

Lader v Sherman

2009 NY Slip Op 33223(U)

October 26, 2009

Supreme Court, Queens County

Docket Number: 26385/03

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

-----X
MICHA LADER,

Plaintiff,

- against -

Index No: 26385/03
Motion Date: 6/24/09
Motion Cal. No: 14
Motion Seq. No: 2

MARK F. SHERMAN and STATEN ISLAND
ORTHOPEDICS & SPORTS MEDICINE, P.C., f/k/a
SHERMAN & BONAMO, P.C.,

Defendants.

-----X

The following papers numbered 1 to 9 read on this motion for an order limiting plaintiff's provable damages to injury caused to plaintiff's left leg other than to the superficial peroneal nerve and precluding any evidence of reflex sympathetic dystrophy (RSD) or complex regional pain syndrome (CRPS).

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Answering Affidavits-Exhibits.....	6 - 7
Reply Affirmations-Exhibits.....	8 - 9

Upon the foregoing papers, it hereby is ordered that the motion is determined as follows:

Relevant Facts

This is an action for medical malpractice arising from defendants' treatment of plaintiff in July 2001, regarding, as alleged by plaintiff, shin pain in his right leg. Defendant Mark F. Sherman ("defendant") made a diagnosis of right tibia anterior compartment syndrome; referred plaintiff for pre-operative pressure testing on his right leg only; however, he performed fasciotomies on both of plaintiff's legs by making, inter alia, an incision on plaintiff's left leg from just below the knee to just above the ankle. Although the recovery period for this type of procedure is normally four months, plaintiff still has visible scars and a limp several years after the surgery.

Plaintiff commenced the instant action for medical malpractice on November 10, 2003, and at the trial of this action the plaintiff attempted to prove first, that defendant departed from accepted

medical practice by performing unnecessary surgery on plaintiff's left leg, and second, that defendant committed acts of malpractice while performing the surgery. Plaintiff offered evidence to show that defendant had negligently severed his superficial peroneal nerve in the left leg during his performance of unnecessary surgery, resulting in complex regional pain syndrome. The verdict sheet contained the following three questions with subparts:

1. Did defendant Mark F. Sherman depart from accepted medical practice by performing surgery on plaintiff Micha Lader's left leg on August 6, 2001? Was that departure a substantial factor in causing injury to plaintiff Micha Lader?
2. Did defendant Mark F. Sherman depart from accepted medical practice in the manner that he performed surgery on plaintiff Micha Lader's left leg on August 6, 2001? Was that departure a substantial factor in causing injury to plaintiff Micha Lader?
3. Did defendant Mark F. Sherman depart from accepted medical practice by not consulting with a neurosurgeon or microsurgeon during the surgery performed on plaintiff Micha Lader's left leg on August 6, 2001? Was that departure a substantial factor in causing injury to plaintiff Micha Lader?

The jury answered "Yes" to only the first part of question "1," finding that defendant had departed from accepted medical practice by performing the surgery, but answered "No" to the second part of that question, finding that the departure was not a substantial factor in causing plaintiff's injury. The jury answered "No" to the remaining questions, thereby finding no departures in the manner that defendant either performed the surgery or his decision to not consult with a neurosurgeon. Upon the jury finding no malpractice on the part of defendant, plaintiff moved for an order, pursuant to CPLR 4404(a), setting aside the jury's verdict as contrary to the weight of the evidence and in the interest of justice and directing a new trial. By order and memorandum decision of this Court dated August 3, 2007, this Court stated, in relevant part, the following:

In essence, by answering "No" to the second and third questions, the jury found that the plaintiff had not proved that malpractice in the manner of surgery had caused nerve damage and complex regional pain syndrome.

In the case at bar, the jury's answer to the second part of the first question finding that the plaintiff did not suffer injury from unnecessary surgery on his left leg is against the weight of the

evidence in this case. The evidence concerning scarring and the experiencing of pain so preponderated in favor of the plaintiff that the verdict could not have been reached under any fair interpretation of the evidence. The court notes that the plaintiff did not establish on this motion that the jury's answers to the second and third questions, which essentially concerned the alleged severing of the superficial peroneal nerve, were against the weight of the evidence.

Accordingly, the plaintiff's motion is granted to the extent that a new trial is ordered limited to the issue of whether the surgery performed by defendant on the plaintiff's left leg caused injury other than to the superficial peroneal nerve.

Thereafter, the Appellate Division, Second Department, affirmed the order of this Court by decision dated January 27, 2009. It is upon the foregoing that defendant now moves for an order limiting plaintiff's provable damages to injury caused to plaintiff's left leg other than to the superficial peroneal nerve and precluding any evidence of reflex sympathetic dystrophy or complex regional pain syndrome (collectively "RSD/CRPS").

Defendant's Motion

In support of the motion, defendant states that the instant issue presented is, "whether RSD, also referred to as CRPS, is still in the case or has been removed from the case by [the] previous decision of this Court and the jury's verdict." In finding that RSD/CRPS has been removed from the case, defendant asserts three points: 1) that the clear language of this Court's underlying August 3, 2007 order so states; 2) plaintiff's medical experts testified that direct injury to the superficial peroneal nerve resulted in the RSD/CRPS; and 3) plaintiff's counsel, in his motion to set aside the verdict, concedes that the jury rejected the RSD/CRPS claim. Defendant proffers the trial testimony of Dr. Steven Brenner, plaintiff's orthopedic surgery expert, who stated, inter alia, that plaintiff "has permanent nerve damage, burning, loss of feeling and he's developed a chronic pain syndrome also known as [RSD/CRPS]. He has permanent and severe injury to his leg as a result of the nerve damage that was caused in his leg."

Defendant also proffers the trial testimony of Dr. Alexander Weingarten, an anesthesiologist and pain specialist, who testified that there are two types of RSD/CRPS: type 1, where there is trauma to the extremity, but not directly to the nerve; and type 2, where there is direct injury to the nerve, such as a the nerve being severed. When asked by plaintiff's counsel what type of RSD/CRPS that plaintiff has and why he has RSD/CRPS, Dr. Weingarten stated, in pertinent part, the following:

Mr. Lader fits under the category of RSD/CRPS 2, which is a direct injury to the nerve leading to the symptoms that occurred after that; after that injury...

He went into surgery where he had normal sensation in that foot. He has a surgical procedure, which is directly in the area of the superficial peroneal nerve, he comes out of surgery and he complains of numbness over [] the second through fifth toes. [] I have to conclude that the surgery [] was directly responsible for injuring that nerve.

Mr. Lader has [RSD/CRPS] because he underwent a surgical intervention which involved trauma to his superficial peroneal nerve in his left foot, and that was the instigating factor that triggered off all the symptoms which we're describing as RSD/CRPS.

Thus, based upon the referenced testimony, defendant asserts that as all of the symptoms of RSD/CRPS were caused by direct damage to the superficial peroneal nerve, and as injury to that nerve has been removed from the case, it follows that RSD/CRPS is no longer a provable injury.

Moreover, defendant asserts that plaintiff's counsel conceded that the jury rejected the claim of nerve damage and RSD/CRPS in his underlying motion, where he gave his view of the evidence and summarized the injuries. Defendant proffers the following statements attributable to plaintiff's counsel:

Indeed, it appears that the jury seized upon plaintiff's alternative theories of liability and claims of nerve damage and [RSD/CRPS] and overlooked the obvious: That some injury necessarily resulted from defendant's negligence in unnecessarily slicing plaintiff's lower left leg open and unnecessarily subjecting plaintiff to the complications of surgery. It appears that upon finding that the defendant did not sever plaintiff's superficial peroneal nerve and did not cause plaintiff to suffer [RSD/CRPS], the jury threw the baby out with the bath water and found that plaintiff suffered no injury at all.

Thus, defendant concludes that plaintiff's counsel, on the motion on the record, and again within his appellate brief, identified the remaining injuries from the unnecessary surgery as pain incident thereto, scarring, limping and a period of disability.

Lastly, defendant contends that based upon the aforementioned and the evidence adduced at trial, plaintiff's theory of the case was a direct injury to the superficial peroneal nerve which caused RSD/CRPS. He asserts that plaintiff now seeks to change his theory of the case to claim that plaintiff's injury is a result of type 1 RSD/CRPS, which generally arises from trauma to the extremity and not direct injury to the nerve. Defendant states that plaintiff cannot be allowed to change his theory of the case at this belated juncture as the jury based its verdict on the theory that RSD/CRPS was caused by the severing of the superficial peroneal nerve by defendant, which was rejected by the jury. Consequently, defendant asserts that the "only provable damages in the trial to be had herein

are those related to the scarring and transitory pain and disability caused by the surgery on plaintiff's left leg.”

Plaintiff's Opposition

In opposition, plaintiff contends, inter alia, that he does not object to the preclusion of any claim that defendant severed plaintiff's superficial peroneal nerve during the underlying surgical procedure, and points out that this Court expressly stated “that a new trial is ordered limited to the issue of whether the surgery performed by defendant on the plaintiff's left leg caused injury other than to the superficial peroneal nerve.” Plaintiff states the following:

The order did not preclude plaintiff from claiming that the unnecessary surgery caused plaintiff to sustain [RSD/CRPS]. The order was clear and unambiguous on its face, and limited nothing other than a claim of injury to the superficial peroneal nerve. I respectfully submit that had this Court intended to bar plaintiff from claiming [RSD/CRPS] at the new trial, this Court would have stated so in its order. The Court did not. Indeed, the jury was not asked whether plaintiff had sustained [RSD/CRPS]. The jury was asked whether [defendant] was negligent in the manner in which he performed the surgery. The jury's finding that [defendant] was not negligent in the manner in which he performed the surgery is not tantamount to a finding that plaintiff did not sustain [RSD/CRPS]. As defendant maintained throughout the first trial, RSD/CRPS in a lower extremity can develop from nearly any traumatic event, without direct injury to the superficial peroneal nerve. If [RSD/CRPS] can develop from any traumatic event, plaintiff should be permitted to claim that his [RSD/CRPS] developed from [defendant's] negligence in unnecessarily slicing his lower left leg wide open.

Moreover, plaintiff asserts that despite defendant's assertions, there is no prohibition against plaintiff changing his theory of the case at a second trial, and refers to Paltey v. Egan, 200 N.Y.83, a 1910 decision of the Court of Appeals in support of that assertion. He further asserts that plaintiff is bound solely by his pleadings, not by the testimony of witnesses, counsel or experts, and posits that “any testimony by an expert or statement by counsel from the prior trial constitute, at most, informal judicial admissions which are not binding on plaintiff, and may [be] explained at the new trial, and may be used by defendants on cross-examination.” He further states that under either the prior or newly asserted theory, which plaintiff asserts is not inconsistent with his pleadings, “under both theories, plaintiff sustained [RSD/CRPS] only because [defendant] unnecessarily operated on his left leg. He asserts that the pleadings do not state that RSD/CRPS was caused only by the injury to plaintiff's superficial peroneal nerve; nor do they discount that it was caused by the unnecessary surgery. Thus, plaintiff contends that “any claim at the new trial that plaintiff's [RSD/CRPS] was

caused by defendant's performance of the unnecessary surgery would be entirely consistent with plaintiff's pleadings, and supported by the medical evidence."

With regard to the testimony of plaintiff's experts at the underlying trial, plaintiff asserts that although their respective testimony is not relevant to this discussion, plaintiff proffers the trial testimony of Dr. Steven Brenner, his orthopedic surgery expert, who stated, inter alia, that plaintiff "has permanent and severe injury to his leg as a result of the nerve damage that was caused in his leg." He further opined that plaintiff "now suffers from this chronic pain syndrome as a result of the surgery performed on the left leg." Plaintiff asserts that on cross-examination, Dr. Brenner conceded that RSD/CRPS can be caused by minimal trauma, and agreed with defense counsel when he stated that RSD/CRPS can occur from a sprained ankle or when you bump your elbow. Likewise, plaintiff contends that Dr. Alexander Weingarten, plaintiff's anesthesiologist and pain specialist expert, although linking plaintiff's RSD/CRPS to direct nerve injury, also conceded that point on cross-examination. In explaining RSD/CRPS, Dr. Weingarten testified as follows:

[RSD/CRPS] is a condition whereby extremities often with little to no injury become swollen, the skin becomes shiny, legs or arms become cold, and we think it happens because of a misfiring of part of the nervous system called the autonomic nervous system and it can happen with the most trivial injuries, sprained ankles, nothing much will cause this kind of problem.

Thus, plaintiff contends that although defendant maintained during the underlying trial that RSD/CRPS can occur in the absence of injury to the superficial peroneal nerve, he now seeks to impermissibly preclude plaintiff from maintaining that position at the new trial.

Discussion

From the outset, it must be noted by this Court that counsel for both parties have made very persuasive and cogent arguments in support of their respective positions as to whether RSD/CRPS remains in this case. Indeed, the elucidation of the facts as perceived by counsel was helpful in allowing this Court to identify the central issues for resolution, which this Court deems are the jury's verdict as interpreted by this Court's order and memorandum decision dated August 3, 2007, and the etiology of RSD/CRPS.

With regard to the jury's verdict, they were asked to consider if defendant departed from accepted medical practice: 1) by performing surgery on plaintiff's left leg; 2) in the manner that he performed such surgery; 3) by not consulting with a neurosurgeon or microsurgeon during that surgery; and 4) if so, were any of those departures substantial factors in causing plaintiff's injuries. The jury found that defendant had departed from accepted medical practice only with respect to performing the surgery on plaintiff's left leg, but this departure was not a substantial factor in causing plaintiff's injury. Thus, upon plaintiff's motion to set aside the jury's verdict, inter alia, as contrary to the weight of the evidence, this Court stated in its underlying order that "by answering

“No” to the second and third questions, the jury found that the plaintiff had not proved that malpractice in the manner of surgery had caused nerve damage and [RSD/CRPS].” The order further stated that plaintiff failed to establish that “the jury’s answers to the second and third questions, which essentially concerned the alleged severing of the superficial peroneal nerve, were against the weight of the evidence.” Thus, the motion was granted to the extent that a new trial shall be had “limited to the issue of whether the surgery performed by defendant on plaintiff’s left leg caused injury other than to the superficial peroneal nerve.”

Based upon the foregoing, the record is clear that the jury was asked to consider, *inter alia*, whether defendant departed in the manner that he performed the surgery. In answering no, this Court determined in its underlying decision that the jury found that defendant did not cause damage to the superficial peroneal nerve in the manner in which he performed the surgery. Stated another way, this Court found that the jury determined that the severance of the superficial peroneal nerve was not the cause of the onset of RSD/CRPS.

With regard to the etiology of RSD/CRPS, the record is also clear, and there can be no dispute with regard to the fact that, there are two types of RSD/CRPS: type 1, where there is trauma to the extremity, but not directly to the nerve; and type 2, where there is direct injury to the nerve, such as the nerve being severed, as alleged in this case. There was testimony elicited from the various experts in the underlying matter that RSD/CRPS can be caused by any trauma to the extremity, whether by something as trivial as a bumped elbow, or as significant as a gunshot wound where the bullet goes through the superficial peroneal nerve. In light of this, it is undisputed that the onset of RSD/CRPS can be cause by the precipitation of any number of factors, be it trauma to the extremity or direct nerve damage. Consequently, it stands to reason that severance of the superficial peroneal nerve, as previously alleged by plaintiff, may not have been the only cause attributable to plaintiff’s condition with regard to RSD/CRPS.

Although there was testimony that plaintiff suffers from RSD/CRPS as a result of defendant’s malpractice in the manner in which he performed the surgery by severing the superficial peroneal nerve, there equally was testimony that defendant appropriately performed the surgery without directly injuring the nerve, and that plaintiff’s RSD/CRPS could have been caused by the onset of any trauma other than by such severance. The jury was free to, and indeed did, reject the argument that defendant departed from good and accepted medical practice in the manner that he performed the underlying surgery. As plaintiff did not establish on its underlying motion to set aside the verdict that the jury’s finding concerning the alleged severing of the superficial peroneal nerve was against the weight of the evidence, it is the law of the case that there can be no proof of injury to plaintiff arising from the severance of the superficial peroneal nerve. See, Mosher-Simons v. County of Allegany, 99 N.Y.2d 214 (2002); People v. Evans, 94 N.Y.2d 499, 503 (2000); Doscher v. Doscher, 54 A.D.3d 890 (2nd Dept. 2008); Hampton Valley Farms, Inc. v. Flower & Medalie, 40 A.D.3d 699 (2nd Dept. 2007); Fellin v. Sahgal, 35 A.D.3d 800 (2nd Dept. 2006); Meekins v. Town of Riverhead, 20 A.D.3d 399 (2nd Dept. 2005); Oyster Bay Associates Ltd. Partnership v. Town Bd. of Town of Oyster Bay, 21 A.D.3d 964, 966 (2nd Dept. 2005).

Nevertheless, this does not end the query with regard to whether RSD/CRPS survives as a provable damage remaining in this case. In light of the fact that RSD/CRPS can be caused by trauma to the extremity, such as here, through the performance of a surgical procedure, it follows that RSD/CRPS has not been removed from this case, despite defendant's contentions to the contrary. Indeed, none of the interrogatories presented to the jury specifically addressed RSD/CRPS and the jury was not presented with the alternative causes of RSD/CRPS to make a determination as to whether this injury could have been caused by anything other than the severance of the superficial peroneal nerve. The jury determined that defendant did not depart in the manner in which he performed the surgery; however, the determination that the performance of unnecessary surgery was not a substantial factor in causing plaintiff's injuries so preponderated against the weight of the evidence that a new trial was ordered on this point. As RSD/CRPS could have been caused by such surgery, this Court finds that RSD/CRPS should not be excluded from plaintiff's provable injuries.

Conclusion

Accordingly, the motion by defendant for an order limiting plaintiff's provable damages to injury caused to plaintiff's left leg by precluding any evidence of reflex sympathetic dystrophy (RSD) or complex regional pain syndrome (CRPS) hereby is denied. The parties are directed to appear before this Court on October 28, 2009 at 10:30 a.m., to discuss the trial schedule and any other issues which have arisen in the interim.

Dated: October 26, 2009

J.S.C.