Bhagwandin v Struhl
2006 NY Slip Op 30857(U)
June 23, 2006
Supreme Court, New York County
Docket Number: 110917/04
Judge: Alice Schlesinger

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

----------X

JERRY BHAGWANDIN,

Plaintiff,

-against -

STEEN STRUHL, M.D.,

Defendant.

----------X

Index No.110917/04
Motion Seq. No. 002

SCHLESINGER, J:

Between March 9 and March 17, 2006 the action of Jerry Bhagwandin against Steven Struhl, M.D. was tried before this court and a jury. Mr. Bhagwandin had undergone ACL reconstruction with Dr. Struhl on September 19, 2002. No complaint was made as to anything that occurred during that surgery or its immediate aftermath. However, on September 24, 2002, the plaintiff visited his doctor for a follow-up appointment and it is the defendant's response to that examination and three subsequent phone calls to the doctor on that day which constituted the predicate for Mr. Bhagwandin's claims of malpractice.

It was the plaintiff's position that by the 24th he had developed an infection in the reconstructed knee, but that Dr. Struhl had "departed from accepted standards of medical care in his assessment and evaluation of Jerry Bhagwandin on September 24, 2002 (Jury interrogatory #1) and/or "that Dr. Struhl departed from accepted standards of medical care by not properly following up on the telephone calls made to him on behalf of Jerry Bhagwandin on September 24, 2002" (Jury interrogatory #2). The jury unanimously found no departure as to the office visit but found unanimously that there was a departure in the defendant's failure to properly follow up on the three documented telephone calls made that day. Finally, they unanimously found this departure was a substantial factor in causing

injury to Mr. Bhagwandin.

Counsel for the defendant has now made a motion to set aside the verdict and grant him judgment or alternatively order a new trial. The argument is that implicit in the jury's answer to Jury Interrogatory #1, finding no departure, is the finding that Mr. Bhagwandin had no knee infection at the time he presented or at any time on September 24th. Therefore, he urges that by this implicit finding of no infection on the 24th , the jury had no basis to find that Dr. Struhl's failure to properly follow-up on the multiple calls made to him on the 24th, were a cause of injury to the plaintiff. After all, if he had no infection on the 24th, it did not matter that the defendant did not meaningfully respond, defendant claims.

However, counsel is wrong when he argues that the jury's negative answer to the first question implicitly or irresistibly leads to the conclusion that Mr. Bhagwandin did not have an infected knee on the 24th. And I say this despite the testimony of the plaintiff's expert orthopedic witness, Dr. Cary Skolnick. Dr. Skolnick did testify that there was an infection that day and that it "started to show its ugly head around the day before" (the office visit on the 24th) and that the defendant should have been able to tell that when the plaintiff was in his office on the 24th (TR 215).

However, the jury was certainly within its rights to find that the assessment and evaluation was acceptable (perhaps because they believed that the plaintiff did not actually make the complaints to the doctor that he said he did), but that later in the day after receiving three consecutive phone calls from the plaintiff's fiancé on Mr. Bhagwandin's behalf reporting that he was suffering many additional symptoms, Dr. Struhl had an obligation to follow-up and find the infection.

As counsel and the court discussed during the charge conference, all agreed that an infection had to have existed on the 24th for there to be a verdict in favor of the plaintiff. However, where I part company with the defense argument is the meaning of the jury's response to the first question, i.e., that implicitly the jury found no infection that day. In other words, the signs and symptoms observed by Dr. Struhl may not have screamed out infection to him sufficient to have had him found negligent by not investigating further. However, the phone calls describing additional symptoms consistent with an infection, arguably supplemented the initial examination and should have resulted in the doctor's further investigation.

Therefore, since I find no inconsistency between the answers to the two liability questions and I find there is a credible basis in the evidence for the finding, the motion to set aside the verdict is denied.

The defendant is also moving to reduce the award of $75,000 for future medical expenses to no more than $25,000. Counsel argues the amount awarded is excessive. The testimony he points to here was from Dr. Robert Israel who testified as to the cost of a total knee replacement approximating the lower figure. Counsel for the plaintiff urges in opposition that the jury could have also figured in costs of pain medication which Mr. Bhagwandin is taking now for persistent pain and will probably have to take for the rest of his life. However, such costs were never submitted to the jury. Therefore, I agree with defense counsel that there was no evidentiary basis for the higher figure. Therefore, unless plaintiff's counsel agrees to a reduction to $25,000 in this category, I will order a new trial on this element of damages.

As to expenses, plaintiff's counsel points out that, pursuant to a stipulation entered into between counsel as to non-reimbursed past medical expenses, the verdict should be increased by $5851.44. Defense counsel in reply does not address this point and therefore I conclude he does not object to it.

Finally, there is still one issue extant, that of the growth rate pursuant to CPLR 4111(d) vis-a-vis question 8, which concerned future lost earnings. I had limited this award to 5 years from the injury or until September 28, 2007. The jury awarded an amount of $51,000. Counsel are directed to appear before this Court in Room 222 to discuss resolution of this issue on July 12, 2006 at 11:30 a.m. so this matter can be finally resolved and a judgment entered in accordance with the terms of this decision.

Dated: June 23, 2006

JUN 23 2006

J.S.C.

ALICE SCHLESINGER

FILED
JUL 06 2006
NEW YORK
COUNTY CLERK'S OFFICE