Goldberg v Sottile & Megna, M.D., P.C.
2006 NY Slip Op 30585(U)
November 8, 2006
Supreme Court, New York County
Docket Number: 11505/02
Judge: Anthony Giacobbe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ELLEN F. GOLDBERG, as Administratrix of the Goods Chattels and Credits which were of STEVEN L. GOLDBERG, deceased, and ELLEN F. GOLDBERG, individually,

Plaintiff,

-against-

SOTTILE & MEGNA, M.D., P.C.,
DANIEL MEGNA, M.D.,
LAWRENCE MANCINO, D.O.
and ROBERT J. SILICH, M.D.,

Defendants.

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Trial Part 9
Present:
Hon. Anthony I. Giacobbe

Decision and Order
Index No. 11505/02

The following papers, numbered 1 to 3, were submitted on this motion this 13th day of September, 2006:

Notice of Motion and supporting papers (dated July 24, 2006)	1
Affirmation in Opposition and supporting papers (dated August 23, 2006)	2
Reply Affirmation (dated September 12, 2006)	3

Upon the foregoing papers and due deliberation thereon, plaintiff's motion to set aside the jury's verdict is denied.

This is an action to recover compensatory damages allegedly arising from defendants' negligence and medical malpractice that resulted in the pain and suffering of plaintiff's intestate and his eventual death following his discharge from Staten Island University Hospital. The basis

of plaintiff's complaint against defendants encompasses the failure to provide adequate medical care to the decedent, and negligent acts during and after the decedent's stay in the hospital, including, *inter alia*, an alleged failure to diagnose a dissecting thoracic aorta -- which was ultimately the cause of the decedent's demise per the autopsy report in evidence -- all substantial factors in causing the decedent's pain, suffering and death.

In summary, the record reveals that on June 30, 2000, decedent, the Chief of Pathology at Staten Island University Hospital, presented at the hospital's emergency room with symptoms including abdominal pain, vomiting, fever, chills, diarrhea, rectal bleeding, left foot numbness, and peripheral vision loss. A colonoscopy was performed by defendant Mancino, who determined that decedent's right colon was inflamed, a condition which had apparently resolved as of the time of the autopsy. A CT scan of the decedent's abdomen and a series of x-rays were also taken, including of decedent's abdomen and chest, the results, interpretation and import of which were disputed by the parties. An intravenous bag of saline was administered to the decedent due to dehydration, a condition also disputed by plaintiff. A blood test determined that decedent had an elevated white blood cell count, and although stool sample cultures did not test positive for infection, an infectious etiology was not ruled out. Based upon his symptoms, the decedent was diagnosed as suffering from, *inter alia*, infectious gastroenteritis, or food poisoning from something decedent had eaten, possibly some clam chowder. As the decedent's vomiting and diarrhea had stopped, and his white blood cell count and fever had begun to drop, it was determined that the decedent no longer required "skilled nursing care" and had reached the " maximum hospital benefit" for his diagnosed condition, and decedent was discharged on July 2, 2000. On July 8, 2000, while at home and following a lunchtime meal with his wife and

daughter, the decedent ascended the stairs to his bedroom to rest. The decedent expired in his bathroom, where he was found a few hours later by his wife.

It is well settled that an act or omission constituting medical malpractice must be the proximate cause of an injury, *i.e.*, a substantial factor in bringing about the injury. *See, e.g., Perez v. St. John's Episcopal Hospital South Shore*, 19 AD3d 389 (2nd Dept. 2005), *lv. denied*, 6 NY3d 715 (2006); *Bloom v. City of New York*, 202 AD2d 465 (2nd Dept. 1994). In the instant case, plaintiff presented evidence that defendants' care of the patient proximately caused his pain and suffering and his eventual death. In stark contrast, defendants presented evidence that the cause of decedent's death was unrelated to the condition for which he was treated at the hospital. There were questions of fact, highlighted by the conflicting medical opinions of the parties' experts [*see e.g., Barbuto v. Winthrop University Hospital*, 305 AD2d 623 (2nd Dept. 2003); *Bobek v. Crystal*, 291 AD2d 521 (2nd Dept. 2002), *lv denied*, 100 NY2d 505 (2003); *Kwasny v. Feinberg*, 157 AD2d 396 (2nd Dept. 1990); *Dority v. Hootnick*, 6 AD3d 1098 (4th Dept. 2004)], as to whether the defendant doctors negligently treated the decedent, and whether that and the other acts or omissions of defendant doctors, as submitted to the jury on the verdict sheet for its consideration, were a substantial factor in bringing about the death of plaintiff's decedent. Contrary to plaintiff's assertion, in essence, that the opinions proffered by defendants' expert witnesses are not supported by any competent evidence and are merely speculative (*see*, Affirmation in Support of George Pfluger, Esq., pp. 68, 83), there is factual record support for the conclusions reached and opinions rendered by defendants' expert witnesses, and the jury was

entitled to accept those opinions. *See, e.g., Shields v. Baktidy*, 11 AD3d 671 (2nd Dept. 2004); *Kiker v. Nassau County*, 175 AD2d 99 (2nd Dept. 1991). Furthermore, here, it cannot be said there is no "valid line of reasoning and permissible inferences which could lead rational people to the conclusion reached by the jury based on the evidence presented at trial ... [and moreover], the verdict was supported by a fair interpretation of the evidence ... ." *Blanar v. Dickinson*, 296 AD2d 431, 432 (2nd Dept. 2002) (citations omitted); *see also, Moccia v. Chi*, 18 AD3d 631 (2nd Dept. 2005); *Rivers v. St. Mary's Hospital of Brooklyn*, 296 AD2d 539 (2nd Dept. 2002); *Nicastro v. Park*, 113 AD2d 129 (2nd Dept. 1985). Simply put, the evidence adduced at trial is not so preponderated in favor of plaintiff that the jury could not have reached a verdict in favor of defendants on any fair interpretation of the evidence. Thus, insofar as plaintiff seeks an order setting aside the jury's verdict as against the weight of the evidence, the motion is denied.

With regard to that part of plaintiff's motion which seeks an order granting a new trial in the interests of justice based upon the conduct of defense counsel, this application is also denied. It is not apparent to this Court, which presided over the approximately four-week-long trial, that the jurors were unable to consider all the admissible evidence and evaluate the facts and the law in a fair and impartial manner. In the Court's opinion, the jurors competently followed all the Court's instructions and remained focused solely upon their duty in reaching a just verdict. The conduct of defense counsel cited by plaintiff did not divert the jurors' attention from the issues or deprive plaintiff of a fair trial, nor does the Court equate such conduct with a continual and deliberate effort to do so. While recognizing, in a general sense, the broad right of fair comment on the evidence (*Braun v. Ahmed*, 127 AD2d 418, 421-422 [2nd Dept. 1987]; *Rodriguez v.*

Polakowski, 175 AD2d 726 [1st Dept. 1991]), the Court finds that the conduct now complained of, including remarks made by defense counsel during cross examination and summation, was either not objected to at trial, or was the subject of timely objections made by plaintiff's counsel which were sustained, and which prompted the Court to quickly admonish defense counsel and/or deliver effective curative instructions to the jurors. *Blanar v. Dickinson, supra*; *Bacigalupo v. Healthshield, Inc.*, 231 AD2d 538 (2nd Dept. 1996); *Kiker v. Nassau County, supra*; *Dunne v. Lemberg*, 54 AD2d 955 (2nd Dept. 1976), *lv denied*, 40 NY2d 809 (1977); *Beth Israel Hospital North v. Castle Oil Corp.*, 220 AD2d 257 (1st Dept.), *lv denied in part, dismissed in part*, 87 NY2d 891 (1995); *Dennis v. Capital District Transportation Authority*, 274 AD2d 802 (3rd Dept. 2000); *cf., Vassura v. Taylor*, 117 AD2d 798 (2nd Dept.), *app dismissed*, 68 NY2d 643 (1986); *Weinberger v. City of New York*, 97 AD2d 819 (2nd Dept. 1983); *Mercurio v. Dunlop, Ltd.*, 77 AD2d 647 (2nd Dept. 1980); *Rodriguez v. New York City Housing Authority*, 209 AD2d 260 (1st Dept. 1994); *Clarke v. New York City Transit Authority*, 174 AD2d 268 (1st Dept. 1992); *Kohlman v. City of New York*, 8 AD2d 598 (1st Dept. 1959).

Significantly, plaintiff's counsel did not, at any time, request a mistrial based upon any purported egregious conduct by the defense, nor did plaintiff's counsel request any additional curative instructions. Under such circumstances, there is an independent basis upon which to deny the motion for a new trial. *See, e.g., Torrado v. Lutheran Medical Center*, 198 AD2d 346 (2nd Dept. 1993); *Kamen v. City of New York*, 169 AD2d 705 (2nd Dept. 1991); *Scott v. Mason*, 155 AD2d 655 (2nd Dept. 1989); *Dunne v. Lemberg, supra*; *Schein v. Chest Service Co., Inc.*, 38

AD2d 929 (1st Dept. 1972); *cf., Berkowitz v. Marriott Corp.*, 163 AD2d 52 (1st Dept. 1990); *Grasso v. Koslowe*, 4/5/06 NYLJ p. 22, col. 1 (Sup. Ct. Richmond Co.).

Accordingly, it is

ORDERED that motion is denied; and it is further

ORDERED that the jury's verdict shall not be disturbed.

ENTER

Dated: November 8, 2006

J.S.C.