

O'Neill v Ho

2008 NY Slip Op 30739(U)

March 10, 2008

Supreme Court, Richmond County

Docket Number: 0011283/2002

Judge: Joseph J. Maltese

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

Index No.: 11283/2002
Motion No.: 009/010

**KATHLEEN O'NEILL and JOAN ANN
KUJALOWICZ, as Administratrices of the Estate
of ROBERT KUJALOWICZ, deceased**

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**VICTOR T. HO, MD.,
PETER M. GOTTLIEB, M.D., and
SISTERS OF CHARITY MEDICAL-CENTER-
ST. VINCENT'S MEDICAL CENTER OF
RICHMOND,**

Defendants

The following items were considered in the review of these motions to set aside a jury verdict.

<u>Papers</u>	<u>Numbered</u>
Notices of Motion and Affidavits Annexed	1
Order to Show Cause	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Defendants, Victor T. Ho, M.D. ("Ho") and Peter M. Gottlieb, M.D. ("Gottlieb"), motions to set aside the jury verdict are denied in their entirety.

Facts

This action involved claims of medical malpractice against defendants Ho and Gottlieb that resulted in the death of Robert Kujalowicz. After an eight day jury trial that consisted of testimony from medical experts and the defendant doctors, the jury found that both Ho and Gottlieb were liable for committing medical malpractice that led to the death of Robert Kujalowicz. Specifically, the jury found that defendants Ho and Gottlieb failed to treat Deep Vein Thrombosis ("DVT") that led to plaintiff suffering from pulmonary emboli over a course of fifteen days. As a result of pulmonary emboli occurring over the course of fifteen days the jury awarded decedent's estate one million dollars for pain and suffering and held Ho and Gottlieb as each being fifty percent responsible.

Defendants now move this court to either: 1) set aside the jury verdict and direct a new trial; or 2) reduce the jury's verdict as excessive and deviating materially from what would be reasonable compensation.

Discussion

In support of his motion, Ho suggests that he is absolved of any liability with respect to diagnosing pulmonary emboli and DVT by virtue of the fact that he retained a pulmonologist, Gottlieb, to treat the decedent. Ho attempts to buttress this position by arguing that *Toth v. Community Hosp. At Glen Cove* applies. In that case the Court of Appeals stated that in the case of a specialist, a physician should be held to a standard of care that requires a “. . . physician [to] use his best judgment and whatever superior knowledge, skill and intelligence he has. Thus, a specialist may be liable where a general practitioner may not.”¹ However, the standard of care for a medical professional should “. . . evidence that a physician conformed to accepted community standards . . .”²

While Ho is not board certified in pulmonology, he is however a board certified neurosurgeon. The record is replete with examples of Ho's experience conducting various complicated surgeries throughout his career. In addition, the record clearly indicates that DVT and pulmonary emboli are possible in any surgical procedure. As a neurosurgeon, it is not a stretch of the imagination that the jury concluded that Ho had the requisite knowledge and experience to diagnose and treat DVT and pulmonary emboli.

Co-defendant Gottlieb in his affirmation in partial opposition to Ho's motion clearly demonstrates the Court of Appeals' holding in *Toth* is inapposite to Ho's position in the motion before this court. Gottlieb cited to *Darren v. Safier* an Appellate Division, Second Department case applying *Toth*, to support his position that the jury's finding that Ho was 50% liable was neither against the weight of the evidence nor utterly irrational. In *Darren*, the plaintiff accused a doctor, a gastroenterologist, of committing medical malpractice for discharging a patient that subsequently committed suicide. There the accused doctor recognized that his patient exhibited

¹ 22 NY2d 255, 262 [1968].

² *Id.*

certain signs that required psychiatric treatment. In that case, it was clear that psychiatry and gastroenterology had apparently no overlap. The Appellate Court found that the accused doctor satisfied his obligation to the patient by seeking out a psychiatrist to treat the patient. In its decision the Second Department stated “. . . there is no basis in the record to support the plaintiff’s conclusory assertions that [the gastroenterologist] departed from the standards of good and acceptable medical practice. Significantly, there is no allegation that [the gastroenterologist] departed from those standards of care applicable to a gastroenterologist.”³

Here, Ho is an experienced surgeon. The record indicates that the decedent succumbed to a complication that occurs frequently during the recovery of surgical procedures. It is therefore impossible for this court to find that DVT and pulmonary emboli are outside the scope Ho’s training and experience.

Both defendants argue the court should exercise its power under CPLR § 4404 and reduce the jury’s verdict or set it aside and grant a new trial. Where the motion to vacate the a jury verdict is predicated on a misapprehension of the evidence offered at trial the movant bears a significant burden in pleading its case. Professor David Siegel in his treatise, New York Practice, 3rd Edition, discussed this very point. Professor Siegel states:

The first situation requires the court to keep hands off, merely confirming the verdict and directing that judgment be entered on it: there are issues of fact that can be resolved either way and it is for the jury to resolve them. If the facts give rise to conflicting inferences, for example, it is for the jury to draw the inferences. If the issue is one of credibility, it is for the jury to determine who is telling the truth. If reasonable minds may differ, in short, it is for the jury to determine who prevails. Most verdicts fall into this category. (Internal Citations Omitted)⁴

This Court agrees with Professor Siegel and will not disturb the findings and award of the jury.

Conclusion

³ *Darren v. Safier*, 207 AD2d 473, 474-475, [2d Dep’t. 1994]

⁴ Siegel, NY Prac § 406, at 656-657 [3ed].

The record before this court does not support defendants motion to vacate the jury award, adjust the proportion or liability or reduce the amount awarded to plaintiffs. There are numerous passages in the record that may be used to substantiate the ultimate conclusions of the jury. A jury's role in the pursuit of justice is clearly defined. As this court sees no issues of law the jury's verdict shall stand. Defendants motions are denied in their entirety.

Accordingly, it is hereby:

ORDERED, that defendants' motions to vacate are denied in their entirety; and it is further

ORDERED, that the plaintiffs are permitted to file and enter the jury's verdict.

ENTER,

DATED: March 10, 2008

Joseph J. Maltese
Justice of the Supreme Court