial the jury heard evidence from a surgeon, Williams, who excised "granulomatous nodular tissue" from Longtin's "lower eyelid orbital rim." Williams testified that he believed the granulomas were caused by the Sculptra Miller had injected. According to Plaintiffs' theory, because Sculptra stays where it is placed, when Williams found the Sculptra in Longtin's eyelid

¹ Commonly defined as "of, relating to, occurring in, or being the tissues surrounding or lining the orbit of the eye." (Merriam-Webster Online Dictionary, <http://www.merriam-webster.com>, accessed June 23, 2014).

² Commonly defined as "of or relating to the cheek or the side of the head." (Merriam-Webster Online Dictionary, <http://www.merriam-webster.com>, accessed June 23, 2014).

he concluded that Miller had placed it there. However, the granulomatous nodular tissue's pathology report did not specifically identify Sculptra as its cause. Although Plaintiffs offered the jury ample evidence supporting their theory, including the compelling cross examination testimony of Miller and his expert, Miller explained to the jury that the pathology report was "nonspecific... nondiagnostic for anything including Sculptra." He and his expert also offered testimony about alternative potential causes of the granulomas. In addition, Miller disputed the location of Williams' surgery. By raising these ambiguities within one of the Plaintiffs' syllogism's premises, Plaintiffs' theory's conclusion is of questionable validity.

The above testimony and supporting documentation, when considered in a light most favorable to Defendants, provided the jury with a valid line of reasoning to answer special verdict question number three in the negative. Moreover, affording the jury's credibility determination great deference as this Court must, Plaintiffs failed to demonstrate that the jury's answer to question three was not based on a fair interpretation of the evidence.

Turning to special verdict question five, Plaintiffs failed to establish that the jury's answer to it was either legally insufficient or against the weight of the evidence. Question five asked: "Did the defendant James R. Miller, M.D. deviate from acceptable standards of medical care by failing to instruct plaintiff Deborah Longtin to perform postoperative massage of the injection site?" The jury's "No" answer was predicated, in part, on Miller's trial testimony. Miller explained to the jury that he was Longtin's plastic surgeon for over ten years and had long counseled her that massage was a component of her treatment. He explained how he instructed patients to perform postoperative massage, and that he did instruct Longtin on such procedure. He admittedly did not provide Longtin with written instructions. However, according to Miller,

this lack of written instructions does not constitute a deviation in the standard of care. While the jury was offered contradictory evidence and Plaintiffs' attorneys exploited Miller's memory gaps on this issue, Miller's testimony as a whole provided the jury with the necessary facts to reach their answer based upon a valid line of reasoning. Moreover, because the jury's credibility determinations between conflicting medical experts must be accorded considerable deference, the jury's answer to special verdict question five was based upon a fair interpretation of the evidence.

Lastly, Plaintiffs failed to demonstrate their entitlement to relief relative to the jury's answer to special verdict question seven. Here, the jury answered "No" to the question: "Did the defendant James R. Miller, M.D., before obtaining plaintiff Deborah Longtin's consent to the Sculptra injections administered on February 20, 2008, provide appropriate information?" Its answer was based, in part, upon Longtin's execution of a "Consent for Surgical, Medical and Other Procedures" that specifically noted the proposed "Sculptra Injection." She executed the Consent eight days before the injection, which stated:

"I acknowledge that I have discussed the... procedure(s) to be performed with the physician named above [Miller] and feel that I understand to my satisfaction the alternatives, and reasonable risks, and the desired benefits. I do not request any further information... I have had all of my questions answered and the explanation I have received from my physician is sufficient for me to give my consent for this procedure."

Miller also testified about his conversations with Longtin, alleging that he provided her with the information she needed to make an informed choice prior to injection. Miller's testimony was confirmed by his Operative Report and an office note. Such proof, considered in a light most favorable, is legally sufficient to support the jury's answer to special verdict question seven. Although Plaintiffs established that Miller did not provide Longtin with all of the written documentation that he could have, such proof does not render this special verdict answer against

the weight of the evidence.

"In view of defendants' presentation of credible conflicting medical evidence, it cannot be said that there was no valid line of reasoning or fair interpretation of the evidence under which the jury could have found in favor of defendants." (Swartz v St. Mary's Hosp. of Amsterdam, 101 AD3d 1273, 1276 [3d Dept 2012] lv to appeal denied, 21 NY3d 859 [2013]). Accordingly, Plaintiffs' motion is denied in its entirety.

This Decision and Order is being returned to the attorneys for Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 23, 2014
Albany, New York



Joseph C. Teresi
Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated April 22, 2014, Affirmation of George Szary, dated April 22, 2014, with attached Exhibits A-GG.
2. Affidavit of Andrew McNamara, dated May 13, 2014, with attached Exhibits A-C..
3. Affirmation of George Szary, dated May 17, 2014.