

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1141

CA 14-00496

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

JOSEPH A. LAUTO, JR., PLAINTIFF-RESPONDENT,
ET AL., PLAINTIFF,

V

MEMORANDUM AND ORDER

CATHOLIC HEALTH SYSTEM, INC., DOING BUSINESS AS
KENMORE MERCY HOSPITAL, DEFENDANT-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF
COUNSEL), FOR DEFENDANT-APPELLANT.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 31, 2013. The order and judgment awarded plaintiff Joseph A. Lauto, Jr., money damages upon a jury verdict.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: In this medical malpractice case involving a surgical instrument left in plaintiff's body during a surgery, defendant appeals from an order and judgment awarding Joseph A. Lauto, Jr. (plaintiff), damages, upon a jury verdict, of \$115,000 for past pain and suffering. Supreme Court denied defendant's posttrial motion for remittitur with respect to the award. Contrary to defendant's contention, we conclude that the award is not excessive and does not deviate materially from what would be reasonable compensation (see CPLR 5501 [c]; see also *Hotaling v Corning Inc.*, 12 AD3d 1064, 1066).

Even assuming, arguendo, that the court erred in precluding defendant's nursing staff from providing opinion testimony at trial, as defendant contends, we conclude that the error is harmless. Defendant contends that it was prejudiced by the court's error because it was unable to elicit the opinions of the nursing staff with respect to the possible negligence of the surgeon who performed the surgery, the operating room procedures, and the surgical instrument that was left in plaintiff's body. We reject that contention. First, a nurse would not be allowed to provide opinion testimony on the standard of care to be applied to a medical doctor (see *Elliot v Long Is. Home, Ltd.*, 12 AD3d 481, 482; *Dombrowski v Moore*, 299 AD2d 949, 951). Second, there were two nurses who testified at trial, but the record

establishes that neither of them had any independent recollection of the surgery. We therefore conclude that the testimony of the nurses would have had no probative value in aiding the jury to determine whether defendant should be held liable for medical malpractice (see generally *Friedmann v New York Hosp.-Cornell Med. Ctr.*, 65 AD3d 850, 850-851).

We reject defendant's further contention that the court erred in denying its request to have the surgeon listed on the verdict sheet so that the jury could apportion any potential liability to him. Inasmuch as the case was discontinued against the surgeon before trial, apportioning any potential liability to him would have required defendant to establish that the surgeon "breached a duty to the plaintiff, and that the breach proximately caused the plaintiff's injuries" (*McNally v Corwin*, 30 AD3d 482, 485). We conclude that defendant failed to meet that burden and, thus, the court did not err in denying defendant's request (see *id.*).

Defendant also contends that the doctrine of *res ipsa loquitur* should not have been charged to the jury because plaintiff could not establish who had exclusive control over the surgical instrument. Contrary to defendant's contention, it was not necessary for plaintiff to establish as a prerequisite to the application of the doctrine of *res ipsa loquitur* which individual, i.e., the surgeon or one of the nurses, had exclusive control over the surgical instrument (see *Schmidt v Buffalo Gen. Hosp.*, 278 AD2d 827, 828, *lv denied* 96 NY2d 710; see also *Backus v Kaleida Health*, 91 AD3d 1284, 1286; see generally *LaPietra v Clinical & Interventional Cardiology Assoc.*, 6 AD3d 1073, 1074).

Finally, defendant failed to preserve its contention that the court erred in denying its application to question plaintiff about other medical conditions that may have been related to plaintiff's joint pain allegedly caused by defendant's medical malpractice (see CPLR 5501 [a] [3]).

All concur except DEJOSEPH, J., who concurs in the result in the following Memorandum: I concur in the result reached by the majority, but I write separately to address defendant's contention, with which I agree, that Supreme Court erred in precluding its nursing staff from providing opinion testimony at trial. Although I agree with the majority that the error is harmless, I note that "CPLR 3101 (d) (1) applies only to experts retained to give opinion testimony at trial, and not to treating physicians, other medical providers, or other fact witnesses" (*Rook v 60 Key Ctr.*, 239 AD2d 926, 927) and, thus, the court's reliance upon CPLR 3101 (d) (1) in precluding opinion testimony from the nurses was misplaced.