

**Tuncsiper v Jaff**

2008 NY Slip Op 32100(U)

July 24, 2008

Supreme Court, New York County

Docket Number: 0116325/2005

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
Justice

PART 1A Part 16

Index Number : 116325/2005  
**TUNCSIPER, EMINE**  
VS.  
**JAFF, STACEY, M.D.**  
SEQUENCE NUMBER : 001  
OTHER RELIEFS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
JUL 28 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: JUL 24 2008

Alice Schlesinger  
ALICE SCHLESINGER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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 16

-----X  
EMINE TUNCSIPER,

Plaintiff,

-against -

STACEY JAFF, M.D.,

Defendant.

**FILED**  
JUL 28 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Index No.116325/05  
Motion Seq. No. 001

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**SCHLESINGER, J:**

On May 12, 2008, the jury hearing this medical malpractice case returned a verdict in favor of the defendant, Dr. Stacey Jaff. Two questions relating to liability had been submitted. The first had to do with informed consent and the second with whether Dr. Jaff had departed from accepted standards of medical care in the manner in which she had administered the trigger point injection to Emine Tuncsiper's (the plaintiff) right shoulder on April 26, 2005. It was uncontested that on April 26, in the course of administering trigger point injections to Ms. Tuncsiper, Dr. Jaff punctured Ms. Tuncsiper's lung, causing it to collapse.

Questions 1(a)-1(c) on the verdict sheet dealt with the informed consent issue. The plaintiff had testified that Dr. Jaff had never informed her of the risk of a lung puncture from such injections. But Dr. Jaff stated that she had so advised Ms. Tuncsiper at an earlier occasion, while she, the doctor, was affiliated with Madison Associates.

The jury answered the first question on this issue, 1(a), unanimously "NO," i.e., that Dr. Jaff had not given Ms. Tuncsiper appropriate information. Question 1(b), however, provided a different response. That inquiry specifically asked (assuming the jury had reached it by answering "NO" to the previous question) whether a reasonably prudent

person in the plaintiff's position at the time consent was given to the injections have given such consent if properly informed. The jury, again unanimously answered "YES" to that question, i.e., that even with the appropriate information a reasonably prudent person in Ms. Tuncsiper's position would have consented to the injections.

Counsel for the plaintiff is now moving for an Order, pursuant to §4404 of the CPLR, to set aside the answer to question 1(b) and for a new trial. He makes two points in arguing for this relief.

First and most significantly he points to this Court's ruling allowing an April 14, 2005 Hackensack Hospital Emergency Room record to be received into evidence and sent into the jury room (at the jury's request) after both sides had rested and after the summations and charge had been presented. Counsel challenged my ruling at the time and now argues that it was not only absolutely wrong but so prejudicial that his client deserves a second trial. Second, he argues that the jury's response to question 1(b) was against the weight of the evidence.

During the trial, the plaintiff had offered the Hackensack Hospital record into evidence. Counsel had subpoenaed the record and it was admitted into evidence, without objection by the defense. However, as it later appeared, this exhibit, marked #1 in evidence, solely contained the Hackensack Hospital admission from April 28, 2005 through May 9, 2005, the admission after the lung puncture by the defendant, and the treatment for it. Ms. Tuncsiper had gone to the emergency room and been admitted on April 28, two days after the defendant had administered injections to her right shoulder.

Plaintiff's attorney had subpoenaed this admission only. However, during the course of the trial, it was brought out on a number of occasions that Ms. Tuncsiper had gone to the

same emergency room at Hackensack Hospital two weeks earlier, on April 14, 2005, for treatment of a severe headache. It also came out that the hospital had attempted a lumbar puncture on that date.

When the April 28 records were admitted, it was noted they were not certified nor were they responsive to a subpoena. Therefore, it was agreed that they would be reviewed by defense counsel and redacted, if necessary. The subpoenaed records subsequently arrived in court and it was decided that they would be substituted for the ones already marked. However, as it turned out later, those certified records only contained the second admission.

This became known after the summations and the charge had been delivered. The jury had not yet received the case and counsel and the Court were going over the evidence to make sure no redactions were necessary. Since it was close to the luncheon recess, I wanted that done so that the jury could have whatever evidence they requested even if counsel were not available.

Therefore, while in the robing room, after comments to the charge had been made, defense counsel indicated that he had reviewed the Hackensack records pursuant to the subpoena and that "they are significantly deficient" (page 621 of the trial transcript). What was missing was the emergency room visit of the 14th. I asked Mr. Johnson (Dr. Jaff's attorney) if he had those records "somewhere else." He thought he did and then this colloquy ensued (at pp. 621-22).

The Court: I don't think, Mr. Grossman (plaintiff's counsel), you should have a problem with somehow having the 14<sup>th</sup> put in there.

Mr. Grossman: I don't see it's relevance to this case, but that's fine with me.

The Court: It's part of Hackensack, so you might as well put it in. We have heard some testimony.

Mr. Grossman: It's a separate record.

The Court: Separate record, then let's mark that, Hackensack. I think, is 1.

Mr. Grossman: Yes

Mr. Johnson: I don't remember.

The Court: I am pretty sure it's 1. I can check it. Let's mark the admission 1A.

Mr. Grossman: I'm asking your Honor to keep them separate.

The Court: They will be separate. We will do it separately as 1A so it will be in evidence. Why don't we go back [to the courtroom].

We returned to the courtroom and the jury was given the case. Soon thereafter, as I was instructing our court reporter to mark the Hackensack April 14, 2005 record pursuant to my previous ruling, I received a note from the jury requesting certain evidence. Specifically, they wanted Dr. Jaff's records, ("C" in evidence) and the consent forms, "2" and "2A". The Court then made these comments to counsel (at p 624) after receiving the jury's note.

And, they also wanted the Hackensack Hospital lumbar puncture and the April 28 records, so they want both. Are you sure it doesn't have the 14?

What happened next, as reflected in the ensuing pages of the transcript was Mr. Grossman's making a variety of objections to that record going to the jury and my response to the arguments. The following, I believe is relevant. First on pg 624-625.

The Court: The jury has asked for various pieces of evidence, including the April 14 lumbar puncture, Hackensack records, which have been referred to, which apparently were not contained in the Hackensack subpoenaed records, which

we received, which exclusively rely on the April 28 admission.

However, the fact that they have not actually been marked individually yet, I think that they should now be marked, that will be over the objection of Mr. Grossman, because they have been referred to certainly, the Hackensack records were subpoenaed, I haven't seen a copy of the subpoena, but I assume they make a distinction. Maybe they did, but now when the jury particularly asks for it and we have had discussions, do you (to Mr. Grossman) have a copy of your subpoena? (He said yes, as did Mr. Johnson. Grossman's subpoena only asked for the April 28 admission)

I then ascertained that the April 14 record had been included in a certification which Mr. Johnson had of both records from the hospital, although not with a raised seal. However, I assumed it was an authentic certification and it did refer to both dates.

Mr. Grossman then strenuously objected for a variety of reasons, including relevance, and I responded as follows, on page 627 and again on 629.

The Court: In a perfect world, Mr. Grossman, I would think some of the objections have merit but in balancing what I believe is an authentic record, and as far as relevance, that's always in the eye of the beholder.

Mr. Johnson thinks it's relevant, the jury obviously thinks it's relevant to a certain extent because they want to see it.

I have convinced myself that it is an authentic record from Hackensack, and, therefore, on balance I think it's important to mark it, even though it should have been admitted earlier.

But I'm going to assume that it wasn't admitted earlier because Mr. Johnson had inadvertently not gone through the new record that had come in to make sure it was included.

The reason it wasn't included because on your subpoena (addressing Mr. Grossman) it only said April 28.

And finally

The Court: Mr. Grossman, now I don't really want anything more because I think we have really exhausted the record on this.

The fact is, in my discretion, I'm allowing it because it was inadvertently not received during the trial. I think [it is] arguably relevant, the jury believe it, I think it's an authentic record. I already said why. And, that's it. You have your exception .

Let's mark this 1A, please.

As referred to above, counsel for Ms. Tuncsiper preserved his record on this point. In the instant motion, he reiterates many of those points, such as that the April 14 record was never timely placed in evidence, that the earlier record was separate and distinct from the April 28 record and thus not relevant, and that the late admission violated the rules of evidence.

He also argues that he had not seen the record and thus had no opportunity to cross-examine on it. Now he states he does not even know if it was complete. However, at this juncture when the motion is made, and where it is clear there has been adequate opportunity to point out where the April 14 record was incomplete or what about the record was specifically prejudicial, nothing is said.

While counsel speculates that the jury may have improperly focused on the consent form for the lumbar puncture found in the earlier record, there is no indication that they did. That consent form was for an entirely different procedure than the one at issue at the trial. There is simply no basis to believe that Ms. Tuncsiper's consent to that earlier procedure

somehow affected her consent to this one, as a reasonably prudent person.

Yet, the April 14<sup>th</sup> admission was relevant, which was why I allowed testimony concerning it during trial and certainly why I would have admitted the records during the trial if they had been formally offered. It was relevant because it showed how serious were the symptoms the plaintiff faced and the lengths she would go to relieve those symptoms, such as searching out the defendant doctor in her own home to give her injections similar to ones she had received at her hand at an earlier time at the doctor's office.

Counsel also cites two criminal cases which he argues support his argument that the late admission of this record and its delivery to the jury was egregious. Both cases could not be more distinguishable from this one.

In *People v. Bouton*, 50 NY2d 130 (1980), the defendant was convicted of sodomy and sexual abuse. The Court of Appeals in reversing that conviction cited five actual errors in the trial, the fourth of which was that the jury's deliberations were contaminated when documents which had been ruled inadmissible by the trial judge and were only marked for identification found their way to the jury room. These documents were extraordinarily prejudicial and included two versions of defendant's confessions including uncharged, unredacted sexual activity as well as psychiatric medical records of the complainant. There were obviously good reasons why they had not been admitted. The documents had inadvertently been given to the jury by a court matron.

In *People v. Johnson*, 7 AD3d 732 (2<sup>nd</sup> Dep't 2004), the appealing defendant was convicted of robbery. The prosecutor there, had improperly elicited testimony from a police officer who had testified that the defendant had agreed to make a statement after the officer had shown him statements made by non-testifying co-defendants, one of whom,

Wellington, had been arrested with him. What compounded this error, one violative of *Bruton v. United States*, 341 US 123 (1968), was that the jury asked to see the Wellington statement, which they incorrectly believed was in evidence. Frankly, it is unclear in the decision whether the statement was in fact ever given to them. It probably was not but the mere fact that the jury obviously placed some importance on the obviously inadmissible statement showed that the original error was not harmless.

Here, I would have admitted the April 14<sup>th</sup> record during the trial if specifically requested, because I believed then and believe now that it was admissible and relevant. Further, I do not find that under the circumstances here, there was anything prejudicial about it despite the unprecedented manner in which it was introduced.

Finally, counsel argues that the answer to question 1b was not supported by the evidence. He points out that nothing was introduced to contradict plaintiff's testimony that she would not have had the procedure if she had been appropriately informed.

But that is not the law. Rather it is, as charged to the jury, whether a reasonably prudent person in Emine Tunçsiper's position at the time consent was given to the trigger-point injections, would have given such consent if she had been provided with appropriate information.

I summarized the parties' positions as part of the charge to illustrate this principle. In doing so, I said, after giving the plaintiff's position, the following with regard to the defendant:

Defendant maintains the answer is Yes. She contends that plaintiff believed the injections were helpful to her and considering the very slight risk of a collapsed lung from the

procedure<sup>1</sup>, that the omitted information would not have caused a reasonably prudent person to have elected not to undergo this procedure.

The jury, by their unanimous answer of "NO" to this question found, after taking all the circumstances into consideration, including Ms. Tuncsiper's testimony given in hindsight, that a reasonably prudent person in Ms. Tuncsiper's position would have gone ahead any way with the injections.

I would be loathe to disturb this finding. I believe Ms. Tuncsiper did receive a fair trial despite the unusual events at its conclusion and despite a verdict adverse to her.

ACCORDINGLY, it is hereby

ORDERED that plaintiff's motion to set aside the jury verdict is denied.

This constitutes the decision and order of this Court.

Dated: July 24, 2008

**JUL 24 2008**



J.S.C.

**ALICE SCHLESINGER**

**FILED**  
JUL 28 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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<sup>1</sup>The defendant's expert had testified to this point, but I did not cite the expert as a source in my marshalling.