

**Geoghegan v OB/GYN Assoc. of Staten Is., P.C.**

2002 NY Slip Op 30180(U)

June 26, 2002

Supreme Court, Richmond County

Docket Number: 12262/01

Judge: Anthony I. Giacobbe

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**SUPREME COURT OF THE  
STATE OF NEW YORK  
COUNTY OF RICHMOND TRIAL PART 9**

**Calendar No.:61487  
Index No.:12262/01**

**THERESA GEOGHEGAN and  
LAWRENCE GEOGHEGAN,**

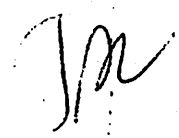
*Plaintiffs,*

*- against -*

**DECISION & ORDER  
JUSTICE ANTHONY I. GIACOBBE**

**OB/GYN ASSOCIATES OF  
STATEN ISLAND, P.C. and  
LOUIS GRECCO, M.D.,**

*Defendants.*



On June 17, 2002, the second day of this jury trial for medical malpractice, the defendant moved for a mistrial, upon the ground that plaintiff's attorney caused irreparable prejudice to the defendant when she asked the following question of the defendant, in an effort to impeach him with his prior sworn testimony:

Q: Do you remember giving testimony in another case, Magdalia Madden versus Louis Grecco, yourself, and OB-GYN Associates of Staten Island, PC, Magdalia Madden, where you gave testimony ...

Counsel for the defendant promptly objected and requested a sidebar and made his application. Plaintiff's counsel acknowledged that the prior testimony was from an unrelated lawsuit. The Court ruled that plaintiff's counsel could not continue with this question, reserved decision on the motion, and then gave the jury the following curative instruction:

Ladies and gentlemen, I am sustaining the objection, and I am directing you to

totally disregard the question in each and every respect. Draw no inference from it, draw no conclusion from it, do not speculate about it. Totally disregard that question.

In opposing the mistrial application, plaintiff's counsel argued that CPLR Rule 4514 permits impeachment of any witness with his or her own prior sworn testimony, and that the Court incorrectly precluded counsel from confronting the defendant with his purported prior inconsistent statement. This argument begs the question, however, since the issue presented is whether plaintiff's counsel's reference to another lawsuit in the question resulted in substantial prejudice, not the right to impeach with prior sworn inconsistent testimony. Indeed, even the case cited by plaintiff's counsel in her memorandum of law in opposition to the defendant's motion for a mistrial, *Skerencak v. Fischman*, 214 AD2d 1020 (4<sup>th</sup> Dept. 1995), acknowledges the impropriety of such a question. Moreover, plaintiff was not prevented from impeaching the defendant with his prior sworn testimony due simply to the fact that it was proffered in another action. Instead, the Court's preclusion of counsel's attempted questioning of defendant was based upon the fact that counsel had disclosed to the jury that defendant had been involved in "another case," and, consequently, the Court was obligated to avoid compounding any possible prejudice to defendant.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court and is to be made on a case-by-case basis ...," and the Court must examine the nature of the material placed before the jurors and determine whether or not prejudice has been engendered. *Chung v. Shakur*, 273 ad2d 340, 340-341 (2<sup>nd</sup> Dept. 2000). A motion for a mistrial should be granted to prevent a substantial possibility of injustice [*Cohn v. Meyers*, 125 AD2d 524 (2<sup>nd</sup> Dept. 1986)], as where the words uttered by counsel in front of a jury were "sufficiently egregious to "permeat[] the trial and creat[] a climate of hostility that effectively destroyed the [plaintiff's] ability to obtain a fair trial []." *Stanton v. Price Chopper Operating Co.*, 243 AD2d 934, 935 (3<sup>rd</sup> Dept. 1997) (citation omitted).

For the following reasons, the Court finds that the isolated reference made by plaintiff's counsel to another lawsuit in which this defendant was a party, albeit inappropriate, was not so substantially prejudicial and was not so egregious as to cause a denial of defendant's fundamental right to a fair trial. *Stanton, supra*.

The Court must consider the exact language contained in the question, as well as the manner in which the question was asked, *i.e.*, the tone and any emphasis used by the questioner, and must also gauge the effect of those words, if any, upon the jury. In this regard, the Court notes that plaintiff's counsel did not "dramatically and emotionally confront[]" the defendant with his prior testimony, as counsel for the defendant asserts in his memorandum of law in support of the defendant's mistrial motion. Here, the question was asked quickly, calmly, and in "routine" fashion, without emphasis on the "another case" portion of the query, as opposed to the prior "testimony" portion, nor did it appear that plaintiff's counsel otherwise highlighted or attempted to improperly focus the jury's attention on the language indicating that the defendant herein was apparently involved in a prior lawsuit.

While the question when asked immediately caught the attention of defendant's counsel and the Court, the Court is of the opinion, after due consideration, that it was of no significance to the jury. Immediately following the mistrial motion and the Court's curative instruction, the Court, having reserved decision, permitted the testimony to continue. The testimony which followed spanned a period of six full days, interrupted by a weekend, and the testimony included the balance of the plaintiff's examination of defendant, the examination of the defendant by defendant's counsel, cross and direct examination of the plaintiff, two gynecologists, two oncologists, an economist, and a radiologist. The question at issue, having been followed by an avalanche of such complex and lengthy expert testimony, could not have been the jury's focus. Under the circumstances, it is most unlikely that the question at issue was even remembered by the jury. Certainly, any potential prejudice which might have been attached to the question was

not at all substantial, and was inconsequential at best.

Moreover, in its curative instruction, the Court deliberately did not make specific mention of defendant's purported involvement in another action, information which may well have gone unnoticed by the jury in the first instance, so as not to highlight that information and possibly draw undue attention to it. Together with the Court's other instructions, repeated on numerous occasions during the trial, *i.e.*, that questions themselves are not evidence of anything and that the jurors are not to speculate about matters stricken from the record, any possibility of substantial prejudice to the defendant was eliminated.

Under all of the circumstances surrounding and following the question at issue, the Court finds that plaintiff's counsel did not create an atmosphere which deprived the defendant of a fair trial; what was involved here was an isolated remark made during questioning of the defendant, not "a seemingly continual and deliberate effort to divert the jurors' and the court's attention from the issues to be determined ... ." *Vassura v. Taylor*, 117 AD2d 798, 799 (2<sup>nd</sup> Dept. 1986), *citing Mercurio v. Dunlop, Ltd.*, 77 AD2d 647 (2<sup>nd</sup> Dept. 1980). Thus, the Court finds that the information placed before the jury, stricken by the Court with an instruction to totally disregard it, did not create a substantial likelihood of prejudice or injustice to the defendant, and the mistrial motion is denied.

This shall constitute the decision and order of the Court.

Dated: June 26, 2002

Enter

*Anthony J. Giacobbe*  
Hon. Anthony J. Giacobbe  
Justice of the Supreme Court

GRANTED  
*[Signature]*  
CLERK