

Morris v Cattani

2007 NY Slip Op 32046(U)

July 11, 2007

Supreme Court, Richmond County

Docket Number: 0011842/2004

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 11842/2004
Motion No. 2**

KRISTINE MORRIS and GARY MORRIS,

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**ROBERT V. CATTANI, M.D., and ROBERT V.
CATTANI, M.D., P.C.,**

Defendants

The following items were considered in the review of this motion to set aside verdict

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Papers	3, 4
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Pursuant to CPLR § 2221, the defendant, Robert V. Cattani, M.D., renews his motion made at the close of the plaintiff's case for a judgment dismissing the plaintiff's claims against him, and for a verdict in his favor on the grounds that plaintiff has failed to establish a *prima facie* case. Defendant Dr. Cattani also moves to renew his motion made at the close of the entire case for a judgment dismissing the plaintiffs claims against him on the grounds the plaintiff has failed to prove her case by a preponderance of the evidence. Alternatively, Dr. Cattani moves pursuant to CPLR § 4404 to set aside the verdict and enter a judgment in his favor, notwithstanding the verdict based upon the alleged insufficient basis with the plaintiffs claim and that the verdict is inconsistent and contrary to the weight of the credible evidence. Finally, Dr. Cattani moves for an order pursuant to CPLR § 4404 seeking a new trial on the grounds that the interests of justice require a new trial because the court failed to permit Dr. Cattani to testify during his case; the failure of the court to provide the jury with an "error in judgment" charge; and the failure of the court to provide the jury with a "mitigation of damages" charge. Dr. Cattani also seeks, in the alternative to all of the

aforementioned, an order reducing the excessive damages as awarded by the jury. The plaintiff opposes this motion.

The trial of this action was commenced on February 5, 2007. On that day, opening statements were made by the attorneys and testimony was taken. The plaintiff, Kristine Morris, was the first witness called by the plaintiff's counsel followed by her husband, Gary Morris. On February, 6, 2007, Robert V. Cattani, M.D. testified. The next day on February 7, 2007, the jury heard testimony from the plaintiff's expert Richard Marfuggi, M.D., after which, the plaintiff rested. Upon completion of the plaintiff's case, the defendant moved to dismiss the plaintiffs' case for failure to prove a *prima facie* case, which this court did not grant.

On February 7, 2007, the defendant called as a witness, Dr. Robert Cucin whose testimony concerned his physical examination of the plaintiff Kristine Morris. On February 8, 2007 the defendant's expert, Robert Grant, M.D. testified. Summations and the jury charge took place on February 13, 2007.

On February 13, 2007, the jury returned its verdict against Dr. Robert Cattani. The question presented to the jury, which was agreed upon by counsel, was "Did Robert V. Cattani, M.D. deviate or depart from accepted medical practice by performing a circum areolar mastopexy upon Kristine Morris?" The jury found that Dr. Cattani was negligent in choosing to perform the procedure and that it was the proximate cause of the injury to Ms. Morris. The jury awarded Kristine Morris \$200,000.00 for past pain and suffering and a total of \$10,000.00 for 20 years future pain and suffering. The plaintiff did not make any award in favor of Gary Morris in connection with his loss of services claim.

In the instant motion, the defendant first moves for renewal of the oral applications made at the time of the plaintiff rested, as well as the close of the trial for judgment as a matter of law as the plaintiff allegedly failed to make out a *prima facie* case. It is well settled that in a medical malpractice action, a plaintiff must prove that the defendant physician departed from the controlling

standard of care (*Lyons v. McCauley* 252 AD2d 516 [2d Dept 1998]) and that the departure was the proximate cause of the plaintiff's injuries. (*Lynch v. Bay Ridge Obstetrical* 72 NY2d 632 [1988]). The defendant argues that the plaintiff failed to make a prima facie case against Dr. Cattani at the time they rested, and at the close of the trial. This court disagrees. The plaintiff's expert, Dr. Marfuggi, testified as to the standards of care and how, in his opinion, Dr. Cattani departed therefrom; and testified that Dr. Cattani's departure was a substantial factor in bringing about the plaintiff's injury, to wit: bilateral hypertrophic areolar scars.

Specifically, Dr. Marfuggi testified that in some patient cases, the choice of a circumareolar mastopexy is appropriate and reasonable, however, not in the plaintiff's case. Specifically, the degree of ptosis as measured by Dr. Cattani called for a modified version of the surgery and the failure to perform such modification and the utilization of an unmodified circumareolar mastopexy caused the scarring of Kristine Morris's breast.

Moreover, the fact that Dr. Robert Grant, the defendant's expert testified that Dr. Cattani did not depart from good and accepted medical practices in his performance of the circumareola mastopexy negates the defendant's argument in that it creates a question of fact for the jury to decide thereby removing entitlement by Dr. Cattani for judgment as a matter of law at the time the plaintiff rested and at the close of evidence in this action. Accordingly, these aspects of the defendant's motion are denied.

The defendant also moves this court to either set aside the jury verdict and direct that judgment be entered in favor of Dr. Cattani notwithstanding the jury verdict or in the alternative setting this action down for a new trial. CPLR § 4404 states that:

“After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the Court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or, it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the Court.”

The defendant argues that the in viewing the evidence in the light most favorable to the plaintiffs, there is no valid line of reasoning or permissible inference which could have led the jury to reach a verdict against Dr. Cattani. Specifically, the defense counsel states in his affirmation “ There was no evidentiary basis for the jury concluding that Dr. Cattani departed from any medical standards with regard to the plaintiff’s circum-areola mastopexy.” This court disagrees.

“The standard for determining whether a jury verdict is against the weight of the evidence is whether the evidence so preponderated in favor of the movant that the verdict could not have been reached on any fair interpretation of evidence” (*Harris v. Marlow*, 18 A.D.3d 608 [2d Dept 2005]). Here, it cannot be said that the jury's determination was contrary to any fair interpretation of the evidence. Contrary to the defendant's contention, the jury's verdict on the issue of liability was based on a fair interpretation of the evidence (*Fryer v. Maimonides Med. Ctr.*, 31 AD3d 604 [2d Dept 2006]; *Speciale v. Achari*, 29 AD3d 674 [2d Dept 2006]). “The disputed testimony of the parties and their medical experts presented issues of credibility which were for the jury to resolve” (*Gerdik v. Van Ess*, 5 AD3d 726 [2d Dept 2004]; *Texter v. Middletown Dialysis Ctr., Inc.*, 22 AD3d 831 [2d Dept 2005]). Thus, the liability, as well as damages, verdict was not against the weight of the evidence and that aspect of the defendants motion is denied.

The defendant also moves for a new trial pursuant to CPLR § 4404 alleging that it was reversible error for this court to prohibit Dr. Cattani from testifying during his case. On the plaintiff’s case, Dr. Cattani was examined by counsel for plaintiff, as well as counsel for the defendant. Counsel for the defendant was afforded the opportunity to reserve Dr. Cattani’s direct testimony for the time when he put on the defendants case; he did not. The instance where the defendant is was not permitted to testify was following the testimony of the plaintiff’s expert, counsel for the defendant sought to place Dr. Cattani on the stand and inquire “Dr. Cattani, did you depart by performing a circum-areola mastopexy, or was your choice in performing that circum-areola mastopexy a departure, as indicated by Dr. Marfuggi? And just have him give some brief explanation as to either why, why not, yes or no, or why he agrees or disagrees.”

It is well settled that a trial court has great discretion in controlling the conduct of the trial including the scope of the redirect examination. (*Feldsberg v. Nitchke* 49 NY2d 636 [1980]). Here, the court denied the defendants request to allow him to re-testify and stated that “when we started this trial I advised you, as I do every defendant’s lawyer that you have the choice to either put your client after the plaintiff puts him on or reserve and then have a full examination.” The court did not allow the defendant to re-testify after he his counsel had already fully examined him. Accordingly, that aspect of the defendants motion is denied.

The defendant also moves that a new trial is necessitated based upon the court’s failure to provide the jury with the “error in judgment” charge. Section 2:150 of the Pattern Jury Instructions provides that “A doctor is not liable for an error in judgment if he, does what he, decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances.” It is well settled that “an error in judgment in choosing among medically acceptable alternatives is not a basis for liability if defendant’s exercise of professional judgment was within the range of accepted medical standards.” (*Oelsner v. State* 66 NY2d 636 [1985]). However, in this action, Dr. Cattani testified that the only type of mastopexy he would do for Kristine Morris was the procedure he performed, the circum-areolar mastopexy. When questions about a number of other acceptable procedures, Dr. Cattani stated that he did not chose any of them. Moreover, Dr. Cattani stated that he chose the one and only method he would use without any consideration of other methods. There was no testimony by the defendant that there were medically acceptable alternatives from which to chose. In sum, his testimony was that it was the circum-areolar mastopexy or nothing.

The Court of Appeals held in *Nestorowich v. Ricotta* (97 NY2d 393) that “a distinction must therefore be made between an ‘error in judgment’ and a doctor’s failure to exercise his or her best judgment.” In the instant action, the plaintiff’s expert unequivocally states that the circum-areola mastopexy was the wrong procedure for the plaintiff. There is no evidence presented by the defendants that this procedure was one of many that could have been performed upon the plaintiff. Rather the testimony elucidated by the defendant is that this procedure is the only one that could

have been performed. There was no error in judgment, just the defendant's failure to use his best judgment and this aspect of the defendant's motion is denied.

The defendant also argues that the defendant is entitled to a new trial for the court's failure to provide the jury with a "mitigation of damages" charge. Pattern jury instruction 2:325 states:

"A person who has been injured is not permitted to recover for damages that could have been avoided by using means which a reasonably prudent person would have used to (cure the injury, alleviate the pain). The defendant claims that if the plaintiff submitted to an operation her (injury, pain) would be (completely cured, greatly alleviated) and that such an operation is not dangerous.

The plaintiff claims that she declined to have the operation because it was (dangerous, too expensive). The burden of proving that the plaintiff failed to avail herself of a reasonably safe procedure which would have (completely cured, greatly alleviated) her injury is on the defendant. If you find that the plaintiff is entitled to recover in this action, then in deciding the nature and permanence of her injury and what damages she may recover for the injury, you must decide whether in refusing to have an operation the plaintiff acted as a reasonably prudent person would have acted under the circumstances. In deciding that question you will take into consideration the evidence concerning the nature of the operation, the expense of such an operation and whether the plaintiff had sufficient funds or had insurance to meet that expense, the extent to which such an operation involves danger to the plaintiff, and the results to be expected from it. If you find that in deciding not to have an operation the plaintiff acted as a reasonably prudent person would have acted then the plaintiff is entitled to recover for her injuries, as you find them to be, without regard to the possibility of an operation. If, however, you find that the operation is one that a reasonably prudent person would submit to and that the operation would (cure the injury, relieve the pain), you will take that fact into consideration in arriving at the amount of damages that you award."

There has been conflicting testimony by the experts as to what type of surgical procedure would attempt to remove or lighten the plaintiff's bilateral areolar scarring. Dr. Cattani claimed that a scar revision would take two or three procedures to correct the plaintiff's hypertrophic scarring. In fact, after Dr. Cattani performed the circum-areolar mastopexy, he debrided the plaintiff's wounds and ultimately injected Kenalog -10 into the keloid scars. The plaintiff continued treatment with Dr. Cattani from July 2002 through September 2002 in an effort to correct her scarring. To require the plaintiff to undergo additional surgery, after the experiences she has had with the very procedure

causing the scarring is patently unreasonably. The mitigation charge was properly not given in this action.

Finally, the court finds that the defendant's request to reduce the damages award as excessive is without merit. The award for past pain and suffering is not simply for the scarring resulting from the defendant's malpractice but for the breast pain, oozing pus like material, the numerous debridements, and the kenalog - 10 injections. The award of \$210,000 does not shock the conscience of the court and is not unreasonable. Therefore, this court will not reduce the amount of the judgment.

Accordingly, it is hereby:

ORDERED, that the defendant's motion is denied in its entirety; and it is further

ORDERED, that the clerk shall enter judgment in favor of the plaintiff in the amount of \$210,000.00, together with costs of suit.

ENTER,

DATED: July 11, 2007

Joseph J. Maltese
Justice of the Supreme Court