

Martin v Falcone

2023 NY Slip Op 31560(U)

May 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 510313/2015

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 5th day of May 2023.

PRESENT:

Hon. Genine D. Edwards
Justice, Supreme Court

-----X
SHEVORNE MARTIN,

Index No.: 510313/2015

Plaintiff,

DECISION & ORDER

-against-

OVIDIO FALCONE, DPM and INTERFAITH
MEDICAL CENTER,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affirmation and Exhibits.....134-137
Affirmation in Opposition and Exhibits.....138-143
Reply Affirmation and Exhibits.....144-145

After a seven-day trial, on January 13, 2023, the jury found that the defendants, Ovidio Falcone, DPM and Interfaith Medical Center, departed from the standard of care in their post-operative treatment of the plaintiff, Shevorne Martin, which proximately caused her injuries. As a result, the jury awarded the plaintiff \$2,500,000.00 in total damages; \$1,000,000.00 for past pain and suffering and \$1,500,000.00 for future pain and suffering. Defendants now move to set aside the verdict on the following grounds: (a.)

pursuant to CPLR §4404(a), for judgment notwithstanding the verdict, and dismissing the complaint against the defendants, as there was no rational process by which the jury could have found that these defendants departed from accepted medical practice and that such departure was a proximate cause of the plaintiff's injuries; (b.) pursuant to CPLR §4404(a), directing a new trial as the jury verdict was against the weight of the evidence; (c.) directing a mistrial because the jury verdict was reached due to erroneous evidentiary rulings; and alternatively (d.) pursuant to CPLR §5501(c), setting aside the damages awards as excessive and contrary to the weight of the evidence. Plaintiff opposes the motion.

CPLR §4404(a) authorizes setting aside a jury verdict, but “only where the jury could not have reached the verdict on any fair interpretation of the evidence” *Ortega v. Ting*, 172 A.D.3d 1217, 102 N.Y.S.3d 110 (2d Dept. 2019). Moreover, the Court of Appeals holds that to set aside the verdict as against the weight of the evidence, the verdict must be utterly irrational. *Killon v. Parrotta*, 28 N.Y.3d 1011, 42 N.Y.S.3d 70 (2016).

The Court correctly permitted plaintiff's expert, Dr. Mark Klion, an orthopedic surgeon who has performed repairs of Achilles tendons, to testify. *Cerrone v. North Shore-Long Is. Jewish Health System, Inc.*, 197 A.D.3d 449, 152 N.Y.S.3d 147 (2d Dept. 2021); *Walsh v. Brown*, 72 A.D.3d 806, 898 N.Y.S.2d 250 (2d Dept. 2010). His testimony was admissible, and the question of its weight was for the jury's determination.

Defense counsel had ample opportunity to cross-examine Dr. Klion regarding his qualifications. Indeed, defense counsel could have requested a voir dire before Dr. Klion's departure and causation testimony.

Dr. Klion's testimony about his November 2022 examination of the plaintiff was properly admitted. The defendants did not receive the report on the "eve of trial." They had two weeks after receipt of the November 2022 report to obtain or request an additional independent medical examination ("IME"). They did not do that. Moreover, this Court offered to give defense counsel a continuance to conduct an IME. Still, defense counsel declined, indicating that she would take photographs of the plaintiff's legs, which would be sufficient.

The testimony regarding the plaintiff's inability to play basketball was part of her claim for loss of ability to enjoy her life and, thus, was properly admitted. In addition, the defendants took three depositions of the plaintiff and should have inquired about all of the plaintiff's limitations.

The plaintiff's photographs were a fair and accurate depiction of her condition, so they were properly admitted. Furthermore, regarding the text messages about social meetings with the plaintiff, Dr. Olatunde Osofisan admitted the same during his testimony.

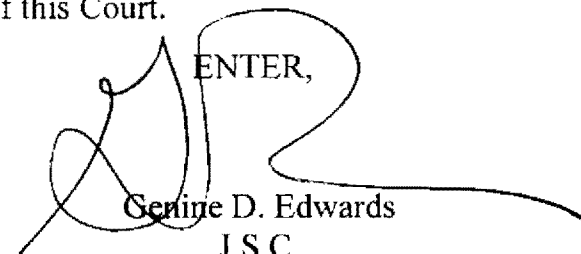
Dr. Falcone's testimony that there should be a note for each time a patient is seen supported this Court's charge regarding missing documents.

It is black letter law to grant the jury's verdict all due deference. This jury could have come to their decision regarding departures from the standard of post-operative care based upon all the evidence presented at trial. *Stewart v. New York Hospital Queens*, 214 A.D.3d 919, __ N.Y.S.3d __ (2d Dept. 2023).

Turning to the jury's damages awards, the Court finds that the awards were not supported by the evidence adduced at trial. At best, the plaintiff proved a delay of a few months in physical therapy, with resultant pain, an ulcer, scarring, atrophy in her calf, and limitation in using her left leg.

Accordingly, the defendants' motion to set aside the verdict as excessive and for a new trial is granted only to the extent that the awards for past pain and suffering and future pain and suffering are set aside. Therefore, a new trial as to damages shall be held on August 12, 2024, unless the plaintiff files with the Court, within 45 days of the entry of this order, a stipulation agreeing to the reduction of the award for past pain and suffering from the sum of \$1,000,000.00 to \$450,000.00 and future pain and suffering from the sum of \$1,500,000.00 to the sum of \$300,000.00. Any other requested relief not expressly granted is denied.

This constitutes the Decision and Order of this Court.

ENTER,

Gerine D. Edwards
J.S.C.