

**Mandel v New York County Public Administrator**

2003 NY Slip Op 30085(U)

October 17, 2003

Supreme Court, Kings County

Docket Number: 3004258/1996

Judge: Marsha Steinhardt

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At an IAS Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 17th day of October 2003

.....	X	
IRAMANDEL, as Administrator of the Estate of	:	
FRANCES MANDEL, Deceased	:	
and IRA MANDEL as Executor of the Estate of	:	
ABRAHAM MANDEL, Deceased	:	
	.	
Plaintiff,	.	
	.	
-against-	:	Index No. 42586196
	.	
THE NEW YORK COUNTY PUBLIC	:	
ADMINISTRATOR, as Administrator of the	:	
Estate of RICHARD HERRMANN, deceased,	:	
	:	
Defendants	:	
-----X		

PRESENT: HON. MARSHA L. STEINHARDT

The following papers numbered 1 to 3 read on this motion

	<u>Papers Numbered</u>
Notice of Motion-Order to Show Cause and	
Affidavit: (Affirmations) Annexed _____	1
Answering Affidavit (Affirmation) & Cross-motion _____	2
Reply Affidavit (Affirmation) _____	3
Affidavit (Affirmation) _____	
Pleadings-Exhibits _____	
Stipulations-Minutes _____	
Filed Papers _____	

The defendant moves this Court seeking an order pursuant to CPLR §4404(a):

- 1) setting aside the verdict and awarding judgment as a matter of law to defendant; or

alternatively,

2) setting aside the verdict and awarding a new trial on the ground that the verdict is against the weight of the evidence; or, alternatively,

3) directing a new trial on the issue of comparative fault unless plaintiff stipulates that the Estate of Dr. Hermann is no more than 1% at fault for the failure to have plaintiffs decedent undergo a needle biopsy in August, 1992; and

4) vacating the award of **\$154,000** for lost earnings on the ground that plaintiff did not establish that item of damages with reasonable certainty; and

5) staying the entry of judgment pending a decision on this motion; and

6) granting such other and further relief as this Court deems just and proper under the circumstances.

Now, upon the foregoing papers and upon hearing oral argument on October 2, 2003 and due deliberation had thereon the motion is in all respects Denied.

In order for a court to conclude, as a matter of law, that a jury verdict is not supported by legally sufficient evidence, it is necessary to find that “there is simply 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 Cards, 45 NY2d 493, 499. In fact, “in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence.” Cohen v. Hallmark Cards, 45 NY2d 493, 499, *supra*.

It is also well established that in deciding a motion for judgment as a matter of law, “the evidence must be viewed in the light most favorable to the non moving party and the motion

should not be granted when the facts are in dispute, where conflicting inferences may be drawn from the evidence, or when there are issues of credibility.” Jastrzebski v. North Shore School District, 223 NY2d 677.

In the case at bar separate and distinct interrogatories were presented to the jury as to the liability of Dr. Hermann and the consultant physician Dr. Libby. Viewing the evidence in the light most favorable to the plaintiffs, as is proper in such a motion, the jury could rationally have found that Dr. Hermann had departed from accepted standards of medical practice in failing to have a needle biopsy performed upon Ms. Mandel in August of 1999. See, Cohen v. Hallmark Cards, 45 NY2d 493,499, supra. Such a finding is supported by the testimony of the plaintiffs expert, Dr. Steinberg, and the EBT testimony and records of Dr. Hermann himself.

With respect to that branch of the motion seeking to set aside the verdict as against the weight of the evidence the issue is not one of law, but rather requires a discretionary balancing of many factors. Cohen v. Hallmark Cards, 45 NY2d 493, at p. 499; see Durante v. Frishling, 81 AD2d 631, appeal dismissed 54 NY2d 833; Facteau v. Wenz, 78 AD2d 931.

“The fact that determination of a motion to set aside a verdict involves judicial discretion does not imply, however, that the trial court can freely interfere with any verdict that is unsatisfactory or with which it disagrees. A preeminent principle of jurisprudence in this area is that the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Fact finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and

“unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury’s duty” (Ellis v. Hoelzel, 57 Ad2d **968,969**; accord, Zolli v. Dubois, 88 AD2d **951**; Durante v. Frishling, supra; Facteau v. Wenz, supra, at p. **932**). This is especially true if a verdict is contested solely on weight of the evidence grounds and interest of justice factors have not intervened to flavor the judicial response to the motion. Absent such complications, the challenge is directed squarely at the accuracy of the jury’s fact finding and must be viewed in that light.”

In the case at bar when viewed in such light, this Court cannot say that the jury’s verdict herein in favor of the plaintiff was against the weight of the credible evidence or is so inconsistent as to warrant the relief sought herein.

Likewise that branch of the motion seeking a new trial on the issue of comparative fault unless the plaintiff stipulates that the Estate of Dr. Hermann is no more than 1% at fault for the failure to have plaintiffs decedent undergo a needle biopsy in August of **1992** must be denied. The record reflects that the jury could certainly have concluded that Dr. Hermann continuously treated Mrs. Mandel for her lung condition from April of **1992** through and including April of **1994**. Moreover, Dr. Hermann’s continuous, active and direct involvement in the treatment of Mrs. Mandel’s lung condition led the plaintiffs expert, Dr. Steinberg, to specifically and unequivocally opine that Dr. Hermann was primarily responsible for the medical care that was being rendered to Mrs. Mandel. In addition, it is uncontested that Dr. Libby, after rendering his opinions and giving his recommendations to Dr Hermann in early August of **1992**, did not have any contact with Mrs. Mandel again until the very end of **1994**. It was Dr. Libby’s understanding that Dr. Hermann “had followed her for years before, and that he would continue to follow her in

the future.” Dr. Hermann was actively, directly and primarily involved in the decision making process regarding Mrs. Mandel’s lung condition. It was Dr. Hermann who would communicate directly with his patient in setting up the CT scans and it was Dr. Hermann who Mrs Mandel had called for the results. The record is filled with evidence establishing that afer receiving the recommendations of Dr. Libby, Dr. Hermann continued as her treating physician in connection with her lung condition. In fact, Dr. Hermann’s own letter of December 2, 1994 states unequivocally that he was treating Mrs. Mandel for her lung condition. Therefore, the Court will not disturb the jury’s apportionment of fault. See, Zygmunt v. Berkowitz, 301 AD2d 593; Donahue v. Smorto, 240 AD2d 464.

Lastly, the Court will not vacate the award of \$154,000.00 for lost earnings. Mrs. Mandel’s salary history for the entire period 1971 until her forced retirement in 1995 was before the jury. Therefore, the simple arithmetic required to calculate the award is not beyond the ken of the average juror. See, DeLong v. County of Erie, 60 NY2d 296; see also, Whelan v. City of New York ,270 AD2d 340.

This constitutes the Decision and Order of this Court.

ENTER,



J.S.C.