Thompson v Parhiscar
2007 NY Slip Op 33322(U)
October 10, 2007
Supreme Court, New York County
Docket Number: 0116457/2004
Judge: Joan B. Carey
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[* 1] SCANNED ON 10/16/2007

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

PRESENT: Honorable Joan B. Carey, Justice

PART 40 D

BRIAN THOMPSON

Plaintiff,

-v-

AFSHIN PARHISCAR, LELA WEEMS, VINCENT LEE, THE LONG ISLAND COLLEGE HOSPITAL, and CONTINUUM HEALTH PARTNERS, INC.,

Defendants.

Index No.: 116457/04
MOTION DATE
MOTION SEQ. NO. 05
MOTION CAL. NO.

The following papers, 1- 14, were read on this motion by plaintiff for an Order , pursuant to Article 44 of the CPLR, setting aside the jury verdict and granting judgment in favor of plaintiff against Dr. Lela Weems and directing a trial of damages only, or, in the alternative, setting aside the jury verdict and directing a new trial on both liability and damages.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits -Memorandum Of Law	1-12
Opposition -	13-14
Replying Affidavits	

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Cross-Motion: ☐ Yes ■ No

In the instant medical malpractice action, the plaintiff sustained facial burns while undergoing a surgical procedure on his nose, on April 7, 2004 at Long Island College Hospital. The surgical procedure was performed by plastic surgeon, Afshin Parhiscar. Defendant Dr. Lela Weems was the attending anesthesiologist, in connection with the subject procedure. This action proceeded to trial on May 9, 2007, with Dr. Weems as the sole defendant.[1] The trial concluded on May 17, 2007,with a jury verdict in favor of defendant Dr. Lela Weems. Plaintiff presently moves for an order setting aside the jury verdict and granting judgment in favor of plaintiff against Dr. Lela Weems, and directing a trial of damages only, or, in the alternative, setting aside the jury verdict, and directing a new trial on both liability and damages.

[1] Prior to the trial of this action, plaintiff settled with defendants Dr. Parhiscar and Long Island College Hospital, and discontinued the action as against Vincent Lee and Continuum Health Partners.

Plaintiff initially sets forth that the jury's verdict, specifically the jury's answer to the first interrogatory on the verdict sheet[2], was against the weight of the evidence, and in contravention of Dr. Weems' own trial testimony. Plaintiff further sets forth that he is entitled to judgment in his favor as a matter of law. Notwithstanding, plaintiff does not make any arguments relating to whether the jury's finding with respect to the first interrogatory was against the weight of the evidence or not based upon legally sufficient evidence, nor does plaintiff address any evidence offered at trial to support his position. In any event, the court denies this portion of plaintiff's motion.

"A defendant's verdict in a tort action should not be set aside as against the weight of the evidence unless the jury could not have reached its verdict on any fair interpretation of the evidence." *White v. New York City Transit Authority*, 40 AD3d 297 [1st. Dept. 2007], see also *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]; *McDermott v.. Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st. Dept. 2004]; *Jamal v. New York City Health & Hosps. Corp.*, 280 AD2d 421, 422 [1st. Dept. 2001]; *Nicastro v. Park*, 113 AD2d 129, 134 [2d. Dept. 1985]. "In reviewing the record to ascertain whether the verdict rests on a fair interpretation of the evidence, great deference must be given to the fact-finding function of the jury." *White v. New York City Transit Authority, supra; see also Nicastro v. Park, supra.*

The verdict in favor of defendant Dr. Weems is not against the weight of the evidence. The jury's verdict in this action, which rested in large measure upon the jury's assessment of the conflicting expert evidence, as well as the testimony of Dr. Weems, and the deposition transcript of Dr. Parhiscar, is supported by a fair interpretation of the evidence. Plaintiff's expert, Dr. Norman Ernst, testified that Dr. Weems departed from good and accepted medical practice by administering supplemental oxygen through a nasal cannula device to the mouth of plaintiff during the subject surgical procedure, without first knowing whether an explosion risk was presented by the use of an electrocautery device, in connection with the procedure. Notwithstanding, defendants experts, Dr. Sheldon Deluty and Dr. John Sherman, both offered testimony to the contrary. Dr. Deluty, an anesthesiologist, testified that Dr. Weems did not depart from good and accepted anesthesiological practice by not asking Dr. Parhiscar what instruments he would be using in connection with the subject procedure. Dr. Sherman, who is a plastic surgeon, testified that it is the responsibility of the surgeon to inform an anesthesiologist whether or not an electrocautery device is to be used in connection with a procedure. Furthermore, although plaintiff argues that the jury's answer to the first interrogatory on the verdict sheet was contradicted by Dr. Weems' own trial testimony, plaintiffs do not point to any testimony offered by Dr. Weems, as none existed, wherein she states that it was a departure from good and accepted medical practice to administer supplemental oxygen, without first knowing that an electrocautery device was to be used during the subject procedure.

Plaintiff is certainly not entitled to judgment in his favor as a matter of law. Based upon the evidence adduced at trial, it cannot be said that there exists no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury. *Nicastro v Park*, 113 AD2d 129, 132 [2d Dept. 1986]; *see e.g. Day v Hosp. for Joint*

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[2] The first interrogatory on the verdict sheet was as follows: "Did Dr. Lela Weems depart from good and accepted medical practice by administering supplemental oxygen without first knowing that an electro-cautery device was to be used during Brian Thompson's facial surgery of April 7, 2004?" The jury answered "No" to this question.

Diseases Orthopaedic Institute, 11 AD3d 505 [2d Dept. 2004]; *Ramos v Shah*, 276 AD2d 767 [2d Dept. 2000]. Drs. Deluty and Sherman proffered sufficient evidence, at trial, from which the jury could rationally have concluded that Dr. Weems did not depart from good and accepted medical practice by administering supplemental oxygen, without first knowing that an electrocautery device was to be used during Brian Thompson's facial surgery of April 7, 2004. It appears that the jury took the position that the subject accident was caused solely by the negligence of Dr. Parhiscar in using the electrocautery device in close proximity to the flow of supplemental oxygen while performing the surgery, which is a rational conclusion based upon the evidence presented at trial.

Plaintiff also appears to argue that the jury's verdict should be set aside because the evidence demonstrates that Dr. Weems departed from good and accepted medical practice by taping the surgical drapes closed prior to the cessation of the administration of supplemental oxygen. According to plaintiff, such actions on the part of Dr. Weems constituted a departure from good and accepted practice because they erroneously signaled to the surgeon that the plaintiff was ready for surgery, despite the fact that supplemental oxygen was still being administered. This argument is without merit. There was absolutely no expert testimony, or any other evidence for that matter, offered during the trial that would indicate that it is a departure from good and accepted medical practice to tape surgical drapes closed while supplemental oxygen is being administered. At trial, plaintiff's counsel did not ask any of the witnesses whether such actions constituted a departure from good and accepted medical practice, nor did plaintiff's counsel seek to have such a departure be put on the verdict sheet. It appears that plaintiff has simply concocted a new theory of liability after scouring the testimony of the defendant, and seeks to use it as a basis to set aside a unanimous jury verdict that was unfavorable to plaintiff.

Plaintiff next argues that the court erred in denying plaintiff's request to charge the jury on the law of *res ipsa loquitur*. "Where the actual or specific cause of an accident is unknown, under the doctrine of *res ipsa loquitur* a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation it." *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489 [1997], citing *Abbott v. Page*, 23 NY2d 502 [1969]; Restatement [Second] of Torts §328D, comments *a, b.* Plaintiff's proof must establish the following three elements to invoke the doctrine of *res ipsa loquitur*: (1) the accident must be of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality causing the accident was within the defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution by plaintiff. *See Kambat, supra; see also Tora v. GVP AG,* 31 AD3d 341 [1st Dept. 2006]; *Banca Di Roma v. Mutual of America Life Ins. Co.,* 17 AD3d 119 [1st Dept. 2005]. If a plaintiff establishes these conditions, a prima facie negligence case exists and plaintiff is entitled to have *res ipsa loquitur* charged to the jury. *See Kambat, supra*.

The court denied plaintiff's request to charge the jury on the law of *res ipsa loquitur* because in the present case the actual cause of plaintiff's accident was known. The evidence presented to the jury made it quite clear that the fire that erupted during the course of plaintiff's surgery was caused by the use of an electrocautery device, while supplemental oxygen was being administered to the plaintiff. The court acknowledges that the doctrine of res ipsa loquitur has been held to be applicable in situations where a patient awakes after surgery to discover an injury not normally connected to the surgery, such as the absence of front teeth after podiatric surgery (*Kerber v. Sarles*, 151 AD2d 1031 [4th Dept. 1989]; the infliction of blood blister on bottom of a patient's right foot during or shortly after undergoing free-tissue transfer of his left foot (*DiGiacomo v. Cabrini Medical Center*, 21 AD3d 1052 [2d Dept. 2005]); and head and neck injuries sustained

by patient after falling off an operating table while unconscious from anesthesia (*Thomas v. New York University Medical Center*, 283 AD2d 316 [1st Dept. 2000]). However, in the present action, despite the fact that plaintiff was unconscious from anesthesia at the time of the subject accident, the specific cause of his injuries are known to him.

Moreover, although the subject accident is of a kind that ordinarily does not occur in the absence of negligence, and was not due to any voluntary action or contribution by plaintiff, the evidence demonstrates that the instrumentality causing the accident was *not* within the defendant's exclusive control. As a result, plaintiff has not established all three elements required to invoke the doctrine of *res ipsa loquitur*. As stated above, the evidence presented at trial clearly establishes that Dr. Parhiscar was operating the electrocautery device while performing the subject surgery on plaintiff, and that it was the use of that device coupled with the administration of supplemental oxygen by the defendant that caused the fire to break out during the procedure. Accordingly, the court did not err in denying plaintiff's request to charge the jury on the law of *res ipsa loquitur*.

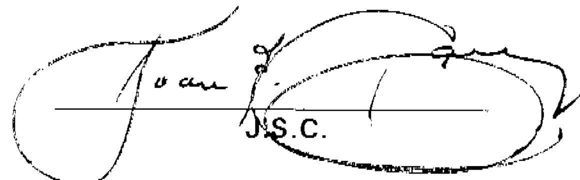
Lastly, plaintiff argues that the court erred in refusing to strike portions of the testimony of defendant's surgical expert, Dr. Sherman. According to plaintiff, the testimony offered by defendant's surgical expert relating to the manner in which he manages his operating room for his own surgical procedures was prejudicial and generally irrelevant, as these surgical procedures do not constitute a generally accepted standard of care. Dr. Sherman has been a board certified plastic surgeon for approximately 23 years, has his own private practice, is an assistant clinical professor of surgery at Cornell Medical School, is affiliated with a number of area hospitals, including New York-Presbyterian/Weill Cornell Hospital, Lenox Hill Hospital, Greenwich Hospital, has been published approximately 23 times (in both peer review journals and textbook chapters) and is President of the American College of Surgeons of Greater New York. He testified that in his practice he uses an electrocautery device while performing plastic surgery on a patient's face, on a daily basis, and, in fact, had done so immediately prior to appearing in court to testify. As such, Dr. Sherman is undoubtedly qualified to testify as an expert witness in connection with the standard of care of a plastic surgeon in an operating room, and, more specifically, the proper procedures to be used when utilizing an electrocautery device..

Although Dr. Sherman, while testifying with respect to the proper procedures to be followed by a plastic surgeon while performing surgery to a patient's nose, couched some of his responses in the context of what he does in such a situation, it was quite clear from his testimony that such procedures represented the standard of care in the medical community. Throughout the course of his testimony he stated that deviations from these procedures constituted departures from the "community standard" or from "accepted surgical practice." In fact, when questioned by plaintiff's counsel during cross-examination as to whether his testimony on direct questioning related only to what *he* believes to be the proper procedures in managing *his* operating room for *his* own surgeries, Dr. Sherman stated that his answers were based on community standards. Dr. Sherman testified that surgeons that do not follow those procedures with respect to the use of an electrocautery device that he outlined before the jury, during his direct examination, were in breach of generally accepted medical standards for surgeons, as opposed to some higher standard created by Dr. Sherman, as plaintiff seems to suggest. Accordingly, the court did not err in refusing to strike portions of Dr. Sherman's testimony.

Based on the foregoing, it is hereby

ORDERED plaintiff's motion to set aside the verdict of the jury entered on May 17, 2007 is denied.

Dated: 10/10/2007


J.S.C.

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