

Resnick v Linkow

2004 NY Slip Op 30062(U)

August 4, 2004

Supreme Court, New York County

Docket Number: 0110013/0013

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Nicholas F. Aquino
Justice

PART 46

0110013/2001

INDEX NO.

110013/01

RESNICK, FLOYD

MOTION DATE

3/2/04

VS
LINKOW, LEONARD D.D.S.

MOTION SEQ. NO.

003

SEQ 3

MOTION CAL. NO.

OTHER RELIEFS

his motion to/for

PAPERS NUMBERED

4213

445

6

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

See

Resnick's decision at 2003

FILED

AUG - 9 2004

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: August 4, 2004

[Signature]

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

FLOYD RESNICK,

Plaintiff,

v.

LEONARD LINKOW, D.D.S.,

Defendant.

Index No. 110013/01

**DECISION
AND ORDER**

LEONARD LINKOW, D.D.S.,

Third-Party Plaintiff,

v.

ROBERT GHALILI, D.D.S., and MICHAEL
MASTROMARINO, D.D.S.,

Third-Party Defendants.

Nicholas Figueroa, J.:

Defendant, Leonard Linkow, D.D.S., moves for an order, pursuant to CPLR Article 44, setting aside the December 19, 2003 jury verdict in favor of plaintiff. The jury found that defendant departed from good and accepted standards of dental care on May 29, 1998 and October 7, 1998, and that these departures proximately caused plaintiff's injury: jaw numbness, a condition known as parasthesia. The jury also determined that defendant failed to obtain plaintiff's informed consent before performing procedures on those dates, as well as on May 8, 1995.

The jury awarded plaintiff \$500,000 for past pain and suffering, from May 8, 1995 to the date of its verdict, and \$1,500,000 for thirty years of future pain and suffering.

The jury found that the third-party defendants had not committed dental malpractice, and, that although plaintiff was negligent, his negligence was not a substantial factor in causing his injury. The case was submitted to the jury on the question of defendant's two alleged departures, as well as the informed consent issue.

The May 29, 1998 departure consisted of defendant's negligent penetration of plaintiff's inferior alveolar nerve canal while installing a dental implant. Damage to the alveolar nerve results in parasthesia, a condition causing numbness of the jaw. The October 7, 1998 departure consisted of defendant's failure to investigate the cause of plaintiff's complaint, if he complained of numbness on that date.

Defendant argues that there was no expert testimony that invading the alveolar canal was a departure from good and accepted standards of dental care and a substantial factor in causing parasthesia. Defendant next argues that plaintiff's belated complaint of parasthesia on October 7, 1998 came too late for remedial measures to be taken, as a nerve repair must be made within five months of injury. Moreover, defendant notes that plaintiff did not complain of parasthesia after the May 29, 1998 procedure, although plaintiff's expert testified that he based his finding of nerve injury, based on plaintiff's immediate complaint of numbness. Defendant asserts that based on this testimony, plaintiff failed, as a matter of law, to prove that failure to take heed of plaintiff's numbness was a proximate cause of his parasthesia; or, that in any event, the finding on this departure was against the weight of the evidence. Defendant further alleges that there was insufficient proof to support the jury's finding of lack of informed consent. Defendant also asks that the jury's finding of comparative fault be set aside. Alternatively, defendant argues that the jury's damage award was excessive, warranting a new trial on damages.

At trial the defendant testified that parasthesia is caused by a dentist penetrating the canal and "grabb[ing] the inferior alveolar nerve. That alone could cause parasthesia. Just touching it

or compressing it can cause parasthesia, you don't have to cut it." Continuing, he testified that "it was obvious why he was numb, very obvious." Defendant, however, attributed plaintiff's injuries to the third-party defendants, stating that, "Because Mastromarino and Dr. Ghalili—or Dr. Ghalili and Dr. Mastromarino put one of the implants right through the inferior alveolar canal and out the other end, and he had immediate numbness."

Defendant testified that he could visualize the alveolar canal invasion on x-rays and that the x-rays showed that the invasion occurred in May, 1998, not October, 1998. In fact, he was able to evaluate the extent of the nerve damage from the x-ray, stating that there is a chance the nerve could be repaired, if it is "just slightly touched or compressed... But the way it is like this, it's like – no, there is no chance. It is irreversible." He emphasized that if a dentist invades the inferior alveolar canal, the numbness "is immediate."

Concerning the alveolar nerve, Dr. Joseph Marged, plaintiff's expert, testified that "It's extremely significant to know the location and position of that nerve because when placing implants into the lower jaw, it's important to keep that implant away from the nerve. If you hit the nerve, nick it, injure it, that's a serious problem."

When asked to describe the "effect of a fixture as we see going through the inferior alveolar nerve canal and out the back..." Dr. Marged responded, "It completely destroys the nerve and causes numbness and/or a combination of numbness and pain." Plaintiff's attorney then asked him to "...assume, as will be testified by the plaintiff, that the day following this placement of this fixture he complained of immediate numbness. In your opinion, doctor, that immediate numbness the proximate result, with reasonable dental probability, of the placing of that fixture in the lower right jaw?" Dr. Marged responded, "Yes, it absolutely was."

Dr. Marged initially testified that he could not visualize the penetration on the two-dimensional Panorex x-rays defendant took, and based his conclusion on plaintiff's "symptoms".

However, on cross examination, he added, "Based on that x-ray, based on that there is a pretty damn good chance it [the parasthesia] came from that."

Dr. Marged, on further cross examination, testified that he could not rule out, with 100 percent certainty, that the injury did not occur on October 7, 1998.

According to Dr. Marged, if a nerve repair were attempted within a reasonable period of time, there would be a fifty percent chance of success. The chance for success would be better if the repair were performed within three months of the injury than after five or six months. Similarly, the chance of success was greater if the nerve were only nicked or injured, rather than transected. However, he reiterated that on average, the success rate is about fifty percent, with a complete severance "a little less than fifty percent, and a less severe injury a little better."

Defendant's expert, Dr. Mordecai Hoschander, also opined that there is an approximate six month window of opportunity during which a repair may be attempted. Dr. Hoschander opined that the injury occurred on October 7, 1998, not May 29, 1998. He noted that the former procedure involved removing, not inserting, an implant because of infection, and that no malpractice occurred.

The court, based on its examination of the transcript finds, that there was legally sufficient proof, by expert testimony, to support the jury's findings on both the May 29, 1998 and October 7, 1998 departures, but that the proof of the lack of informed consent departure was legally insufficient.

Defendant's own testimony establishes a departure and subsequent causation on May 29, 1998. Defendant, although attempting to blame others for the malpractice, testified that he could see the nerve damage on an x-ray. He testified that a dentist must not penetrate the canal, and that nerve damage could be the result of the penetration. The facts in this case are not dissimilar to those in *Kutson v. Sand*, 282 A.D.2d 42, in which similar testimony by the

defendant established departure and causation. The distinguishing factor is that in *Sand*, the defendant's statement was not made in an attempt to implicate others. Despite defendant's interest in diverting blame, his statement was not made thoughtlessly or insincerely in ignorance of the facts (see *Gangi v. Fradus*, 227 N.Y. 452, 457). Rather, the testimony was based on the x-ray film in evidence, and so was based on factual material within defendant's knowledge (*id.* at 475).

Moreover, the testimony by plaintiff's expert, Dr. Marged, also established that it is important to keep an implant away from a nerve in order to avoid nerve damage. Although he primarily based his finding that plaintiff's parasthesia occurred on May 29, 1998, because the symptom, numbness, began that date, he also testified with adequate certainty, that the x-ray showed the nerve damage on that date (see *Matott v. Ward*, 48 N.Y.2d 455).

Because evidence of nerve damage was apparent from the x-ray in evidence, defendant's argument, based on *Cassano v. Hagstrom*, 5 N.Y.2d 643, is unavailing. In that case, there was no direct or circumstantial evidence that a nerve was damaged during a procedure. Rather, the only evidence was that the procedure involved was not performed in proximity to the damaged nerve. In defendant's case, there is no dispute that an implant was inserted into plaintiff's jaw. The only question is the depth of insertion into the canal, an issue resolved by the testimony based on the x-ray.

There is also legally sufficient evidence supporting the October 7, 1998 departure. Defendant's argument, that plaintiff's complaint of numbness came too late for the nerve to be repaired, is without merit. The evidence at trial was that if the nerve is injured, there is an approximate fifty percent chance that it can be repaired if the repair is attempted within some six months. This testimony shows that regardless of whether the injury occurred on May 29, 1998 or October 7, 1998, defendant's failure to take appropriate action when plaintiff complained of

numbness was a substantial factor in causing the injury (see *Kallenberg v. Beth Israel Hospital*, 45 A.D.2d 177, *affd.* 37 N.Y.2d 615 - proper treatment would have given the patient a twenty to forty percent chance of survival). In the instant case, where plaintiff complained of numbness within the six-month window of opportunity, the fifty percent success rate given by Dr. Marged allowed the jury to find that the departure was a substantial factor in causing the injury (*cf Mortensen v. Memorial Hospital*, 105 A.D.2d151).

The jury finding on lack of informed consent, however, must be vacated, as it was not based on legally sufficient evidence.

Defendant gave plaintiff a written consent form informing plaintiff that the treatment could result in irreversible nerve damage. Plaintiff testified that he knew the meaning of irreversible. He also testified that he was aware that he could ask questions about the procedures, but failed to do so. This knowledge and understanding bars recovery in an action based on lack of informed consent (see *Lynn v. Hugo*, 96 N.Y.2d 306).

Plaintiff has not cited any legal authority for his theory that defendant's failure to specifically inform him that he could negligently penetrate the canal was a departure from accepted practice. Rather, he refers to Dr. Hoschander's testimony that he gives his patients more detailed information than defendant gave to plaintiff. However, Dr. Hoschander was not testifying about a general standard of care; rather, he was referring to his own particular protocol. Hoschander did not testify that a dentist who did not adhere to his more rigid standard practiced substandard medicine. Therefore, plaintiff failed to present facts that were sufficient, as a matter of law, for the jury to find that defendant failed to obtain plaintiff's informed consent (see *Stancavage v. Mirman*, 309 A.D.2d 918).

Nor is there a basis to vacate the jury's finding as to plaintiff's lack of comparative fault. While plaintiff's smoking or poor hygiene may have been negligent, it could not have been a

substantial factor in damaging the nerve, since this injury results from trauma to the nerve.

On the basis of the foregoing, the court finds that with the exception of the portion of the verdict on informed consent, the jury's verdict was based on legally sufficient evidence.

Although defendant only specifically asks that, as an alternative, the verdict based on the October 7, 1998 departure be set aside as against the weight of the evidence, he also asks for such other and further relief as the court deems proper in his *ad damnum* clause. Therefore, the court will determine whether, in addition to being based on legally sufficient evidence, both the May 29, 1998 and October 7, 1998 departure and causation findings were based on a fair interpretation of the evidence (*Grassi v. Ulrich*, 87 N.Y.2d 954; *Lolick v. Big v. Supermarkets, Inc.*, 86 N.Y.2d 744).

In determining whether to exercise its discretion to set aside a verdict as being based on an unfair interpretation of the evidence, a court must act "with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict." (*Brown v. Taylor*, 221 A.D.2d 208, 209). The court finds that despite inconsistencies in the proof, the liability findings were based on a fair interpretation of the evidence and that substantial justice has been done.

In reaching this finding, the court is mindful of the fact that while both defendant and Dr. Marged stated that there would be immediate numbness after the May 29, 1998 nerve injury, plaintiff testified that he did not experience numbness until after the October 7, 1998 procedure. While plaintiff's complaint of pain on the latter date may appear inconsistent with an injury on the former, there was no testimony that the numbness could not have occurred after a passage of time. Nor was there testimony that it was impossible for the nerve to be damaged without resulting in a physical manifestation. Given the fact that two dentists testified that the nerve damage could be seen on an x-ray, the court cannot say that the plaintiff's evidence as to when

the numbness occurred preponderated over and negated the evidence graphically showing that an injury had in fact occurred.

In any event, despite being given the opportunity to do so before the court discharged the jury, defendant failed to move to set aside the verdict as inconsistent. Therefore, he has waived this argument (see *Barry v. Manglass*, 55 N.Y.2d 803).

The jury award of \$500,000 for past pain and suffering and \$1,500,000 for future pain and suffering, however, is found, based on the trial evidence, to deviate materially from what would be just compensation (CPLR 5501(c)).

While there was testimony concerning the pain and inability to work associated with the numerous procedures plaintiff underwent, the jury found only that defendant malpracticed by damaging the alveolar nerve and by failing to take further action. Thereafter, liability was not predicated on the use of improper implants necessitating numerous procedures; therefore, pain and suffering damages could not be based on any adverse consequences of such treatment. Nor did the jury find any malpractice relating to the infection plaintiff suffered. Rather, the damages relate only to the numbness, and possible drooling, associated with the nerve damage. Notably, the jury did not find that plaintiff had suffered lost wages from his career as a bartender and actor.

In opposing the motion, however, plaintiff predicates his argument against reducing the award on the effects of infection, bone damage allegedly resulting from the improper procedures and the pain resulting from these procedures. He refers to his need to take antibiotics and pain killers, and to his need to re-cement a lower dental prosthesis every two hours. None of these consequences are attributable to the parasthesia.

Moreover, while the jury awarded damages based on eight years of past pain and suffering, from May 8, 1995 to the date of the verdict, the latter date may no longer be used as

the beginning of the pain and suffering, as that date is the date of the first date of the alleged lack of informed consent, a cause of action that is now dismissed. Therefore, past damages may only run from May, 1998 to the date of verdict, a period of five years.

Under the circumstances of this case, the court finds that an award of \$300,000 for past pain and suffering and \$700,000 for future pain and suffering would be reasonable compensation (see *Siegel v. Wank*, 270 A.D.2d 573).

Accordingly, it is

ORDERED that the portion of defendant Leonard Linkow's motion to set aside the jury verdict and dismiss the complaint is granted to the extent that the cause of action based on lack of informed consent is dismissed, and is otherwise denied, and it is further

ORDERED that the portion of the motion for a new trial on past and future damages is granted unless, within twenty days of service of a copy of this order with notice of entry, plaintiff stipulates to entry of judgment in the amount of \$300,000 for past pain and suffering and \$700,000 for future pain and suffering, and if the plaintiff so stipulates, the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: August 4, 2004

ENTER



J.S.C.

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