Russano v Schulman
2001 NY Slip Op 30065(U)
December 26, 2001
Supreme Court, New York County
Docket Number: 28350/92
Judge: Norman C. Ryp
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 44 x
JAMA RUSSANO and RICHARD RUSSANO, Ind.,

Plaintiffs,

-against-

NORMAN H. SCHULMAN, M.D.,

Defendants,
x

INDEX NO. 28350/92
DECISION & ORDER
PUBLISH IN FULL

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RYP, NORMAN C., J.:

"They have mouths, but speak not, eyes that see not, ears that hear not." - Psalm 115

Duty (of reasonable disclosure), unlike beauty, is not in the eye of the beholder but the mouths, eyes and ears of a reasonably informed and informative surgeon and patient.

Defendant's, NORMAN H. SCHULMAN, MD, CPLR § 4404(a) motion to set aside the unanimous jury verdict, in the sum of $2,150,000.00 is denied for the hereinbelow stated reasons.

A. ISSUES

1. Actionable

Whether defendant plastic surgeon was a reasonably informed and patiently informative intermediary, to a reasonably prudent patient, such as, plaintiff, JAMA RUSSANO, of new developments, positive and negative in the field at subject surgery to have informed consent? *An* issue of first conception and application on the issue of informed consent!

2. Evidentiary

Whether there was sufficient competent evidence presented during trial to support the verdict that the defendant, NORMAN SCHULMAN, MD, committed malpractice and failed to obtain informed consent in excising thirteen (13) axillary lymph nodes; removing a cyst from behind the plaintiffs, JAMA RUSSANO, right nipple (malpractice only); performing the mastopexy of the left breast (informed consent only); and using another silicone breast implant?

B. FACTS

Plaintiff, JAMA RUSSANO, was born with a malformation of her right breast as well as a congenital hemangioma. The hemangioma and breast tissue were removed. In July, 1970, at age fourteen (14), plaintiff, JAMA RUSSANO, had her right breast reconstructed and a mammary prosthesis implanted. The prosthesis was a Dow Corning silastic silicone gel-filed breast implant.

Approximately eleven (11) years later, plaintiff, JAMA RUSSANO, began experiencing various health problems and in 1989, was diagnosed with a Scleroderma-like syndrome. She was then referred to defendant, NORMAN SCHULMAN, MD, a plastic surgeon, regarding her breast implant. On December 13, 1989, defendant, NORMAN SCHULMAN, MD, removed plaintiff, JAMA RUSSANO's, old implant and inserted a new Dow Corning Silastic silicone gel-filled implant. At the same time, defendant, NORMAN SCHULMAN, MD, also removed thirteen (13) lymph nodes from the axillary section of **Ms.** RUSSANO's right arm. Additionally, Dr. Schulman performed a mastopexy on her right breast.

Following the implant exchanges, plaintiff; JAMA RUSSANO's, health problems continued to persist and worsen, yet there was no specific traceable etiology for her illnesses.

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Then in the early 1990's, there were reports that silicon breast implants may cause immunological malfunctions, similar to those experienced by Mrs. RUSSANO. Suspecting that her health problems may be so related to her implant, in December 1991, plaintiff, JAMA RUSSANO, had the silicon implant removed. Ultimately, in October, 1991, plaintiff, JAMA RUSSANO, had reconstructive surgery whereby a portion of her right latisimus dorsi muscle was used to create a right breast. The surgery was performed by Dr. Shaw of the UCLA Medical Center in California.

C. PARTIES' CONTENTIONS

Defendant contends the jury verdict should be set aside, under CPLR § 4404(a), for six reasons. First, defendant declares the jury verdict is not supported by the evidence adduced at trial. Second, defendant contends the claim of malpractice submitted to the jury on the Jury Interrogatory (Ct. Ex. 9) has no causal nexus with the injuries alleged. Third, defendant argues there was insufficient evidence that the plaintiff suffered the alleged injuries. Fourth, defendant submits the jury verdict is against the weight of a fair interpretation of the credible evidence. Fifth, defendant claims the Court made erroneous charges and rulings which tainted the verdict and were not harmless. Lastly, defendant disputes the jury's award deviated materially from reasonable compensation.

In opposition, plaintiffs contend the jury verdict was supported by both fact and expert evidence adduced at trial and not against the weight of a fair interpretation of the credible evidence. Plaintiffs submit that this Court made no error of law in the charge or in the introduction of evidence. Plaintiffs also declares the damages awarded by the jury were supported by the evidence and not excessive.

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D. TRIAL

This nine (9) day ended with a jury verdict for plaintiffs in the total sum of $2,150,000.00; $1,200,000.00 for past pain and suffering (December 13, 1989 to verdict), $800,000 for future pain and suffering (15 years) and $150,000 for spouse RICHARD Russano's derivative suit for loss of services.

At trial, plaintiffs brought the following witnesses: plaintiff, JAMA RUSSANO; plaintiff, RICHARD RUSSANO; expert pathologist, Dr. Douglas Shanklin; and expert plastic surgeon, Dr. Richard Mafiggi; and also called defendant on plaintiffs case.

At trial, defendant presented the following witnesses: defendant, Dr. Norman Schulman; expert plastic surgeons, Dr. Jane Petro and Dr. Arthur Ship.

E. ANALYSIS & FINDINGS

1. Whether the jury's verdict is or is not supported by the evidenced adduced at trial.

In order to set aside a jury verdict as against the weight of the credible evidence there must be "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial." Cohen v. Hallmark, 45 NY 2d 493, 410 NYS 2d 282, 382 NE 2d 1145 (1978); Adamy v. Zinakus, 92 NY2d 396, 681 NYS2d 463, 704 NE2d 216 (1998).

Whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination which must be exercised with considerable caution based upon the absence of substantial justice, not simply an unsatisfactory verdict or one which the Court

disagrees. Cohen v. Hallmark; suura; Nicastro v. Park, 113 AD 2d 129, 495 N Y S 2d 184 (2nd Dept. 1985).

In this matter, both sides presented expert testimony which differed as to the necessity of and consent to removing the axillary mass including the thirteen (13) lymph nodes and the cyst behind the left nipple, the medical appropriateness of and consent to using silicone breast implants, as well as, consent to the mastopexy. Both sides adduced testimony as to the plaintiffs medical history before and after Dr. Schulman's surgery. Each side presented testimonial evidence in a manner most beneficial to their position on the **risks** and benefits of the various surgical procedures performed on plaintiff, JAMA RUSSANO, as well as the manner in which informed consent to each phase of the surgery was obtained. Accordingly, the issues of medical malpractice and informed consent were questions of fact for the jury to decide. Thus, this Court may not overturn that verdict because the defendant has failed to show there was "no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the evidence presented at trial." Cohen v. Hallmark, suura.

2. Medical Malpractice

To prevail on a malpractice action, plaintiff must show that there was a deviation(s) of the average Board certified plastic surgeon in good standing or departure(s) from accepted medical practice of the average Board certified plastic surgeon in good standing in New York County, and evidence that such departure(s) was a proximate cause of injury or damage. Spensieri v. Lasky, 94 NY 2d 231, 701 N Y S 2d 689, 723 NE 2d 5444 (1999); De Stefano v. Immerman, 188 AD 2d 448, 591 N Y S 2d 47 (2nd Dept. 1992); Amsler v. Verilli, 119 AD 2d 786, 501 NYS 2d 411 (2nd Dept. 1986). The law normally permits the medical profession to establish its own standard of

care so that evidence a physician conformed to accepted community standards of practice usually insulates the doctor from tort liability. Beason v. Dean, 232 NY 52, 133 NE 125 (1921); Prosser & Keeton, The Law Torts [5th Ed] $32 - The Reasonable Person p. 185 (1984) A second principle based on the reasonable man applies in a medical malpractice case. Such requires that a physician use his best judgment and whatever superior knowledge, skill and intelligence possessed so that the specialist may be held to a higher standard than the general practitioner. Toth v. Community Hospital at Glenn Cove, 22 NY 2d 255,263,292 NYS 2 440,447,239 NE 2d 368, 372-3 (1968); Restatement 2d, Torts § 299A, (2000) comment c. Annot: Zitter, Jay, Standard of Care Owed to patient by Medical Specialist as Determined by Local, "Like Community," State, National or Other Standards, 18 ALR 4th 603 (2001).

a. Removal of the axillary mass containing thirteen lymph nodes.

At trial plaintiffs pathology expert, Dr. Shanklin testified the removal of the axillary tissue containing the thirteen (13) lymph nodes was not within the standard of care in New York City and County in 1989. (TT 30:13 - 31:23; 41:7 - 42:12). Similarly, plaintiffs plastic surgery expert Dr. Marfuggi testified that the mass removed was a dissection, not a biopsy, and that "the standard was to take the least amount of tissue that would give a diagnosis..[a] frozen section would be what I consider standard." (TT 34:2 - 24; 38:8 - 39:20) Furthermore, Dr. Shanklin testified the injuries sustained by the plaintiff as a result of the aforementioned departure include "acute lymphedema" and "swelling of her right arm and under her arm, restriction of movements and pain" which are "the long-term consequences of all those lymph channels by removing 13 nodes."(TT 53:7 - 15; 54:21 - 55:4)

b. Removal of cyst from behind left nipple.

At trial, plaintiffs pathology expert, Dr. Shanklin testified that a reasonable surgeon who encountered a visually undiseased cyst during elective surgery, such as a mastopexy, would aspirate, not remove, the cyst. (TT 94:23 - 95:9; 96:17 - 96:24) Dr. Shanklin, after having stated that it was not necessary to remove the cyst testified that in doing so the plaintiff is injured by scarring. (TT 97:8 - 97:11) Dr. Marfuggi also testified that the decreased nipple sensation complained of by plaintiff could be the result of the mastopexy or the cyst removal. (TT 51:5 - 51:19)

c. Using silicone breast implants.

In the 1980'sgeneral concern evolved over a potential negative relationship between silicon gel breast implants and immunological disorders. Dr. Marfuggi testified that the source of his knowledge regarding the controversy ever silicone gel breast and immunological disease came from discussion at professional meeting, peer reviewed medical journals and the manufacturers themselves. (TT 19:14 - 19:24) According to Dr. Marfuggi's testimony, "at least one (manufacturer) that I know of actually put it in their insert, the instruction sheet...that comes with the implant, and suggested that it was certainly a reason for concern." (TT 19:20 - 19:24) That manufacturer, Dr. Marfuggi testified, was Dow-Corning. (TT 20:3) In light of the suspicion and manufacturer concur, Dr. Marfuggi testified that the appropriate care for a patient such as JAMA RUSSANO, in 1989, by a reasonable plastic surgeon would be to delay, "'We think that there might be a connection [between silicone and Scleroderma]. The recommendation is that you have that [the old silicone implant) removed until we know that it's safe to put it back in or put something else back in."' (TT 21:5 - 23:20) Thus, as per Dr. Marfuggi, the standard for

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individuals presenting with medical concerns like JAMA RUSSANO, was to remove the implant(s) and monitor the patient to see if there was an improvement in the condition about which the patient was concerned. (TT 23:10 - 23:20) The injuries sustained by plaintiff as a result of Dr. SCHULMAN's actions, according to Dr. Marfuggi, were additional surgery to remove the implants, scarring and possible relation or exacerbation of Ms. RUSSANO's immunological problems. Dr. Shanklin added slippage of the implant to the list of injuries sustained by plaintiff

3. Lack of Informed Consent

a. Lack of informed consent to removal of the axillary mass containing thirteen lymph nodes.

In 1914, Mr. Justice Cardozo of the New York Court of Appeals held that a surgeon who performed an operation without a patient's consent committed an assault and battery. Schloendorff v. Society of NY Hosp., 211 *NY* 125, 105 NE 92 (1914); see also, Darrah v. Kite, 32 AD2d 208, 301 *N Y S* 2d 286 (3rd Dept - 1969); Pearl v. Lesnick, 20 AD2d 761, 247 *N Y S* 2d 561, affd 19 NY2d 590, 278 *N Y S* 2d 237, 224 **NE** 2d 739 (1967); McCandless v. State of New York, 3 AD2d 600, 162 *N Y S* 2d 570 (3rd Dept - 1957) This concept has been consistently upheld, although today, the concept is codified and characterized as a lack of informed consent, more closely akin to malpractice, than battery which requires mens rea. Public Health Law (PHL) § 2805-d; Murriello v. Crapotta, 51 AD 2d 381, 382 *N Y S* 2d 513 (2nd Dept - 1976). The transition from battery to lack of informed consent is grounded in a patient's right to self determination and complementary duty of a physician to disclose the risks, choices and potential dangers of a given medical procedure. Lipsius v. White, 91 AD 2d 271, 458 *N Y S* 2d 928 (2nd Dept - 1983).

Statutorily, then, lack of informed consent is:

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> "the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical...practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation." PHL § 2805-d(1).

To have a cause of action for lack of informed consent,

> " it must also be established that a reasonably prudent person in the patient's position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought." PHL § 2805-d(3)

Nothing in Public Health Law §2805-d(1), nor in the applicable case law suggests that elective cosmetic surgery is subject to a less stringent disclosure standard. Lee-Lu Pan v. Shaw, 203 AD2d 611, 195 NYS2d 158 (1st Dept. 1994). To prevail on a lack of informed consent claim plaintiff must show: 1) the treating physician failed to disclose to the patient the material risks, benefits and alternatives of the procedure, 2) a reasonably prudent patient would not have undergone the procedure if such information were disclosed, and 3) this failure to disclose information is a proximate cause of the patient's injury. PHL §§ 2805-d(1) and (3); Alberti v. St. John's Episcopal Hospital-Smithtown, 116 AD 2d 612, 497 *N Y S* 2d 701 (2nd Dept. 1986)

The level of disclosure required is what "a reasonable medical...practitioner (i.e. Board Certified Plastic Surgeon) under similar circumstances would have disclosed," PHL § 2805-d(1), and must cover (1) the alternatives, (2) the reasonably foreseeable risks and (3) the benefits, Marchione v. State, 194 AD 2d 851, 598 *N Y S* 2d 592 (3rd Dept. 1993) and the lack of informed consent must be a proximate cause of the injury. PHL § 2805-d(1)

The "learned intermediary" doctrine was first enunciated by the New York Court of

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Appeals in Martin v. Hacker, 83 **NY** 2d 1,607 *N Y S* 2d 598,628 **NE** 2d 1308 (1993) which focused on a drug manufacturer's duty to warn of the dangers of using the drug in question, which is fulfilled by giving adequate warning to the prescribing physician. The physician must then balance the risks and benefits of the various drugs and treatments and act as an "informed intermediarv" between manufacturer and patient in malpractice cases. Martin v. Hacker, 83 **NY** 2d suura at 9. The Physicians Desk Reference (PDR) applicable page(s) is admissible **not** as a hearsay exception to prima facie establish the standard of care (or professional negligence) in medical malpractice cases since New York rejects the Minnesota "Mulder rule" (Mulder v. Park Davis & Co., 288 Minn. 332, 181 NW2d 882, 45 ALR2d 920 [1970]) but solely to establish the existence of a warning and its adequacy to a physician. Spensieri **v.** Lasky, supra at 239.

There appears no distinguishable basis in fairness, reasonable reliance or professional responsibility why the "informed intermediary doctrine" applied in a medical malpractice case should not apply to risk disclosure in a lack of informed consent action based upon the same principle that a patient has a right to determine what shall be done with her (or his) body, ~~apply~~. Schoendorff v. Societv of New **York** Hosp., 211 NY 125, 105 **NE** 920 (1914); Zeleznik **v.** Jewish Chronic Disease Hospital, 47 AD 2d 199, 366 *N Y S* 2d 163 (2nd Dept - 1975); Waltz & Schneurman: Informed Consent to Therapv 64 NWUL Rev 628,647 (1993)

NCL JSC

The physician's obligation **is** to make reasonable disclosure of the available choices and potential dangers to the patient and the test of such reasonableness is for the jury to decide. Fogal v. Genesee Hosp., 41 AD 2d 468,344 *N Y S* 552 (4* Dept - 1973); Canterbury v. Spence, 464 F 2d 772 (DC Cir - 1972). In Canterburv, the Court held that the duty and required scope of

disclosure standards in the medical profession must be established by expert medical testimony but "tested by general considerations of reasonable disclosure under all the circumstances will materially affect the patient's decision to proceed with the treatment. (emphasis added) This is not a retrospective determination. There should be no criticism of the physician unless the fact-finder determines that the information was inadequate." Canterbury v. Spence, **464** F 2d supra at **787.** Consideration of the patient's veracity shifts the focus from the time relevant to causation; the time juncture at which her (or his) consent was given. Waltz & Schneurman supra at **646.** The proper rule is to resolve the causality issue on an objective basis; i.e. what a reasonably prudent person in the patient's circumstances would have decided if reasonably informed of the significant perils. The patient's testimony is relevant, but not determinative. Canterburv v. Spence, **464** F 2d supra at 790.

Thus, this Court properly allowed testimony by both defendant, Dr. NORMAN SCHULMAN, and plaintiffs medical expert, Dr. Richard Marfuggi, about the 1985 manufacturer's insert reference to reports of suspected immunological sensitization **from** silicon breast implants to a person with past history, including plaintiff, of scleroderma and immunological problems.

Nowhere in the record does Dr. SCHULMAN claim to have informed the patient of the material **risks,** benefits or alternatives of removing thirteen (13) lymph nodes from the axilla under Mrs. **RUSSANO's** right arm. Rather, by his own admission he did not intend to nor initially know that he had removed thirteen (13) lymph nodes. (TT 78:5) Dr. SCHULMAN acknowledges there was a "scar tissue lump" (TT **44:6-7)** in the area which he "never for a moment thought might be cancerous" (TT **44:**12) otherwise he "wouldn't have done plastic

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surgery." (TT44:15-16) Dr. SCHULMAN was apparently so unconcerned about this lump that there is no mention of it in Mrs. RUSSANO's chart on November 9th or 16' at which time Dr. SCHULMAN had examined Mrs. RUSSANO both visually and tacitly. (TT 44:18-20) The first mention of the under arm excised lump is found in a clinical history and summary Dr. SCHULMAN was asked to produce for the RUSSANOS' insurance company.

Given some of the potential risks to removing thirteen (13) lymphnodes such as, slippage of the breast implant, right arm swelling, and increased potential for lymphedema, and that an alternative to removing thirteen (13) lymphnodes would be to biopsy only one (1) or two (2) nodes because in DR. SCHULMAN's own words "lymph nodes are lymph nodes and one node may be representative of the rest of the body," and that he felt only a benign "scar tissue lump,"(TT:2-4) it is believable that a reasonably prudent patient in the plaintiffs position with the aforementioned appropriate information would not have undergone the surgery. This analysis is also supported by the unanimous jury verdict declaring DR. SCHULMAN did not have informed consent to remove thirteen (13) lymphnodes. Furthermore, there was credible expert medical testimony that the removal of thirteen (13) lymphnodes can cause swelling, lymphedema and make a woman more susceptible to breast cancer. (SCHULMAN TT 135-146) Plaintiff, JAMA RUSSANO, had swelling beyond what was to be expected, developed lymphedema and her right implant repeatedly slipped into the empty space created by the removal of the lymphnode mass.

By DR. SCHULMAN's own admission he did .not plan to remove a mass, containing thirteen (13) lymph nodes, and any biopsy he may have contemplated doing was to be of only one lymph node. It is reasonable that a reasonably prudent patient in the plaintiffs position would not have had the surgery if she had known all the risks and alternatives, and medical testimony

revealed the removal of the lymphnode mass was a proximate cause of plaintiff, JAMA RUSSANO's, injuries. Thus, taking Dr. SCHULMAN's testimony as true he could not possibly ~~received~~ afforded U/P JSC informed consent to a procedure he did not intend to perform and is not exempted from needing to obtain informed consent because the surgery was not of an emergency nature. PHL § 2805-d(2); Connellv v. Warner, 248 AD 2d 941, 670 *N Y S* 2d 293 (4" Dept. 1998).

b. Lack of informed consent to mastopexy of the right breast and using another silicone breast implant.

Plaintiffs right breast was perfectly healthy, yet defendant performed a mastopexy for cosmetic conformity with her left breast without any prior discussion with, much less choice of, the plaintiff about what shall be done with a sensitive part of her body. Schoendorfv. Society of New York Hospital, supra. **As** noted above, there is nothing in Public Health Law §2805-d(1), nor in the applicable case law suggests that elective cosmetic surgery is subject to a less stringent disclosure standard. Lee-Lu Pan v. Shaw, 203 AD2d 61 1, 195 NYS2d 158 (1st Dept. 1994).

3. Loss of Services and Society of Plaintiff RICHARD RUSSANO

The jury verdict in the sum of $150,000.00 rendered in favor of plaintiff spouse, RICHARD RUSSANO, for loss of services and society of plaintiff, JAMA RUSSANO, based on plaintiffs testimony of their close relationship was fair, reasonable and amply supported by the trial evidence. Cohen v. Hallmark, supra.

F. CONCLUSION

For the foregoing reasons the verdict in favor of the plaintiff. $1,200,000.00 for past pain and suffering (12/13/89 to date), $800,000 for future pain and suffering (15 years) and $150,000 awarded to spouse RICHARD RUSSANO for his derivative suit is upheld; defendant, N O W H. SCHULMAN, M.D.'s CPLR §4404(a) motion to set aside the verdict is denied and plaintiffs are entitled to and the Clerk is directed to enter judgment in accordance with the foregoing Decision and Order.

Settle Order and Judgment.

Dated: December 26,2001

(J.S.C.