

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D27393
H/prt

_____AD3d_____

Argued - April 23, 2010

STEVEN W. FISHER, J.P.
RUTH C. BALKIN
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2009-03771

DECISION & ORDER

Joan L. Sutton, appellant, v Elias Kassapides,
respondent, et al., defendants.

(Index No. 8896/05)

Rosenberg, Minc, Falkoff & Wolff, LLP, New York, N.Y. (Gary Silverstein of counsel), for appellant.

Garson DeCorato & Cohen, LLP, New York, N.Y. (Joshua R. Cohen, Daniel G. Federico, and Jennifer M. Lobaito of counsel), for respondent.

In an action to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme Court, Queens County (Hart, J.), dated February 18, 2009, which denied her motion pursuant to CPLR 4404(a) to set aside a jury verdict in favor of the defendant Elias Kassapides, and for a new trial.

ORDERED that the order is reversed, on the law and as a matter of discretion, with costs, the motion is granted, the jury verdict is set aside, and the matter is remitted to the Supreme Court, Queens County, for a new trial before a different Justice.

The plaintiff was deprived of a fair trial in this medical malpractice action as a result of the cumulative effect of the improper conduct of the trial court, both during cross-examination and in its charge to the jury (*see Matter of Travelers Indem. Co. v Mohammed*, 14 AD3d 710; *Ougourlian v New York City Health & Hosps. Corp.*, 5 AD3d 644, 645; *Perkins v New York Racing Assn.*, 51 AD2d 585, 586). In addition, the trial court erred in giving an “error in judgment” charge (*see Nestorowich v Ricotta*, 97 NY2d 393, 399 n 4; PJI 2:150). There was no evidence that the

May 18, 2010

SUTTON v KASSAPIDES

Page 1.

defendant surgeon, Elias Kassapides, had to consider and choose among medically acceptable alternatives regarding the treatment of the plaintiff (*see Nestorowich v Ricotta*, 97 NY2d at 399-400; *Rospierski v Haar*, 59 AD3d 1048, 1049; *Vanderpool v Adirondack Neurosurgical Specialists, P.C.*, 45 AD3d 1477, 1478; *Martin v Lattimore Rd. Surgicenter*, 281 AD2d 866). Accordingly, we remit the matter to the Supreme Court, Queens County, for a new trial before a different Justice.

FISHER, J.P., BALKIN, ROMAN and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court