

**ROSS v Mandeville**

2005 NY Slip Op 30321(U)

October 11, 2005

Supreme Court, Queens County

Docket Number: 29077/02

Judge: Allan B. Weiss

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M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY  
IA PART: 2

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TAYLOR ROSS, an infant by her  
mother and natural guardian,  
DIONNE HUBBARD, and DIONNE HUBBARD,  
individually,

INDEX NO. 29077/02

BY: WEISS, J.

DATE: October 11, 2005

Plaintiffs,

-against-

EDGAR MANDEVILLE, M.D., THE NEW  
YORK HOSPITAL MEDICAL CENTER OF QUEENS,

Defendants.  
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In this action to recover damages for medical malpractice, defendant Edgar Mandeville, M.D. seeks a judgment in his favor, notwithstanding the verdict, pursuant to CPLR 4404(a) on the grounds that the verdict is based upon insufficient evidence; and, in the alternative, seeks a new trial on the grounds that the verdict of liability is against the weight of the evidence; that the jury failed to apportion fault; that the jury verdict sheet was equivocal and confusing as to the apportionment of damages so as to deprive the defendant of a fair trial; and that there must be a new trial as to damages as the award of damages was excessive and against the weight of the evidence.

Dr. Edgar Mandeville was Dionne Hubbard's obstetrician and attending physician at New York Hospital Medical Center of

Queens. On September 21, 2001, Ms. Hubbard began to go into labor and she arrived at the hospital at 11:30 A.M. at which time she was admitted, and was placed on a fetal heart monitor. Dr. Mandeville was notified and arrived at the hospital shortly after 12 P.M. Dr. Mandeville was unsuccessful in administering an epidural to Ms. Hubbard, and a primary cesarean section was performed by Dr. Mandeville, along with Dr. Jane Kaufman, a third-year OB/GYN resident. The infant Taylor Ross, was delivered by cesarean section at 12:30 P.M. In performing the cesarean section, Dr. Kaufman made a uterine incision which resulted in a laceration on the infant's forehead. The infant was treated by a plastic surgeon within a day or two after birth, and has a two-inch scar located on the right side of her forehead.

Ms. Hubbard commenced an action for medical malpractice on behalf of her daughter, Taylor Ross, and a derivative action to recover costs and expenses on behalf of her daughter and for loss of services against Dr. Mandeville and the New York Hospital of Queens. At the time of the trial, which was held on May 17, 18, 19 20, 24 and 26, 2005, the hospital was no longer a defendant in this action.

At the trial, plaintiff Dionne Hubbard asserted that Dr. Mandeville made a determination to perform a cesarean section before he arrived at the hospital; that he had not examined her at the time he made this decision; that he failed to perform an internal examination before he performed the cesarean section;

that he never advised her of the risks of a cesarean section; that he incorrectly advised her that the cesarean was necessary because the baby's heart was "beating fast"; that he failed to advise her that the baby's heart rate was slightly above normal; and that he never advised her that Dr. Kaufman would be performing any portion of the cesarean section or be making an incision.

Dr. Mandeville asserted that prior to his arriving at the hospital, Ms. Hubbard was placed on a fetal heart monitor and at 11:45 A.M. the nurse's note indicated that tachycardia was noted and that he informed the staff that he would be in shortly and that he was likely to perform a cesarean section. He asserted that at 12 P.M. the fetal heart tracing was nonreassuring and that the plan was to prepare plaintiff for a cesarean section as soon as Dr. Mandeville arrived.

Upon his arrival, Dr. Mandeville reviewed the fetal heart monitor strips and determined that a cesarean section would be performed. Ms. Hubbard was taken to the operating room, at which time the epidural was unsuccessfully administered, and a general anesthesia was given. Dr. Mandeville asserted that Dr. Kaufman was solely responsible for the laceration to the baby's forehead, and that she was capable of performing the surgery on her own, without his assistance or supervision, and that they were co-equals in the operating room. It was also asserted that the injury to the infant was minor and that as the scar is located near the hairline, it may be partially covered by her

hair.

The jury rendered a verdict against Dr. Mandeville on May 26, 2005. Five of the six jurors found that Dr. Mandeville departed from good and accepted medical practice by performing a cesarean section on Dionne Hubbard on September 25, 2001, and that this departure was a substantial factor in causing injury to Taylor Ross. Five of the six jurors found that Dr. Mandeville departed from good and accepted medical practice by failing to properly perform a cesarean section on Ms. Hubbard on September 25, 2001, and that this departure was a substantial factor in causing injury to Taylor Ross. All six jurors found that Dr. Jane Kaufman departed from good and accepted medical practice in failing to properly incise or cut the uterus of Dionne Hubbard on September 25, 2001 and that this departure was a substantial factor in causing injury to Taylor Ross. All six jurors found that at the time that Dr. Kaufman departed from good and accepted medical practice, she was under the direct supervision of Dr. Mandeville. The jurors did not state the percentage of fault attributable to Dr. Mandeville and Dr. Kaufman. All six jurors awarded plaintiff Taylor Ross the sum of \$200,000 for past pain and suffering, and the sum of \$350,000 for future pain and suffering, over a period of 77 years.

Defendant Dr. Edgar Mandeville now moves for an order granting judgment in his favor, notwithstanding the verdict, and asserts that plaintiffs failed to make out a prima facie case of liability. It is asserted that the jury's verdict is based upon

insufficient evidence, in that the testimony of plaintiff's expert was insufficient to establish the claimed departures from good and accepted medical practice by Dr. Mandeville, or causation. It is asserted that the evidence presented by plaintiffs was insufficient to establish that Dr. Mandeville instructed Dr. Kaufman, or that Dr. Kaufman was not qualified to perform this surgery without intervention by Dr. Mandeville and, therefore, the jury could not have rationally concluded that Dr. Kaufman was under the direct supervision of Dr. Mandeville at the time she was found to have departed from good and accepted medical practice. It is further asserted that the preponderance of the evidence established the absence of departures from good and accepted medical practice, the absence of causation, the absence of malpractice and the absence of negligence. It is claimed that the preponderance of the evidence establishes that although Dr. Mandeville was in authority in the operating room, he had no need to give Dr. Kaufman detailed or specific instructions on how to perform the cesarean section due to her being a third-year resident with ample experience, skill and technical expertise. Defendant further claims that the jury's verdict is defective in that the jurors failed to apportion fault between himself and Dr. Kaufman and, therefore, a new trial is required. It is asserted that plaintiffs never pled an exception to CPLR 1601, and that they failed to establish that Dr. Mandeville was not entitled to apportionment of liability. It is thus claimed that the verdict sheet deprived Dr. Mandeville

of his right to apportionment, that this was prejudicial, and deprived him of his right to a fair trial. Finally, it is asserted that the damage award deviates materially from what would be reasonable compensation, and is against the weight of the evidence, so as to require a new trial.

Plaintiffs', in opposition, assert that the jury's findings are supported by the evidence and testimony presented at trial, and that the jury did not find the defendant or his expert to be credible. Plaintiffs specifically assert that the evidence and testimony established that the defendant should not have ordered the cesarean section, that the defendant improperly performed the cesarean section and that the defendant is vicariously liable for the resident's malpractice. Plaintiffs further assert that the jury properly determined that the defendant is 100% liable for his own malpractice, and vicariously liable for the acts of the resident and that vicarious liability cannot be diminished by apportionment. Finally, it is asserted that the jury award of \$550,000 is neither excessive nor against the weight of the evidence.

It is well settled that a trial court is vested with the discretion to set aside verdicts it finds inadequate or excessive or against the weight of the evidence, and grant a new trial as to damages. (See O'Connor v Papertsian, 309 NY 465 [1955]; Tate v Colabello, 58 NY2d 84 [1983]; Cooke v Meltzer, 235 AD2d 517 [1997]; CPLR 4404[a].) To set aside a verdict and grant judgment as a matter of law, a court must determine "that there

is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial.” (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978].)

The jury’s finding that the defendant Dr. Edgar Mandeville committed malpractice when he performed a cesarean section on Dionne Hubbard, on September 25, 2001; that the cesarean section was not properly performed; that Dr. Kaufman also committed medical malpractice when she made an incision in Ms. Hubbard’s uterus; that Dr. Kaufman was under Dr. Mandeville’s direct supervision; and that this was a substantial factor in causing the infant Taylor Ross’s injury, was supported by legally sufficient evidence at trial. (See Campbell v City of Elmira, 84 NY2d 505, 509 [1994]; Mirand v City of New York, 84 NY2d 44, 48-49 [1994]; Cohen v Hallmark Cards, supra [1978].) Moreover, according due deference to the jury’s fact-finding function, the court is not persuaded that the verdict as to liability was against the weight of the evidence. (See Nicastro v Park, 113 AD2d 129 [1985].)

The court further finds that the verdict as to damages for pain and suffering was supported by a fair interpretation of the evidence (see Zygmunt v Berkowitz, supra; Thomas v Brookdale Hosp. Med. Ctr., 287 AD2d 448 [2001]; Romero v Karavidas, 282 AD2d 665 [2001]). It is well recognized that “the amount of compensation to be awarded to an injured person is a question of fact to be resolved by the trier of fact and will only be

disturbed when it deviates materially from what would be reasonable compensation.” (Simeon v Urrey, 278 AD2d 624 [2000]; see, CPLR 5501[c].) Here, it is beyond dispute that Taylor Ross sustained a laceration to her forehead as a result of the cesarean section and that she has a permanent two-inch-long scar on her forehead, which is clearly visible, and was observed by the jury. The jury clearly rejected the defendant’s claim that the scar was minor, and could be partially hidden, as it is near the hairline, and on the side of the forehead. The court finds that based upon the jury’s finding of malpractice, the infant plaintiff’s resultant injury and the impact this injury will have on her throughout her life, the amount awarded as damages herein does not deviate materially from what would be reasonable compensation.

Although the plaintiffs did not assert an exception to Article 16 in their pleadings, Dr. Mandeville asserted a right to apportionment under Article 16 as a defense in his answer. Therefore, he had the burden of proving that his liability, if any, was only 50% or less in relation to other tortfeasors. Dr. Mandeville, thus, had to establish that Dr. Kaufman’s liability was at least 50% or greater, and that she acted independently. The evidence presented at trial established that Dr. Mandeville was Ms. Hubbard’s treating physician, and that Dr. Kaufman, a third- year resident, had no prior relationship with Ms. Hubbard. Plaintiffs’ presented evidence that Dr. Mandeville had the authority in the operating room, and that Dr. Kaufman was present

in the operating room at the invitation of Dr. Mandeville, and that both doctors performed the cesarean section.

The jury clearly rejected the defendant's claim that Dr. Mandeville and Dr. Kaufman were co-attending physicians or co-equals in the operating room. Rather, the jury found that Dr. Kaufman performed the cesarean section under the direct supervision of Dr. Mandeville. Plaintiffs' inability to establish the exact words spoken by and between Dr. Mandeville and Dr. Kaufman in the operating room, did not negate this relationship. It is well settled that a defendant who is held vicariously liable cannot seek apportionment between itself and the person whose malfeasance exposed the defendant to liability (Rangolan v County of Nassau, 96 NY2d 42[2001]; CPLR 1602[2][iv]). Thus, the jury's failure to apportion fault reflects a determination that Dr. Mandeville, as the resident's supervisor, was vicariously liable for the acts of the resident, in addition to being liable for his own acts of malpractice (See generally Turcsik v Guthrie Clinic, Ltd., 12 AD3d 883, 885-886 [2004]; Taylor-Gove v St. Joseph's Hosp. Health Ctr., 242 AD2d 879, 880 [1997], lv denied 91 NY2d 805).

In view of the foregoing, defendant's motion is denied in its entirety.

Settle order.

Dated: Oct. 11, 2005

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J.S.C.