

Raynor v St. Vincent's Hosp. and Med. Ctr.
2007 NY Slip Op 33370(U)
October 15, 2007
Supreme Court, New York County
Docket Number: 0122405/2001
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BRANSTEN
Justice

PART 6

LAUREN RAYNOR

INDEX NO. 122405/01
MOTION DATE 10-7-07
MOTION SEQ. NO. 8
MOTION CAL. NO. _____

ST. VINCENT'S HOSPITAL

The following papers, numbered 1 to ~~45~~ were read on this motion to/for set aside verdict

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2, 3, 4
5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
OCT 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10-15-07

Eileen Bransten
HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

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

-----X
LAUREN RAYNOR, Individually and as Administratrix
of the Estate of GREGORY K. RAYNOR, a/k/a
GREGORY RAYNOR, deceased,

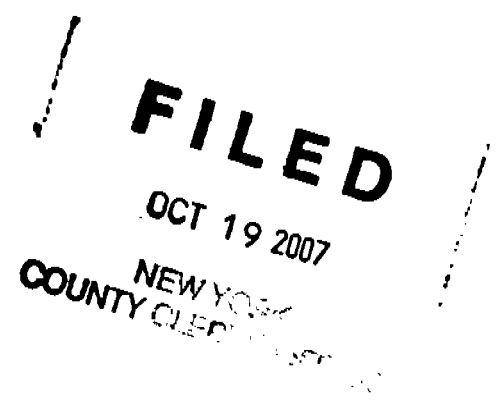
Plaintiffs,

-against-

Index No.: 122405/01
Motion Date: 06-07-07
Motion Sequence No.: 08

ST. VINCENT'S HOSPITAL AND MEDICAL
CENTER, MICHAEL J. BLECKER, M.D., NINA S.
FALLICK, M.D., ALICE C. FURMAN, M.D., HUNG-
SAM LEE, D.O., GENE R. PESOLA, M.D., CRAIG
TENENBAUM, M.D., ASSOCIATES IN INTERNAL
MEDICINE, P.C., MANHATTAN PRIMARY CARE,
BIGELOW PHARMACY CO., INC., BIGELOW
CHEMISTS, INC., and JOHN DOE DOCTORS 1-5
(fictitious names),

Defendants.



-----X

EILEEN BRANSTEN, J.:

In this wrongful death, medical malpractice, and negligence action, plaintiff Lauren Raynor ("Ms. Raynor" or "Plaintiff") moves, pursuant to CPLR 4404(a), for an order setting aside the jury verdict in favor of defendants Bigelow Pharmacy Co., Inc. ("Bigelow"), Dr. Gene R. Pesola, M.D. ("Dr. Pesola"), St. Vincent's Hospital and Medical Center ("St. Vincent's"), and Dr. Alice C. Furman, M.D. ("Dr. Furman"), and directing a new trial or a judgment notwithstanding the jury verdict.

Background

On July 28, 1998, Gregory K. Raynor ("Mr. Raynor") presented at the office of Dr. Nina S. Fallick, M.D. ("Dr. Fallick"), complaining of epigastric pain. He also reported having had an asthma attack on an airplane because a dog, to which he was allergic, was in the cabin. Dr. Fallick concluded that Mr. Raynor had a gastric condition and allergic asthma that was stable. She prescribed Pepcid for the epigastric pain, Claritan for allergies, Vanceril double strength as a maintenance medication, and the rescue inhaler, Albuterol (a medicine used to treat bronchospasm associated with reversible obstructive airway disease such as asthma). Several refills of Albuterol were provided. Dr. Fallick also allegedly instructed Mr. Raynor to return to her office in a year for a routine physical.

Through the end of 1998, the Albuterol prescription from Dr. Fallick was filled six times at Bigelow. On January 4, 1999, Mr. Raynor presented at the emergency room of St. Vincent's with acute asthma symptoms. He was given Albuterol nebulizer treatments, another prescription for Albuterol (which he filled at Bigelow on January 25, 1999), and discharged. On February 17, 1999, defendant Dr. Furman, who works with Dr. Fallick, renewed Mr. Raynor's prescriptions, and allegedly told Mr. Raynor to return to the office when the medication was renewed.

According to the evidence, between February 17, 1999, and August 19, 1999, Mr. Raynor filled the prescription for Albuterol nine times at Bigelow. Bigelow records reflect

that Dr. Furman issued prescriptions for Albuterol on August 19, 1999, which had one refill, and on September 24, 1999, which had five refills. Dr. Furman testified that the August 19, 1999 prescription was with one refill because the decedent had not been to her office for examination for more than a year. She believes she gave the decedent the September 24, 1999 prescription with five refills, based on custom and practice, only after he had made an appointment to come into the office for examination. Thus, Mr. Raynor filled Albuterol prescriptions authorized by Drs. Fallick and Furman approximately 17 times, and filled additional prescriptions for Albuterol issued by the emergency-room doctors.

On November 5, 1999, Mr. Raynor went to the emergency room at St. Vincent's again because of his asthma. Defendant Dr. Lee treated Mr. Raynor. Among other things, Dr. Lee administered Albuterol nebulizer treatments. Mr. Raynor was discharged with another prescription for liquid Albuterol to be used with a nebulizer at home, and was instructed to follow up with his primary-care physician.

Mr. Raynor returned to the emergency room at St. Vincent's two days later on November 7, 1999. He was treated by defendant Dr. Pesola and was again discharged with instructions to follow up with his physician. Although his condition had improved, Mr. Raynor returned to the St. Vincent's emergency room a few weeks later on November 24, 1999. Dr. Pesola again attended to Mr. Raynor. After rendering treatment, Dr. Pesola provided new prescriptions for, among other things, liquid Albuterol, and once again

instructed Mr. Raynor to see his primary-care physician. Mr. Raynor filled the prescriptions that very day. According to Ms. Raynor, his condition did not improve significantly after the November 24, 1999 emergency-room visit.

On December 2, 1999, Mr. Raynor passed away, reportedly from acute and chronic bronchial asthma.

In November 2001, Ms. Raynor commenced this medical malpractice and wrongful death action, alleging that all of the defendants committed malpractice by, among other things, failing to properly evaluate, diagnose and treat Mr. Raynor, as well as repeatedly and excessively renewing prescriptions for Albuterol. Plaintiff maintained that these departures from accepted medical and pharmacological practice caused Mr. Raynor injury, and ultimately resulted in his death.

At trial, the jury found for the defendants. Plaintiff now seeks a new trial or directed verdict, arguing that this Court committed reversible error in its jury charge and that the verdict as to Dr. Furman was against the weight of the evidence.

Analysis

Bigelow Pharmacy Co., Inc.

At trial, Plaintiff attempted to show that Bigelow, between February 17, 1999 and November 23, 1999, filled Mr. Raynor's prescriptions for Albuterol issued by Dr. Furman

more frequently and more times than allowable. During that time, Bigelow also filled a prescription for Albuterol issued by a different physician as well. Plaintiff presented evidence that Mr. Raynor's excessive use of Albuterol was an indication that his asthma condition was worsening, and argued that Bigelow's failure to note and report such over-usage contributed to his death.

The Court heard arguments, and received submissions, on the appropriate jury charge with regard to Bigelow. Plaintiff advocated the supplementation of the generic jury charge for negligence with what she argued was a specific standard of care delineated in *Hand v. Krakowski*, 89 A.D.2d 650, 651 (3rd Dept. 1982). In the context of a pretrial motion for summary judgment, the court in *Hand* stated that the:

“standard of care which is imposed on a pharmacist is generally described as ordinary care in the conduct of his business. The rule of ordinary care as applied to the business of a druggist means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers involved and the consequences which may attend inattention.”

Id. (citation omitted).

This Court refused to add the language from *Hand* to the applicable pattern jury instruction and Plaintiff now argues that was reversible error.

There was no error.

At the outset, the language quoted from *Hand* is *dicta* and does not establish a heightened duty of care. The decisive issue in *Hand* was whether a motion for summary

judgment made prior to any disclosure was appropriate. *Hand* did not specifically address the appropriate standard of care applicable to pharmacies. *See, Hand v. Krakowski*, 89 A.D.2d, at 650.

In any event, the language in *Hand* derives from cases concerning knowing dispensation of dangerous or counter-indicated drugs that result in injury. *See, Bichler v. Willing*, 58 A.D.2d 331, 335 (1st Dept. 1977) (pharmacist only required to give warning "if he has knowledge of the dangerous ingredient or side effect, or if by the application of reasonable, developed, human skill and foresight he should have such knowledge"); *Ullman v. Grant*, 114 Misc. 2d 220, 221 (Sup. Ct, Kings County 1982) ("pharmacist is not negligent unless he knowingly dispenses a drug that is inferior or defective"); *see also, Willson v. Faxon, Williams & Faxon*, 208 N.Y. 108, 113 -114 (1913) ("basis of the action is the sale of a poison to a person who called for a harmless drug").

Here, the action was not based on the pharmacy's alleged knowing dispensation of a dangerous drug; rather, it was premised on the theory that Bigelow failed to: surmise, despite the issuance of a new prescription in September of 1999, that Mr. Raynor was not seeing his doctor; and its alleged failure to diagnose and inform Mr. Raynor's physicians of, possible

overuse of a non-lethal drug, which may have alerted the physicians to a worsening condition.*

Additionally, Plaintiff has not established, or, indeed, argued, that the jury charge given was itself erroneous; rather she urges that the language from *Hand* should have been used to supplement that charge. "There is no authority to suggest that the more specific charge requested by plaintiff"--even assuming that it was proper, and for the reasons stated above it was not--"was necessary." *Ortiz v. Variety Poly Bags, Inc.*, 19 A.D.3d 239, 240 (1st Dept. 2005).

Dr. Gene R. Pesola, M.D. and St. Vincent's Hospital and Medical Center

With regard to Dr. Pesola and St. Vincent's, Plaintiff moves for a new trial or judgment notwithstanding the verdict, urging that this Court erroneously gave the jury an "error in judgment" instruction. Plaintiff maintains that Dr. Pesola's conflicting testimony, and the facts of the case, both indicate that such an instruction should never have been given.

The basic rule is that a doctor using his or her best judgment to choose between medically acceptable alternatives does not incur liability solely for mere errors in judgment. *Nestorowich v. Ricotta*, 97 N.Y.2d 393 (2002). Where alternative procedures are available

* The record establishes that Bigelow did, indeed, call the decedent's physicians to approve the very refills for which Plaintiff wishes to hold them liable. *See*, Trial Transcript, at 412-415.

to a physician, any one of which is medically acceptable and proper under the circumstances, there is no negligence in choosing one option rather than another. *See, e.g., Henry v. Bronx Lebanon Med. Ctr.*, 53 A.D.2d 476 (1st Dept. 1976). The "error in judgment" charge implies the exercise of some professional judgment in electing among medically acceptable alternatives. *Spadaccini v. Dolan*, 63 A.D.2d 110, 116 (1st Dept. 1978); *see, also, Martin v. Lattimore Road Surgicenter*, 281 A.D.2d 866 (4th Dept. 2001).

Plaintiff's first argument--that Dr. Pesola's testimony may have been conflicting regarding whether he considered hospitalizing Mr. Raynor--does not provide a basis for a new trial or a directed verdict. Plaintiff was free to focus on Dr. Pesola's allegedly conflicting testimony in her closing. Here, moreover, even assuming that the evidence in Plaintiff's favor is strong, Dr. Pesola's testimony could fairly have been interpreted to conclude that he made a medical decision to treat the decedent by either: (1) discharge after a course of systemic steroids, and a prescription for oral steroids; or (2) hospitalization and continuous administration of systemic steroids only.

The second of Plaintiff's arguments is also unavailing. Plaintiff suggests that Dr. Pesola did not choose among those medical alternatives because he did not originally suggest in his testimony that hospitalizing the decedent was a medically acceptable alternative. Plaintiff's own expert, however, asserted that there were two alternatives (hospitalization and systemic steroids versus systemic steroids, an oral-steroids prescription, and discharge). *See,*

Trial Transcript, at 809:7-19. That Plaintiff's expert would have made a different choice than Dr. Pesola, or, indeed, Dr. Pesola's expert, does not indicate that there was no choice. Rather, it reinforces that there were medical alternatives available, and Dr. Pesola chose one. As such, an "error in judgment" instruction was not inappropriate.

Dr. Alice C. Furman, M.D.

Plaintiff moves for a new trial and/or judgment against Dr. Furman. Specifically, Plaintiff maintains that the jury verdict that Dr. Furman did not "fail to recognize and respond to the Gregory Raynor's usage of Albuterol inhalers" should be set aside as against the weight of the evidence.

A court's "discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict." *Nicastro v. Park*, 113 A.D.2d 129, 133 (2d Dept. 1985); *see also, Cholewinski v. Wisnicki*, 21 A.D.3d 791, 791 (1st Dept. 2005). Thus, a "verdict should not be set aside unless the jury could not have reached its verdict on any fair interpretation of the evidence." *O'Mara v. City of New York*, 31 A.D.3d 340, 341 (1st Dept. 2006) (citations omitted), *lv. denied* 7 N.Y.3d 717 (2006); *see also, Won Sok Kim v. New York City Tr. Auth.*, 29 A.D.3d

984, 985 (2d Dept. 2006); *Yau v. New York City Tr. Auth.*, 10 A.D.3d 654 (2d Dept 2004), *lv. denied* 4 N.Y.3d 701 (2004).

In making such a determination, this Court is required to give great deference to the fact-finding function of the jury, as the Court should not substitute its own assessment of the witnesses' credibility for the jury's assessment. *See, Cholewinski v. Wisnicki*, 21 A.D.3d, at 791; *see also, McDonagh v. Victoria's Secret*, 9 A.D.3d 395, 396 (2d Dept. 2004); *Burney v. Raba*, 266 A.D.2d 174, 175 (2d Dept. 1999) (expert's credibility solely within the province of the jury); *Gray v. McParland*, 255 A.D.2d 359, 360 (2d Dept. 1998). Moreover, particular deference is to be accorded a jury verdict in favor of a defendant in a tort action, particularly if resolution turns on evaluation of conflicting expert testimony. *Cholewinski v. Wisnicki*, 21 A.D.3d, at 791.

Plaintiff argues that there is nothing in Dr. Furman's medical charts, or in the record, to indicate that the decedent made an appointment with her prior to her writing a prescription with five refills on September 24, 1999. Moreover, Plaintiff points out that Dr. Furman gave conflicting testimony as to the reason that she gave the refill. Finally, she argues that without positive testimony that Dr. Furman spoke with the decedent, the jury could not reasonably have found that she recognized and responded to the decedent's over-use of Albuterol.

Plaintiff's arguments are unavailing. Dr. Furman testified to her belief, based upon her office custom and practice, that if the decedent received a prescription with five refills

in September of 1999, that he would had to have made an appointment to come to her office for examination. Mr. Eichel of Bigelow testified that the pharmacy called Dr. Furman's office for a refill on September 24, 1999, and that the office called back later that day to authorize the prescription. Trial Transcript, at 271-272. Of that September 24, 1999 refill, Dr. Furman testified that "[i]f I gave him the one for five refills it would have been because he either had an appointment scheduled or made an appointment before those refills came in, because that would – because that was our office policy at that particular time." *Id.*, at 414:10-14.

A fair interpretation of this evidence is that Dr. Furman provided a prescription for one plus one refill on August 19, 1999 because Mr. Raynor had no appointment, and that Dr. Furman provided a prescription for one plus five refills on September 24, 1999 only after Mr. Raynor made an appointment. A trial court is empowered to set aside a jury verdict only once it determines that there is no valid line of reasoning and permissible inferences that could possibly lead a rational person to the conclusion reached by the jury. Here, that is clearly not the case.

With regard to Plaintiff's allegation that the testimony of Dr. Furman is contradictory, it is not for a court to substitute its evaluation of the credibility of witnesses for that of the jury. *See, Lewis v. Progressive Agency*, 6 A.D.3d 293, 293-294 (1st Dept. 2004). Nor should a trial court supplant a jury's fact-finding process with its own independent findings. Thus,

a "motion to set aside a verdict as against the weight of the evidence should only be granted where the verdict is palpably wrong and the jury could not have reached its conclusion upon any fair interpretation of the evidence. While a trial court may view the evidence differently, it may not substitute such alternative evaluation unless these exacting standards are first met." *Cholewinski v. Wisnicki*, 21 A.D.3d 791, 791 (1st Dept. 2005) (citations omitted).

The jury could have reasonably reached the conclusion that Dr. Furman recognized and responded to the decedent's over-use of Albuterol if the jury accepted that on September 24, 1999, Dr. Furman's office contacted the decedent and extracted assurances that he would come in for an examination. This interpretation of the evidence would not have been entirely untenable, especially in light of evidence that Mr. Raynor was instructed to see his primary-care physician on November 5, 7, and 24, and failed to do so.

Accordingly, it is ORDERED that Plaintiff's CPLR 4404(a) motion for judgment and/or new trial is DENIED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 15, 2007

ENTER



Hon. Eileen Bransten

FILED
OCT 19 2007
NEW YORK
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