

Chambers v Rock

2008 NY Slip Op 30191(U)

January 18, 2008

Supreme Court, New York County

Docket Number: 0116705/2005

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM PART 13
Justice

Malvina Chambers and Lance Chambers

INDEX NO. 116705 /05

MOTION DATE 11/15/07

MOTION SEQ. NO. 002

MOTION CAL. NO. 21

FILED
JAN 24 2008
NEW YORK
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Dr. Gregg Rock

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiffs, pursuant to CPLR 4404, to set aside as against the weight of the evidence the jury verdict in favor of defendant and to direct a verdict in favor of plaintiffs or, alternatively, to grant plaintiffs a new trial, is denied.

On December 3, 2004, defendant Dr. Gregg Rock, a podiatrist, performed surgery on the first and second toes of plaintiff Malvina Chambers's left foot. The surgery consisted of a bunionectomy on the big toe and a peg 'n hole arthrodesis on the second toe to correct a hammertoe condition. At that time Mrs. Chambers was a non-diabetic 50 year-old, who had been cleared for the surgery by her family doctor. Six days later on December 9, 2004, at Mrs. Chambers's first post-operative visit it was discovered that the tip of her second toe had gangrene. Dr. Rock immediately referred his patient to Dr. Giangola, the chief of vascular surgery at St. Luke's-Roosevelt Hospital, who amputated the toe in February 2005.

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

In bringing this podiatric malpractice action, plaintiffs alleged that Dr. Rock's negligence in bandaging Mrs. Chambers's toes after performing the surgery caused the big toe to become infected and the second toe to become gangrenous and ultimately to be amputated. The critical factual issue during the trial of this case was how Dr. Rock bandaged plaintiff's toes after he performed the surgery.

Plaintiffs took the position that Dr. Rock wrapped bandages around Mrs. Chambers's toes too tightly. Plaintiffs' expert Dr. Passet testified that Dr. Rock's post-surgery bandaging technique of placing coban or coflex, a thin self-adhesive bandage similar to an ace bandage, between and around plaintiff's toes constricted the blood flow in plaintiff's second toe like a tourniquet and caused the toe to become gangrenous. He also testified that the too-tight bandaging of the big toe was not sufficiently constricting to cause gangrene of that toe but that it did cause the big toe to become infected. Dr. Passet opined that the gangrene in Mrs. Chambers's second toe would not have occurred absent Dr. Rock's negligent bandaging.

Dr. Passet based his opinion primarily on the description Dr. Rock gave during his deposition of how he dressed plaintiff's foot and toes after he performed the surgery. In questioning Dr. Passet, plaintiffs' counsel read Dr. Rock's deposition testimony on this point (and he read it several times while questioning Dr. Rock and Dr. Rock's expert, Dr. Wolf). Dr. Rock testified at his deposition that he placed bandages "[a]round the left foot and between the digits, between the toes." (Trial Transcript ["T."] 52,144, 314, 321). Dr. Passet also based his opinion on Mrs. Chambers's deposition testimony regarding the strange tight feeling she experienced in her foot the day after the surgery, which she conveyed to Dr. Rock when he called to check on her.

At trial, Dr. Rock both testified to and demonstrated for the jury how he placed gauze between and around Mrs. Chambers's toes and how he

placed a flex around her foot but not between or around her toes. After applying these dressings, he placed a stockinette over her foot. Dr. Rock denied any negligence in bandaging the toes and offered possible explanations other than his alleged negligence for the gangrene in Mrs. Chambers's second toe. He testified that Mrs. Chambers had asked him on the day he unwrapped her foot and discovered the gangrene whether she herself had caused it by icing her foot, that the toe might have suffered a vasospasm from the icing or from some other unknown cause and that Mrs. Chambers gave a history consistent with Raynaud's syndrome (dilation or contraction of the blood vessels of the toes and finger tips caused by environmental changes such as cold temperatures) to the doctors at St. Luke's-Roosevelt.

All of these possible explanations were initially rejected by Dr. Passet, who conceded on cross-examination that Mrs. Chambers could have suffered a vasospasm and that his opinion that Dr. Rock's bandaging caused the gangrene was "a guess" (T. 167). But Mrs. Chambers has never been diagnosed as having Raynaud's syndrome.

Defendant's expert, Dr. Wolf, testified about Dr. Rock's bandaging technique and opined that "it would be difficult, if not impossible, to selectively bandage a second toe with such force that that toe, and that toe alone, would be bandaged inappropriately to end up causing the types of changes that would cause gangrene" (T. 297). Dr. Wolf also testified that had Mrs. Chambers's toe been bandaged too tightly as Dr. Passet opined, the whole toe, not just the tip, would have been gangrenous immediately. While Dr. Wolf ruled out defendant's bandaging as a cause of the gangrene and could not state what did cause it, he noted that an arteriogram performed on Mrs. Chambers to assess the vascular system of her lower extremities after her toe became gangrenous showed that she had a condition of her second toe known as atresia. Dr. Wolf explained that atresia is "a congenital lack of formation" of the blood vessels (T. 302).

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Regarding infection of Mrs. Chambers's big toe, Dr. Wolf testified that there did not appear to be any immediate post-operative infection of any concern from the records he reviewed.

This conflicting testimony by Dr. Rock and the two opposing experts (Mrs. Chambers was still unconscious when her foot was bandaged; she did not see her foot before it was covered with the stockinette and could offer no testimony about the bandaging) formed the basis for the sole departure question on the verdict sheet. That question, propounded by plaintiffs, was: "Did the defendant, Dr. Gregg Rock depart from accepted standards of practice in applying surgical dressings too tightly to plaintiff Malvina Chambers' left first and second toes?" The jury answered the question unanimously in the negative.

Plaintiffs now move to set aside the verdict on two grounds: 1) that the verdict was against the weight of the evidence; and 2) that it was error not to charge *res ipsa loquitur*.

Regarding the first ground, plaintiffs argue confusingly that the way the departure question is worded it assumes that Dr. Rock applied surgical dressings, which they insist could only mean coflex (or coban), to Mrs. Chambers's toes and if the evidence adduced at trial does not support that assumption, then the verdict is not a rational one. This argument suggests that plaintiffs seek to set aside the verdict not as against the weight of the evidence but rather, as not being supported by sufficient evidence.

The distinction between the two standards was explained by the Court of Appeals in Cohen v. Hallmark Cards (45 NY2d 493 [1978]). The former involves what is largely a discretionary balancing of many factors that merely results in a new trial, while the latter involves a question of law requiring a harsher, more basic assessment of the verdict and results in a final judgment. For a court to set aside a jury verdict as not supported by sufficient evidence, "[i]t is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could lead rational

[* 5]
[persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*id.*, p 499). To make this assessment the court must apply the criteria used to direct a verdict. Where the evidence presents "an actual issue of fact", the court may not properly direct a verdict (*id.*).

As can be gleaned from the synopsis of the testimony above, the evidence presented an actual issue of fact. But the issue of fact was not whether surgical dressings were applied to Mrs. Chambers's toes. There was no dispute about that. Rather, the dispute was over what type of dressings were used and how they were applied. Plaintiffs' theory was that cofilin was wrapped between and around Mrs. Chambers's toes and that the cofilin was wrapped so tightly that it caused infection in one toe and gangrene in the other. The jury's rejection of plaintiffs' theory was far from irrational if the jury credited Dr. Rock's testimony and accepted his demonstration of how he dressed plaintiff's toes with gauze and not cofilin, as it apparently did in answering "No" to the departure question.

If plaintiffs are seeking to set aside the verdict as against the weight of the evidence and not because the evidence is insufficient, "a motion to set aside the 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'" (Cholewinski v. Wisnicki, 21 AD3d 791 [2005], quoting Rivera v. 4064 Realty Co., 17 AD3d, 201, 203 [2005]; accord O'Mara v. City of New York, 31 AD3d 340 [2006]). This is so because "[p]articular deference is to be accorded a jury verdict in favor of a defendant in a tort action" (McDermott v. Coffee Beanery, Ltd., 9 AD3d 195, 206 [2004]; accord Nicastro v. Park, 113 AD2d 129, 134 [1985]; Cholewinski, id.), "especially if resolution of the case turns on evaluation of conflicting expert testimony" (Fontana v. Kurian, 214 AD2d 832, 833 [1995], lv denied 86 NY2d 707 [1995]), as the "resolution of such a conflict rests with the jury, and not the court" (McDermott, 9 AD3d at 207). "The credibility of the [expert] witnesses, the

truthfulness and accuracy of the testimony, whether contradicted or not, and the significance of weaknesses and discrepancies are all issues for the trier of the facts" (Sorokin v. Food Fair Stores, Inc., 51 AD2d 592 [1976]; see also People v. Fields, 16 AD3d 142 [2005]).

Here, as noted above, conflicting expert testimony was given on the critical issue of how Dr. Rock applied surgical dressings to plaintiff's toes and what dressings he used. That the jury chose to believe Dr. Rock and his expert over plaintiffs' expert does not make its verdict "palpably wrong". Any discrepancy between Dr. Rock's deposition and his trial testimony was for the jury to decide. Nor can it be said that the evidence on this issue so preponderated in favor of plaintiffs that the verdict against them could not be reached on any fair interpretation of the evidence. Thus, the verdict will not be set aside either as against the weight of the evidence or because the evidence is insufficient.

Plaintiffs also seek to set aside the verdict for failure to charge the jury on the evidentiary doctrine of *res ipsa loquitur* as they had requested. This doctrine permits the jury to infer negligence from the mere fact of the occurrence of an event. For the doctrine to apply, a plaintiff must establish three elements: 1) the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; 2) It must be caused by an agency or instrumentality within the exclusive control of the defendant; and 3) It must not have been due to any voluntary action or contribution on the part of plaintiff (see PJI 2:65; States v. Lourdes Hospital, 100 NY2d 208 [2003]). To get this charge, a plaintiff must first satisfy all three elements.

Plaintiffs contend that they satisfied all three of these requirements plus a fourth one: "evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff" (Cornacchia v. Mount Vernon Hospital, 93 AD2d 851 [1983]). I disagree.

A *res ipsa* charge to the jury here was inappropriate because plaintiffs failed to meet the first two requirements (and whether plaintiffs met the extra

one is also debatable). The gangrene to Mrs. Chambers's second toe was not discovered until six days after her surgery. Plaintiffs offered no testimony concerning when the gangrene occurred, other than Mrs. Chambers complaining to Dr. Rock a day after her surgery that she felt a strange tightness in her foot.

Plaintiffs' position presented by their expert was that the gangrene was due solely to Dr. Rock's overly tight application of coflex bandages to the toe and that a gangrenous toe does not ordinarily result from the procedure Dr. Rock performed absent negligence. That position was contradicted by Dr. Rock and his expert, both of whom testified that while unusual, a complication such as gangrene can occur without the doctor being negligent. And each testified that Dr. Rock's bandaging of plaintiff's foot was not the cause of her gangrene. They also attributed Mrs. Chambers's gangrenous toe to unexplained causes although they offered possible explanations, including a vasospasm. Thus, plaintiffs did not establish that the mere occurrence of the gangrene was due to negligence. As is pointed out by defendant, not every post-surgical complication warrants a charge of *res ipsa loquitur*.

Finally, Dr. Rock did not have exclusive control over the dressings he applied to plaintiff's toes and foot during the six days between the surgery and her first post-operative visit when the gangrene was discovered. During that entire period, Mrs. Chambers was at home caring for herself. Accordingly, it is

ORDERED that plaintiffs' motion to set aside the verdict is denied.

Dated: January 18, 2008

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J.S.C.

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