Wixted v Schoenwald
2020 NY Slip Op 30592(U)
February 3, 2020
Supreme Court, Suffolk County
Docket Number: 26292/2000
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

ORIGINAL

INDEX No. 26292/2000
CAL No. 201200279MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1-7-20
SUBMIT DATE 1-30-20
Mot. Seq. # 12 - MD
13 - WDN

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STACIE-ANN WIXTED and THOMAS WIXTED,

Plaintiffs,

- against -

ROBERT C. SCHOENWALD, M.D., IRENE A. SCHULMAN, M.D. and LONG ISLAND MEDICAL DIAGNOSTIC IMAGING, P.C.,

Defendants.

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Upon the following papers numbered 1- 96 ; read on this motion to set aside verdict; Order to Show Cause and supporting papers 1 - 21 (Seq. #12); 22 - 43 (Seq. #13) ; ~~Notice of Cross Motion and supporting papers ____~~; Answering Affidavits and supporting papers 43 - 73; 74 - 86; Replying Affidavits and supporting papers 87 - 96 ; ~~Other _~~; ~~(and after hearing counsel in support and opposed to the motion)~~.

In this action to recover damages for medical malpractice, by two identical motions dated December 31, 2019, plaintiff, STACIE-ANN WIXTED moves for an order pursuant to CPLR 4404(a) and CPLR 4401 setting aside the verdict, entering judgment in her favor and additur.

The defendants have opposed this application.

In short, the allegations in this case have their genesis in the undisputed claim that a piece of a catheter, that was placed in the plaintiff during her treatment for Hodgkin's Lymphoma, was left in her when

the catheter was removed and traveled to her pulmonary artery and possibly her right ventricle. Following a jury trial, on December 20, 2019, a verdict was rendered in favor of the defendants. The jury found no departures by defendant Dr. Schoenwald and while the jury found a departure by defendant Dr. Schulman, they concluded that it was not a substantial factor in causing injury to the plaintiff.

The plaintiff proffers various arguments in support of her request for relief. The plaintiff claims that Dr. Schoenwald has "admitted" he mistakenly left a foreign object in her body during the May 22, 1998, port removal surgery and "[t]t is utterly irrational for the jury to find that this 'Never Event' is not malpractice." Further, Dr. Schoenwald offered no defense, because there is none, to his deviations and departures mistakenly leaving part of a medical device he inserted inside the plaintiff. Rather, the defendants chose to argue that the piece of catheter had migrated to its current location and caused no injuries to the plaintiff, while ignoring the additional surgery and three failed surgical attempts to remove the piece of catheter. The plaintiff opines that Dr. Schoenwald conceded the loss of chance which was the causation of additional injuries to her.

The plaintiff argues that "[n]o reasonable-minded or logically rational jury could have possibly come to the verdict rendered," given the evidence submitted by the defendants at trial.

As to defendant Dr. Schulman, the plaintiff claims that:

> "It is undisputed that Defendant Schulman's misread the first chest x-ray of Plaintiff and failed to directly communicate a finding of a foreign object in plaintiff's second chest x-ray, causing a delay of diagnosis for another five months. Defendant Schulman, as a result of her admitted negligence and malpractice, caused a total delay in diagnosis of 1.4 years, depriving the Plaintiff of an opportunity to be cured. These delays by Defendant Schulman are classic examples of the 'Loss of Chance' doctrine."

The plaintiff requests that this Court set aside the verdict in favor of the defendants, enter judgment in her favor on both liability and damages and award damages.

In opposition, Defendant Dr. Schoenwald contends that the evidence and testimony produced at the trial clearly supports the conclusions reached by the jury. Moreover, there was ample testimony in the trial record for the jury to rationally conclude that Dr. Schoenwald did not depart from accepted standards of medical practice with regard to the departure questions submitted to the jury. Dr. Schoenwald opines that the plaintiff cannot show, based upon the evidence adduced at trial, that the jury was "utterly irrational" when it rejected the testimony of the plaintiff's experts and accepted the testimony of defense expert "Dr. Dan Reiner.

With respect to the plaintiff's motion to set aside the verdict pursuant to CPLR 4401, Dr. Schoenwald argues that even if his deposition testimony, (which was read to the jury during the trial), that: (1) he did not measure the catheter when it was placed or removed; (2) he did not inspect the catheter tip after removal; and (3) he did not order a postoperative chest x-ray, were to be considered "admissions", such testimony, but itself, does not entitle the plaintiff to judgment as a matter of law.

In opposition, defendants Dr. Schulman and Long Island Medical Diagnostic Imaging, P.C., claim that the plaintiff offers "misleading and inappropriate comment" in paragraph seventeen of the affirmation in support of the motion that "Dr. Mair, [defense expert], in a cheap slight of hand, purposefully showed the jury the wrong TTE images; . . . ". These defendants deny presenting false information to jury and state that Dr. Mair presented the same images to the jury as those presented by the plaintiff's expert, Dr. Schneider. In addition, Dr. Mair presented a series of CT scans, (done over an approximately 20 year period), of the catheter piece to confirm its location while the plaintiff failed to have any witness testify or present the multiple CT scans of her chest.

Furthermore, the line of questioning provided by the plaintiff in support of the motion does not constitute an admission by Dr. Schulman that she departed from accepted medical practice in her interpretation of the December 30, 1998, chest x-ray which she read on January 4, 1999. The plaintiff's claim that it was an admission is misleading and not a fair interpretation of the evidence presented to the jury.

With respect to the claimed October 15, 1999, departure by Dr. Schulman, the movants note that a departure was in fact found by the jury for not directly communicating her findings to the family practitioner, but that departure was not a substantial factor in causing injury to the plaintiff.

Dr. Schulman and Long Island Medical Diagnostic Imaging urge that the plaintiff has not set forth a basis for setting aside the jury verdict.

The Court has also reviewed the plaintiff's reply which proffers various arguments in contravention to the defendants' opposition to the motion and reiterates the request to set aside the verdict and enter judgment in her favor.

> "A trial court may only grant judgment as a matter of law in the [plaintiff's] favor pursuant to CPLR 4401 where it finds, upon the evidence presented, that there is no rational process by which the jury could find in the [defendants'] favor (***see, Szczerbiak v Pilat***, 90 N.Y.2d 553, 556, ***Dockery v Sprecher***, 68 A.D.3d at 1045, ***Fellin v Sahgal***, 35 A.D.3d 800, 801, ***Velez v Goldenberg***, 29 A.D.3d 780, 781, ***Johnson v Jamaica Hosp. Med. Ctr.***, 21 A.D.3d 881, 882; ***Wong v Tang***, 2 A.D.3d 840). In making this evaluation, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (***Szczerbiak v Pilat***, 90 N.Y.2d at 556)"

(***Goldberg v Horowitz***, 73 A.D.3d 691, 693, [2d Dept. 2010].

Guided by this standard of review the Court concludes that based upon the evidence presented during the trial there was a rational process by which the jury could find in the defendants' favor.

> "Pursuant to CPLR 4404(a), the "court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a

matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence" (***Ramirez v Mezzacappa***, 121 A.D.3d 770, 771-772). The "setting aside of jury verdict as a matter of law and the setting aside of a jury verdict as contrary to the weight of the evidence involve two inquiries and two different standards" (*id*, at 772, 994 N.Y.S.2d 627; ***see***, ***Cohen v Hallmark Cards***, 45 N.Y.2d 493, 498).

* * *

A motion pursuant to CPLR 4404(a) "to set aside a jury verdict and for judgment as a matter of law will be granted only if there is no valid line of reasoning and permissible inferences which could possibly lead a rational jury to the conclusion reached on the basis of the evidence presented at trial" (***Hollingsworth v Mercy Med. Ctr.***, 161 A.D.3d 831, 832; ***see, Killon v Parrotta***, 28 N.Y.3d at 108."

(***Lopes v Lenox Hill Hosp.***, 172 A.D.3d 699 [2d Dept. 2019]).

"Moreover, it is well settled that a jury's resolution of conflicting expert testimony is entitled to great weight, since it is the jury that had the opportunity to observe and hear the experts [citations omitted]." (***Bobek v Crystal***, 291 A.D.2d 521, 522; ***see***, ***also***, ***Hollingsworth v Mercy Med. Ctr.***, 161 A.D.3d 831).

Here, there was a valid line of reasoning and permissible inferences that led the jury to the conclusions it reached based upon the evidence presented at the trial.

Accordingly, the plaintiff's motion is in all respects denied.

The foregoing shall constitute the decision and order of this Court.

Dated: Suffolk County, New York
February 3, 2020

HON. JOSEPH A. SANTORELLI
J.S.C.