Abbene v Conetta
2017 NY Slip Op 30798(U)
March 20, 2017
Supreme Court, Queens County
Docket Number: 700820/13
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Jane Abbene, Administrator of the Estate of Joseph D. Sarra, deceased,

Plaintiff,

- against -

Rick Conetta, M.D.,

Defendants.

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Index Number: 700820/13

Motion Date: 2/8/17

Motion Cal. Number: 1

Motion Seq. No.: 1

The following papers numbered 1 to 7 read on this motion by plaintiff to set aside the jury's verdict and for a new trial.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-6
Reply	7

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff, pursuant to CPLR 4404(a), to set aside the jury's verdict as being against the weight of the evidence and for a new trial is denied. There is no basis to disturb the jury's verdict.

This is a medical malpractice action alleging that defendant Dr. Rick Conetta, a pulmonologist, failed to diagnose lung cancer in plaintiff's decedent, Joseph Sarra. It was alleged that Sarra presented to Dr. Conetta with symptoms that caused him to suspect that Sarra may have had cancer and, indeed, cancer was included in Dr. Conetta's differential diagnosis. In spite of Dr. Conetta's concern that Sarra may have cancer, he nevertheless ordered a chest x-ray instead of a CT scan, which is a much more sensitive diagnostic test and could resolve much smaller abnormalities than an x-ray. It was alleged that had Sarra been given a CT scan on

September 16, 2011 instead of an x-ray, it would have shown lung cancer which would have been only Stage I at that time and could have been treated, giving plaintiff an 85% or greater chance of a cure. Instead, by the time Sarra underwent a CT scan on February 17, 2012, ordered by his internist, showing nodules in the lungs, enlarged lymph nodes, masses on the liver and evidence of bone metastasis, and a follow-up series of CT scans on February 21, 2012 revealing lung lesions, multiple chest lymph nodes and cancer in the liver, bone and brain, the cancer, which was then diagnosed as squamous cell lung cancer, was Stage IV, and Sarra died on March 10, 2012.

As plaintiff's counsel informed the jury in his opening statement, Sarra, who was a heavy smoker, had begun to decline in health from 2005. He had initially been hospitalized from November 5-13, 2009 with complaints of shortness of breath and increased dyspnea on exertion. His weight had also plummeted from 176 lbs to 139 lbs. A chest x-ray, a colonoscopy and CT scans of the chest, pelvis and abdomen were performed and, in counsel's words, 'there was no sign of cancer". He was subsequently seen in December 2009 by Dr. Conetta after his internist requested a pulmonary consult. Dr. Conetta examined plaintiff, found that he had decreased breath sound through his lungs and mild gravity-related dependent edema in his legs, i.e, fluid was accumulating in his legs and ankles, and diagnosed him with moderate COPD and non-specific emphysema. Dr. Conetta also noted that Sarra appeared undernourished, weighing 138 pounds. Sarra was seen again by Dr. Conetta in January 2010 when he presented to the emergency room of New York Presbyterian Hospital complaining of cough and shortness of breath. He was found to be hypercapnic and a chest x-ray was given, which showed no infiltrates. Dr. Conetta's impression was exacerbation of COPD and chronic respiratory acidosis, and he prescribed antibiotics.

Sarra presented again in July 2011 complaining that he was waking up at night with dyspnea and coughing. Dr. Conetta's impression was a mild exacerbation of his COPD and prescribed an inhaler. He also ordered a chest x-ray, but Sarra did not go for the x-ray.

Sarra thereafter presented to Dr. Conetta on September 16, 2011, complaining of shortness of breath, increased swelling in his legs, nodules in both hands and a five-pound weight loss, although he now weighed 142 lbs, up from the 138 lbs he weighed on his December 2009 examination. Dr. Conetta found the same mild dependent edema and found, with respect to the nodules in Sarra's hands, that the skin was normal and there was no pain. After conducting a pulmonary function test, Dr. Conetta diagnosed him with severe COPD. Dr. Conetta ordered x-rays of the hands and a

with severe COPD. Dr. Conetta ordered x-rays of the hands and a chest x-ray and told him that he wanted to see him again in two weeks. Sarra went for the x-rays on September 23, 2011. The chest x-ray showed no infiltrates and that the examination was stable and compatible with COPD. The hand x-rays were also negative for cancer, showing merely arthritis. Sarra did not make an appointment to see Dr. Conetta in two weeks as he was instructed to do.

Sarra presented to his primary care physician, Dr. Pizzolla, on September 30, 2011, complaining of a recurrence of the edema and difficulty walking, and again presented to Dr. Pizzolla on November 11, 2011, on which date Dr. Pizzolla noted that Sarra had further unexplainable weight loss. He attributed this to nutritional and smoking-related COPD causes, but nevertheless ordered a CT scan of the chest, abdomen and pelvis to rule out cancer.

Sarra again presented to Dr. Pizzolla on February 3, 2012, having not gone for the CT scans that had been ordered. Sarra had lost 17 lbs from poor appetite and was taking Percocet for severe back pain. At Dr. Pizzolla's urging to go for the CT scans, Sarra underwent the CT scans on February 17 and 21, 2011.

There was only one departure elicited by plaintiff, and three questions in total on the verdict sheet. Question 1 of the verdict sheet asked, "Did defendant Dr. Rick Conetta depart from good and accepted medical practice on September 16, 2011 by not ordering a chest CT scan for Joseph D. Sarra?" Question 2 asked whether said departure was a substantial factor in causing harm to Sarra. Question 3 asked the jury to state the amount of damages to plaintiff for Sarra's past pain and suffering. The jury answered "No" to Question 1, unanimously, and, consequently, pursuant to the instructions after that question, proceeded no further and reported to the Court. Plaintiff contends that the jury's verdict was against the weight of the evidence.

CPLR 4404(a) provides that a trial court "may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence [or] in the interest of justice." A jury verdict is against the weight of the evidence if the jury could not have reached the verdict on any fair interpretation of the evidence (see Yalkut v City of New York, 162 AD 2d 185; Nicastro v Park, 113 AD 2d 129).

Plaintiff's counsel contends that the jury's verdict was against the weight of the evidence based upon his characterization of the testimony of Dr. Conetta, his expert pulmonologist, Dr. Alan Mensch, and plaintiff's expert in the field of onclogy, Dr. Aymen Elfiky.

Dr. Conetta agreed that the standard of care regarding a diagnostic test for a particular condition required choosing, in plaintiff's counsel's words, "the test that was the most specific test". He also testified that there are two imaging tests for the lungs: x-ray and CT scan. Dr. Conetta admitted that a CT scan is a more sensitive imaging test than an x-ray and could pick up nodules that could be missed on an x-ray, nodules, that if cancerous, would be Stage I. Plaintiff's counsel argues that Dr. Conetta admitted that he was concerned about the possibility of malignancy and that lung cancer could have been causing Sarra's symptoms, and indeed part of Dr. Conetta's differential diagnosis was lung cancer. Nevertheless, Dr. Conetta ordered a less sensitive chest x-ray instead of the more sensitive CT scan. Counsel argues that this testimony is a concession on the part of Dr. Conetta that he departed from the standard of care. Counsel further argues that Dr. Conetta testified that the x-ray that he ordered was not even to diagnose lung cancer but to diagnose COPD, even though he was concerned about the possibility of plaintiff having lung cancer.

Dr. Elfiky testified that the standard of care for diagnostic tests is to order the most definitive tests which, in the case of most cancers, is a CT scan that is more sensitive than an x-ray. He testified that a CT scan is sensitive enough to have picked out a cancerous lesion 6-7 mm long, which, in his opinion, would have been the size of the lesions in Sarra's lungs in September 2011, but an x-ray would not have been sensitive enough to have resolved such lesions because Sarra's COPD would have obscured them on the less sensitive x-ray. Dr. Elfiky opined that it was a departure from good and accepted medical practice by sending Sarra for an x-ray instead of a CT scan when Sarra presented with a five pound weight loss, nodules in the hands and edema, thereby raising in Dr. Conetta the concern about the presence of malignancy. He further opined that in Mr. Sarra's situation one does not wait for an abnormal x-ray before ordering a CT scan.

Plaintiff's counsel contends that the foregoing testimony is unrebutted and that the only evidence presented on behalf of Dr. Conetta was the testimony of Dr. Mensch, who merely gainsaid Dr. Elfiky by summarily opining that it was not a departure to have ordered an x-ray instead of a CT scan, without offering any objective basis for that conclusion. In this regard, plaintiff's counsel argues that notwithstanding that Dr. Mensch conceded that certain diagnostic tests are done to determine if a patient has lung cancer where the patient presents with signs or symptoms suggesting lung cancer, he nevertheless opined that Dr. Conetta did not depart from good and accepted medical practice by not ordering a CT scan because the two earlier x-rays were identical. Plaintiff's counsel argues, essentially, that this explanation is

entirely non-sequitur since it is undisputed that an x-ray is not sensitive enough to have resolved a 6-7 mm cancerous nodule or lesion and, therefore, to say that the two x-rays were identical is a meaningless statement. Counsel does not relate the testimony of Dr. Conetta and Dr. Mensch with complete accuracy.

Dr. Conetta did not concede that his decision to order an x-ray instead of a CT scan was a departure from good and accepted medical practice; he stated that it was not a departure. He testified that his concern on September 16, 2011 that Sarra may have had cancer was because of his reported loss of 5 lbs over the past 45 days. But he also explained that all of Sarra's symptoms (shortness of breath, weight loss, edema, hand nodules), were non-specific, meaning that they were not symptoms specifically of cancer or any other disease, but that many diseases could cause those symptoms, including COPD/emphysema, as well as cancer, and not just lung cancer. So for that reason he included lung cancer as part of his differential diagnosis. But a CT scan was not medically indicated at that time to test for lung cancer. Instead, he ordered an x-ray to image COPD, since that was the original diagnosis in 2009 and 2010. In this regard, although plaintiff's counsel doubts the veracity of Dr. Conetta's testimony that the x-ray he ordered was for COPD and not cancer, it was not against the weight of the evidence for the jury to have accepted his testimony in this regard.

This Court notes that Sarra was originally diagnosed by Dr. Conetta with COPD and non-specific emphysema in 2009 based upon his shortness of breath, his edema, weight loss and his pulmonary function test, and based upon a CT scan of the chest, pelvis and abdomen, and an x-ray which did not show anything. Plaintiff's counsel, in his opening statement to the jury, stated that Sarra's health began to decline in 2005 and his weight plummeted from 175 lbs to 139 lbs by the time he went to the hospital in 2009. Sarra was again diagnosed with COPD in 2010 based upon the same conditions and complaints, but was not sent for either a CT scan or an x-ray. Dr. Conetta also explained that while the reported weight loss was concerning, it was not overly concerning, to the point of ordering a CT scan to test for cancer, because he noted that although Sarra reported a 5-lb weight loss in the past month, Sarra's original weight at his 2009 examination was 138 lbs while his weight in September 2011 was 143, an increase of 5 lbs. He stated that 5 lbs here or there is not remarkable, especially since Sarra was taking diuretics to reduce his edema, and it is normal to lose up to 5 lbs while on diuretics. Dr. Conetta explained that he thus wanted Sarra to return in two weeks so that he could see if Sarra had lost any more weight or whether something appeared on the x-ray. If there was either an abnormal x-ray or if Sarra lost more

weight, approximately another 5 lbs, Dr. Conetta would then order a CT scan.

Dr. Elfiky testified that the nodules in Sarra's lungs would have been 6-7 mm in length on September 16, 2011, based upon his "doubling" calculations. However, the undisputed evidence presented was also that an x-ray could resolve nodules of that size. Dr. Elfiky attempted to harmonize his testimony that the chest x-rays were not sensitive enough to have picked up the 6-7-mm nodules in Sarra's lungs and therefore that Dr. Conetta's ordering of an x-ray instead of a CT scan was a departure, with the undisputed testimony that an x-ray can resolve nodules of that size, by explaining that Sarra's COPD would have obscured these nodules on the x-ray, but would not have obscured them on a CT scan. Dr. Conetta disagreed with that statement. When plaintiff's counsel tried to elicit an acknowledgment by Dr. Conetta of Dr. Elkify's testimony in this regard, asking, "Well, COPD on an x-ray could make it difficult for a doctor to see a nodule, a small nodule due to the COPD itself, correct?", Dr. Conetta replied, "In my experience that's not correct."

The jury was entitled, in weighing the credibility of the testimony of competing medical professionals, to credit Dr. Conetta's testimony in this regard. The jury was also entitled to credit Dr. Conetta's testimony that the standard of care is to order, in plaintiff's counsel's words, "the more specific, more precise, more informative test", meaning a CT scan instead of an x-ray, but with the proviso that "[o]nly if the chest x-ray is abnormal you do a CT scan. That's the way it is." When plaintiff's counsel replied, "That's not the way it is", Dr. Conetta responded, "I'm a pulmonologist. That's the way it is. I'm sorry." It was within the province of the jury to find Dr. Conetta more credible in this regard than Dr. Elkify. Indeed, plaintiff's counsel retorted, "Okay, we'll leave that to the jury, okay."

Plaintiff's counsel argues that Dr. Mensch's opinion that ordering an x-ray instead of a CT scan was not a departure was based solely upon his reasoning that the 2009 x-ray was the same as the subsequent x-ray. Since x-rays were unable to resolve small nodules, argues counsel, Dr. Mensch's explanation that there was no reason to order a CT scan to check for cancer because both prior x-rays did not show anything was illogical and, thus, his opinion that not ordering a CT scan was not a departure was merely conclusory and unsupported, and, thus, does not rebut Dr. Elkify's testimony. Counsel presents an inaccurate account of Dr. Mensch's testimony and draws conclusions therefrom which are not based upon undisputed evidence.

In the first instance, the undisputed evidence presented was that an x-ray can pick up a nodule or lesion that is 6-7 mm in size, the size that Dr. Elfiky calculated was the size of the nodules in Sarra's lungs on September 16, 2011, and Dr. Elfiky's theory to explain the absence of any findings on the September 16th x-ray notwithstanding that he opined that Sarra had nodules that were 6-7 mm in size, to wit, that these nodules were obscured by Sarra's COPD, was rebutted by Dr. Mensch. The jury could have rationally discounted Dr. Elfiky's opinion that there was a cancerous nodule 6-7 mm in length on September 16, 2011 based upon his "doubling" theory and that its image on a x-ray would have been masked by the COPD. Dr. Mensch did testify that he disagreed with Dr. Elfiky's opinion that it was a deviation from the standard of care not to have ordered a CT scan on September 16, 2011 "[b]ecause he had a chest x-ray that was identical or was stable compared to 2009 chest x-ray" and he did testify that an x-ray can pick up nodules down to approximately 5-6 mm, while a CT scan can image nodules down to approximately 2 mm. However, plaintiff's counsel omits his explanation as to what the significance was of the two prior identical x-rays to the determination that a CT scan was not medically necessary on September 16, 2011.

Dr. Mensch stated that even if a CT scan is performed and it resolves something small, there is no way to tell from the CT scan whether it is cancerous. The only way to determine whether a nodule is cancerous is to perform a biopsy, requiring the cutting open of the patient's chest and removing the nodule from the lung. He also explained that studies showed that nodules are picked up in CT scans of 30% of smokers whose lungs are so imaged, but only 1% probably have cancer, and as to the remaining 29%, the decision then has to be made whether or not to perform a biopsy, weighing the benefits against the risks. In those cases where a CT scan is administered, the procedure is not to perform a biopsy, but to wait 6 months to 1 year and do another CT scan to see if the nodule has grown. If it has, only then a biopsy would be indicated, since growth would suggest cancer whereas if it has not grown, that would indicate that the nodule is benign. He further explained that 90% of nodules are in fact benign and a biopsy is a potentially dangerous surgery, to which it is preferable not to expose a patient, especially one who has benign nodules. Furthermore, Dr. Mensch gave unrebutted testimony that CT scans administer 70 times more radiation than x-rays. He explained that the concern over exposing a patient unnecessarily to such radiation also factors into the decision on whether or not to order a CT scan.

Plaintiff's counsel challenged Dr. Mensch's testimony in this regard by asking, in essence, the rhetorical question of what good it would do to spare Sarra excessive radiation exposure by waiting

6 months to do another CT scan if waiting that long would also allow the cancer to grow and result in his death. Dr. Mensch explained that a 6-mm nodule is too small to cause any illness in six months, that it is "a cancer in situ and it does not spread at that size. They generally spread when they get to be over a centimeter or more." He added that squamous cell carcinomas do not spread until they are much larger, approximately two to three centimeters.

With respect to Sarra's shortness of breath, weight loss, edema and hand nodules, this Court notes that Dr. Mensch testified that "even if it was a small little focus of cancer something an inch in diameter it would be very unusual or almost impossible for it to cause any systemic symptoms". Since Dr. Elfiky contends that the lesions, or nodules, in Sarra's lungs on September 16, 2011 were only 6-7 millimeters, considerably smaller than one inch, then it would not be irrational to extrapolate from Dr. Mensch's testimony that even were there 6-7 mm lesions or nodules in Sarra's lungs, they could not have caused these other conditions. Indeed, there was no evidence to contradict Dr. Conetta's finding that the x-rays of Sarra's hands showed arthritis and not cancer, and although Dr. Conetta did testify that edema in the legs and ankles could be indirectly caused by cancer, no evidence was presented that Sarra's edema was in fact caused by lung cancer, and Dr. Elfiky did not rebut Dr. Conetta's testimony that the edema was a manifestation of Sarra's COPD. In addition, with respect to the hand nodules, this Court notes that it was plaintiff's theory of malpractice that Sarra had 6-7 mm lung nodules on September 16, 2011 which if caught on that date, would not have metastacized and, thus could have been treated with a high probability of a cure. Indeed, the unrebutted evidence presented at trial was that a cancerous nodule in the lung would be Stage I, meaning that the cancer would not have spread. Therefore, by plaintiff's own admission, which is the very theory of her case, Sarra's lung cancer was still primary on September 16, 2011 and not metastatic and, therefore, could not have spread to the hands or other areas of the body.

It was in this context that Dr. Mensch opined that it was not medically indicated, and thus was not a departure, to have ordered another x-ray instead of a CT scan on September 16, 2011 because there was no change in the previous x-ray taken in 2010 from the one taken in 2009. Dr. Mensch did opine that continued weight loss of approximately another five pounds would have also then justified a CT scan. This reflects Dr. Conetta's testimony that on September 16, 2011 he ordered another x-ray and instructed Sarra to come back in two weeks, so that he could see if there were any changes or further weight loss, which might then be more indicative of cancer so as to merit a CT scan.

Thus, although Dr. Conetta was concerned that Sarra may have had cancer due to his weight loss, and did include cancer in his

differential diagnosis, the jury could have rationally found that such weight loss alone was not sufficient justification to have ordered a CT scan for cancer in the absence of an x-ray that showed something that was not present on an earlier x-ray and in the absence of further and more significant weight loss.

Therefore, contrary to the contention of plaintiff's counsel, the jury's verdict in finding that Dr. Conetta did not depart from good and accepted medical practice by not ordering a CT scan of Sarra's lungs on September 16, 2011 could have been reached by a fair interpretation of the evidence and was not against the weight of the evidence so as to require a new trial (see Nicastro v Park, 113 AD 2d 129 [2nd Dept 1985]).

Accordingly, the motion is denied.

Dated: March 20, 2017

KEVIN J. KERRIGAN, J.S.C.