

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

D34118  
O/kmb

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Argued - December 6, 2011

REINALDO E. RIVERA, J.P.  
RANDALL T. ENG  
SHERI S. ROMAN  
SANDRA L. SGROI, JJ.

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2010-09029  
2010-09031

DECISION & ORDER

Joan Maraviglia, et al., appellants,  
v Irina Lokshina, et al., respondents.

(Index No. 6892/05)

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John L. Juliano, P.C., East Northport, N.Y., for appellants.

Kelly, Rode & Kelly, LLP, Mineola, N.Y. (John W. Hoefling of counsel), for  
respondents.

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Suffolk County (Whelan, J.), dated August 13, 2010, which denied their motion pursuant to CPLR 4404(a) to set aside a jury verdict on the issue of liability and for judgment as a matter of law or, alternatively, for a new trial, and (2) a judgment of the same court entered August 30, 2010, which, upon the jury verdict, and upon the order, is in favor of the defendants and against them dismissing the complaint.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is reversed, on the law, that branch of the plaintiffs' motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of liability and for a new trial is granted, the complaint is reinstated, the matter is remitted to the Supreme Court, Suffolk County, for a new trial on the issue of liability, and the order is modified accordingly; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs.

February 28, 2012

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The appeal from the intermediate order dated August 13, 2010, must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501[a][1]*).

A new trial is warranted in light of the inappropriate cross-examination of the plaintiffs' witnesses, as well as the inflammatory and improper summation comments of counsel for the defendants. The defendants' counsel repeatedly denigrated the medical background of the injured plaintiff's treating physician. Counsel also made inflammatory remarks, including commenting during summation that the plaintiff's treating physician and the plaintiff were "working the system." Moreover, counsel remarked that the injured plaintiff's treating physician testified "at an enormous amount of Workers [Compensation] proceedings" and was the "go-to" doctor in Suffolk County for patients who wished to stop working. By contrast, counsel vouched for the credibility of the defendants' expert witness by thanking "God there are people like [him] who are the stop gap."

Additionally, during cross-examination of the plaintiffs' expert anesthesiologist, counsel for the defendants twice referred to the medical center where this doctor performed certain procedures as a "parking lot," even though the court had sustained the plaintiffs' objection to the first use of this reference. In addition, counsel persistently questioned the plaintiffs' expert about an investigation by the Department of Health of "anesthetic mishaps" in the anesthesiology department at Long Island Jewish Medical Center, despite the expert's testimony that the investigation did not involve his practice, and the defendants' lack of any evidence to the contrary. Counsel also commented that the plaintiffs' expert was "sensitive" about this topic, and stated repeatedly that the plaintiffs' expert was "out of control." Further, in questioning the plaintiffs' expert about a malpractice case that had been brought against him, counsel remarked that the expert had been "afraid to take the witness stand in that case."

Moreover, counsel for the defendants cross-examined the plaintiffs' economic expert on collateral issues, including, among other matters, the state of the local Suffolk County economy, the foreclosure rate in that county, and the twelve-year period during which judges in New York State had continued to work without receiving a raise.

Based on the foregoing, the Supreme Court should have granted that branch of the plaintiffs' motion which was pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of liability and for a new trial (*see Blinds to Go [U.S.], Inc. v Times Plaza Dev., L.P.*, 88 AD3d 838; *Gutierrez v City of New York*, 205 AD2d 425; *Pagano v Murray*, 309 AD2d 910, 911; *Reynolds v Burghezi*, 227 AD2d 941, 942; *Steidel v County of Nassau*, 182 AD2d 809, 814).

RIVERA, J.P., ENG, ROMAN and SGROI, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court