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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 103465/2006

COLLADO, PABLO

VS

PLAWNER, JANUSZ, M.D.

Sequence Number : 004

TRIAL DE NOVO

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

is

~~motion and cross-motion are~~ decided in accordance with accompanying memorandum decision.

FILED
OCT 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/8/10

SALIANN SCARPULLA J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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PABLO COLLADO and KATHLEEN BOYLE-COLLADO,

Plaintiffs, Index No. 103465/06

-against-

JANUSZ PLAWNER, M.D., LENOX HILL HOSPITAL, BASIL HUBBI, M.D. and CYNTHIA CASTENADA, R.N.,

Defendants.

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Papers reviewed on the motion for judgment notwithstanding the verdict and for other relief:

Notice of motion, supporting affirmation and exhibits 1
Affirmation in Opposition and exhibits 2
Reply Affirmation 3

PRESENT: SALIANN SCARPULLA, J.S.C.:

In this action for medical malpractice plaintiffs Pablo Collado ("Collado") and Kathleen Boyle-Collado (collectively, "Plaintiffs") move, pursuant to CPLR 4404(a) and 5501 for: 1) judgment notwithstanding the jury's verdict in favor of the defendant Janusz Plawner, M.D. ("Plawner"); 2) an order setting aside the jury's verdict in Plawner's favor and ordering a new trial on the ground that the verdict was contrary to the weight of the evidence and because a new trial is in the interests of justice; 3) an order setting aside the

jury's verdict in Plawner's favor and ordering a new trial on the ground that the verdict is inconsistent; 4) an order setting aside the verdict and ordering a new trial on the ground that "the Court erred in failing to charge res ipsa loquitur and circumstantial evidence to the jury"; 5) an order setting aside the jury's verdict in Plawner's favor and ordering a new trial on the ground that "the Court erred in refusing to allow plaintiff's counsel to comment in her closing argument about statements and admissions made by defense counsel in his opening statement at trial"; 6) an order setting aside the jury's verdict in Plawner's favor and ordering a new trial on the ground that "the Court erred in permitting and in not striking the testimony of defendants' experts Dr. Chama and Dr. Rubin on the basis that their opinions were not contained in their pre-trial disclosures served pursuant to CPLR 3101(d), they were not competent to render an expert opinion, and their opinions were not based on evidence"; and 7) an order setting aside the jury's verdict in Plawner's favor and ordering a new trial on the ground that "the Court erred in requiring the jury to stay late in Court and rushing them to a verdict rather than requiring them to appear on a subsequent day for due deliberation before rendering a verdict.

Plaintiffs sued Plawner, Lenox Hill Hospital ("Lenox Hill"), and operating room nurse Cynthia Castenada ("Castenada") in connection with a circumcision and vasectomy Plawner performed on Collado at Lenox Hill on May 21, 2004. The trial of the action was held between November 13 and November 24, 2009. At trial, the uncontradicted testimony showed that Collado, at the time of his circumcision and vasectomy, was a 43

year old man suffering from obesity, hypertension and diabetes. Collado also suffered from phimosis, with resulting small cracks on his penis. His primary care physician, Dr. Slaski, referred Collado to Plawner, a urologist.

Plawner recommended a circumcision to Collado to relieve the phimosis symptoms. Collado requested, and Plawner agreed to perform, a vasectomy at the same time as the circumcision. These procedures were uneventfully performed. However, after the circumcision and vasectomy Collado testified that he suffered from swelling and unusual and severe pain.

Collado continued to see Plawner after the surgery until August 2004. During these visits Plawner recommended that Collado wrap the swelling area with an ace bandage and take a pain reliever. Collado testified that he eventually lost confidence in Plawner and sought treatment from a second urologist, Dr. Arnold Melman ("Melman"). Melman treated Collado throughout the fall of 2004. During this time he drained fluid out of the area surrounding the circumcision and vasectomy site.

Melman performed a second procedure on Collado's penis in December, 2004. During that surgery, Melman removed tissue from Collado's penis in the area of the circumcision. The parties' experts gave conflicting testimony concerning the composition of the tissue removed from Collado during the second surgery. Melman testified that the tissue was penile foreskin, left behind during the circumcision. Plawner's expert, Dr. Natan Bar-Chama ("Bar -Chama"), testified that the circumcision was properly

performed. Further, Bar-Chama testified that, based upon his review of the pathologist's report, it was impossible that the removed tissue was foreskin left on the penis during the circumcision. Rather, Bar-Chama testified, the removed tissue was a benign cyst.

Collado claimed that, as a result of Plawner's negligent treatment of him, he suffered incredible pain and discomfort after the surgery and suffered permanent loss of sensation in his penis, and consequent continuing erectile dysfunction. Here again, the parties submitted conflicting evidence concerning damages. Collado's experts, Melman and Dr. Robert April, testified that Collado's claimed intense post-operation pain was atypical, and that his loss of penile sensation and erectile dysfunction resulted from the negligently performed circumcision. In contrast, Plawner's experts, Bar-Chama and Dr. Barry Rubin, testified that post-operation pain and lymphedemia were not unexpected, and that Collado's loss of sensation and continuing erectile dysfunction were most probably caused by his continuing, unchecked diabetes and hypertension, or other health issues, not as a result of the circumcision.[1]

Plaintiffs proceeded against Plawner on two theories of malpractice: that Plawner negligently left behind penile foreskin when performing the circumcision, and that Plawner negligently treated Collado after the surgery by failing to take a more aggressive, investigatory approach to Collado's complaints of pain and lymphedemia. Plaintiffs

[1] On cross-examination, even Melman admitted that diabetes and hypertension are leading causes of erectile dysfunction and can cause loss of penile sensation.

further claimed that Lenox Hill Hospital deviated from acceptable standards of medical care by misscheduling the surgery, forcing Plawner to rush. Finally, plaintiffs claimed that Castenada, one of the operating room nurses during Collado's surgery, lacked the requisite knowledge and training to assist with the circumcision and vasectomy.

The entirety of the evidence plaintiffs submitted against Lenox Hill and Castenada was Collado's testimony describing the scheduling and performance of the operation, and Castenada's deposition testimony concerning the tasks she performed prior to and during the circumcision. At the close of the evidence I dismissed the claims against Lenox Hill and Castenada, finding that plaintiffs had failed to make out a *prima facie* case of malpractice against either. I noted in particular that plaintiffs were required, but failed, to submit any expert testimony to show that any actions or inactions by Lenox Hill or Castenada deviated from accepted standards of medical care.

I then submitted the action to the jury on plaintiffs' malpractice claims against Plawner. In the verdict sheet the jury was asked to determine both theories of malpractice against Plawner, *i.e.*, whether Plawner had negligently left in penile foreskin during the circumcision, and whether Plawner departed from accepted standards of medical care in his post-operative treatment of Collado.

In their verdict, the jury found that Collado had failed to show, by a preponderance of the evidence, that Plawner negligently left penile foreskin behind during the course of the circumcision. The jury next determined that Plawner had departed from accepted

standards of medical care in his post-operative treatment of Collado, but that this deviation did not cause the damages claimed by Collado – post-operative pain, loss of penile sensation and erectile dysfunction.

Plaintiffs now move to set aside the jury's verdict on a host of grounds. I address below each of the grounds raised by plaintiffs and supported by substantive argument.[2]

Motion for Judgment As A Matter of Law Notwithstanding the Jury's Verdict and Motion for a New Trial On the Ground that the Jury's Verdict Was Contrary to the Weight of the Evidence

Plaintiffs argue that I should set aside the jury's verdict and grant judgment in their favor because they have established all of the elements of medical malpractice as a matter of law. A trial court should only grant a motion for judgment as a matter of law, notwithstanding the jury's verdict, when "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997); *see also Alexander v. Eldred,* 63 N.Y.2d 460 (1984).

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[2] In their notice of motion and prayer for relief, plaintiffs sought a new trial on the ground that the Court improperly curtailed plaintiffs' counsel from commenting on defendants' counsel's opening statement, and on the ground that the Court improperly permitted defendants' experts to testify, as they were not competent to render expert opinions and because the substance of their testimony was not adequately disclosed in defendants' 3101(d) statement. Plaintiffs, however, failed to address these claims at all in their moving papers, *i.e.,* failed to cite to any testimony or make any substantive argument in support of these two grounds. Plaintiffs have therefore waived these grounds for a new trial. While plaintiffs did briefly mention these two arguments at the end of their reply, the Court may not consider arguments that are made for the first time in reply papers.

In reviewing a party's request for judgment as a matter of law, the trial court is required to view the testimony at trial in a light most favorable to the non-moving party. *Dinardo v. City of New* York, 13 N.Y.2d 872, 874 (2009); *Szczerbiak,* 90 N.Y.2d at 556; *Lopez v. New York City Transit Authority,* 60 A.D.3d 529 (1st Dep't 2009). Finally, "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 (2nd Dep't 1985), *see also White v. New York City Transit Authority,* 40 A.D.3d 297 (1st Dep't 2007); *McDermott v. Coffee Beanery, Ltd.,* 9 A.D.3d 195 (1st Dep't 2004).

Here, plaintiffs have failed to show that, as a matter of law, "there is no rational process by the [jury] could base a finding in favor of [Plawner]." *Szczerbiak,* 90 N.Y.2d at 556. To be sure, the evidence submitted to the jury was sharply conflicting. The parties' experts disagreed on almost every substantial factual issue at trial, including whether Collado's post-operative complaints were unusual or cause for alarm, whether the tissue eventually removed from Collado was left-behind penile foreskin or a benign cyst formed after the circumcision, and whether Collado's claim of lost penile sensation and erectile dysfunction is due to the circumcision or his continuing, unchecked diabetes, hypertension and other medical issues.

As in every case, the jury here was not required to accept any person's testimony wholesale. The jury was entitled to accept the lay and expert testimony the jurors found believable, and reject the lay and expert testimony that the jurors found unbelievable.

That is, the jurors were entitled to, and as is evident from the verdict, did accept some of plaintiffs' expert testimony, and some of defendants' expert testimony. There is certainly sufficient testimony to support each of the jury's factual determinations, thus I deny that part of plaintiffs' motion to set aside the jury's verdict and enter judgment in favor of plaintiffs as a matter of law.

"A new trial should be granted in the interests of justice only if there is evidence that substantial justice has not been done . . .as would occur, for example, where the trial court erred in ruling on the admissibility of evidence, there is newly-discovered evidence, or there has been misconduct on the part of the attorneys or jurors." *Gomez v. Park Donuts, Inc.*, 249 A.D.2d 266, 267 (2d Dep't 1998)(citation omitted); *see also Schafrann v. N.V. Famka, Inc.*, 14 A.D.3d 363, 364 (1st Dep't 2005) ("A new trial in the interest of justice is warranted only if there is evidence that substantial justice has not been done."). For the same reason stated above, I deny that part of plaintiffs' motion in which they seek an order setting aside the jury's verdict and a new trial on the ground that the verdict is against the weight of the evidence and in the interests of justice.

Motion for A New Trial on the Ground that the Verdict Was Inconsistent

Plaintiffs' motion to vacate the jury's verdict as inconsistent is both untimely and without merit. The timeliness of a motion to vacate an inconsistent verdict in a jury trial is not a mere formality that the court may lightly overlook. *See Gilbert v. Kingsbrook,* 37 A.D.3d 531, 532 (2nd Dep't 2007) (finding that the lower court improperly set aside the verdict as inconsistent, because the motion was untimely). The motion to vacate an inconsistent verdict may be timely made only before the court discharges the jury. *See Barry v. General Motors Corp.*, 55 N.Y.2d 803, 805 (1981). Otherwise, the Court will not have an opportunity to "correct the claimed error or, on the attorney's application, to retain the jury for a reasonable time, in light of the complexities involved . . ." and resubmit the matter to the jury. *Barry*, 55 N.Y.2d at 805; *see also Arrieta v Shams Waterproofing, Inc.*, 2010 N.Y. Slip. Op. 6508, *2 (1st Dep't 2010) (directing a new trial on the damages when plaintiff timely moved).

Here, the jury returned its verdict and I then polled the jury at plaintiff's request. Afterward, both counsel and I thanked the jury members for their service, and I discharged the jury. At no time before the jury's discharge did plaintiffs bring to my attention their position that the verdict was inconsistent, nor did plaintiffs make such a motion. It was only after the jury was discharged that I instructed counsel to make post-verdict motions, in writing, at a later date. Plaintiffs raise the inconsistent verdict issue

for the first time in their post-trial motion. Therefore, plaintiffs have waived this objection.

In any event, were I to consider the merits of plaintiff's motion to vacate the verdict, I would adhere to the verdict. The jury's verdict is entitled to great deference and may not be disturbed unless the court finds that the jury could not have reached its verdict on any fair interpretation of the evidence. *See Lolik v. Big V Supermarkets, Inc.*, 86 N.Y.2d 744, 746 (1995); *see also Ohdan v. City of New York*, 268 A.D.2d 86, 88 (1st Dep't 2000). It is not inherently inconsistent or irrational for the jury to reach a conclusion that defendant was negligent, but decline to find that the negligence was the proximate cause of Collado's injury, as the two inquiries are separate and are not necessarily inextricable. *See Ohdan*, 268 A.D.2d at 88.

Here, the jury could have rationally, and upon a fair interpretation of the evidence, concluded that the tissue Melman removed was a cyst, not penile foreskin, and that the injury Collado claims to have sustained could have been caused, separately, by his underlying uncontrolled diabetes, hypertension and obesity. The jury could rationally have disbelieved the conflicting causation testimony offered by plaintiffs' medical experts. There was sufficient evidence introduced at trial which could explain the jury's finding that Plawner's negligence in post-operative care did not cause plaintiffs' alleged damages. Therefore, I do not find sufficient grounds to disturb the jury's verdict.

Motion for A New Trial on the Ground That The Court Declined to Give the Jury a Charge on Res Ipsa Loquitur and Circumstantial Evidence

Plaintiffs argue that "it was error for the Court not to charge res ipsa loquitur and circumstantial evidence to the jury, especially in light of the evidence of Dr. Chama." Plaintiffs claim that these requested charges would have assisted the jury in "concluding that the foreskin later removed by Dr. Melman was foreskin that should have been removed during the circumcision on May 21, 2004 and was sutured inside of plaintiff and to allow the jury to infer that the defendant was negligent . . . ." However, I confirm my ruling at trial that, on the evidence presented, this action is not one in which the doctrine of res ipsa loquitur is applicable. Further, I adhere to my decision at trial to decline to give the jury a charge concerning circumstantial evidence.

"Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur, a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it." *Kambat v. St. Francis Hospital*, 89 N.Y.2d 489, 495 (1997). This doctrine recognizes that some events ordinarily do not occur in the absence of negligence. Prosser and Keeton, Torts § 39, at 247 (5th Ed.).

In the context of medical malpractice suits, the doctrine of res ipsa loquitur is applied in a narrow class of cases, falling into either one of two categories: (1) in case of a foreign body inadvertently left behind; or (2) an injury that a patient incurs, while under general anesthesia, to a part of the body not involved in medical procedure. *Kambat*, 89 N.Y.2d at 497 (finding res ipsa loquitur applicable where an 18-by-18-inch laparotomy

pad was discovered inside a patient's abdomen following a hysterectomy); *see also States v. Lourdes Hospital*, 100 N.Y.2d 208, 212 (2003) (permitting application of res ipsa loquitur where patient's arm was improperly positioned during surgical removal of ovarian cyst); *Rosales-Rosario v. Brookdale University Hospital Medical Center*, 1 A.D.3d 496, 497 (2nd Dep't 2003) (infliction of a blistering burn to patient's right knee during vaginal examination performed under sedation).

If, on the other hand, an object is intended to be placed inside the patient for medical purposes, and a treating physician improperly places it or fails to adequately diagnosis any resulting post-operative complications, such errors are akin to medical misdiagnoses. *See Delaney v. Champlain Valley Physicians Hospital Medical Center*, 232 A.D.2d 840, 841 (3rd Dep't 1996) (res ipsa loquitur inapplicable where an object was purposefully placed to serve a continuing treatment function, albeit improperly positioned). To find that negligence occurred in such an instance necessitates an evaluation of whether defendant's diagnostic methods and treatment procedures were consistent with contemporary professional standards of care. *See Rodriguez v. Manhattan Medical Center, P.C.*, 77 N.Y.2d 217, 223 (1990).

Neither of the two circumstances supporting res ipsa loquitur in a medical context is present here. The portion of the foreskin that plaintiffs alleged Plawner negligently left behind was not a "foreign body" as first described in *Flanagan v. Mount Eden General*

Hospital, 24 N.Y.2d 427, 430 (1969). Furthermore, the alleged injury occurred to the part of the body that was subject of the medical procedure.[3]

Plaintiffs' claim that Plawner improperly removed the penile foreskin, causing subsequent loss of sensation in the penis and erectile dysfunction, is a paradigmatic medical malpractice action. Plaintiffs argued to the jury that Plawner negligently exercised professional diagnostic judgment or discretion in performing the circumcision and administering the follow-up treatment. Under these circumstances, the doctrine of res ipsa loquitur does not apply, and plaintiffs have failed to show that I improperly declined to charge this doctrine to the jury.

I also find that I did not commit error by declining to give a circumstantial evidence charge, because plaintiffs' case did not exclusively rest on circumstantial evidence. *See People v. Vasquez*, 56 A.D.3d 378, 378 (1st Dep't 2008). Whenever a criminal charge [or a civil cause of action] is supported with both circumstantial and direct evidence, the court need not deliver a circumstantial evidence charge. *See People v. Daddona*, 81 N.Y.2d 990, 992 (1993); *see also Martinez v. Te*, 75 A.D.3d 1, 4 (1st Dep't 2010). Here, plaintiffs' expert witness's testimony and Collado's medical records constituted direct evidence, upon which the jury could determine the issue of Plawner's negligence. Thus, a circumstantial evidence charge was not warranted.

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[3]Plaintiffss reliance on *Antoniato v. Long Island Jewish Medical Center*, 58 A.D.3d 652, 655 (2nd Dep't 2009) is unavailing. In *Antoniato*, the injury was caused by a contaminated needle to a part of the spine upon which the doctor did not operate.

Motion for A New Trial on the Ground That The Court Erred in Requiring that the Jury Stay Late and In Rushing The Jury to Judgment

Finally, plaintiffs argue that I should set aside the jury's verdict because I allegedly forced the jury to deliberate far into the night on Tuesday, November 24th, and because I allegedly rushed the jury to come to a verdict. Plaintiffs claim that "the jury was faced with the reality of being forced to stay all night without dinner or to return the following week."

In reviewing the transcript, I note that I instructed the jury, not once, but *several times*, not to rush through their deliberations, to take their time, that they did not have to stay that evening, as we could come back after the Thanksgiving break, and that the matter was too important to the parties and the court system to have the jurors give less than full deliberation to all of the issues. Further, the jurors were not coerced into "stay[ing] all night without dinner." The jurors were provided sustenance, and reached their verdict at approximately 6:45 pm.

In short, plaintiffs have failed to produce *even a scintilla of evidence* to show that I improperly rushed the jury to judgment. I therefore deny that part of the plaintiffs' motion in which they seek to set aside the jury's verdict and order a new trial on this ground.

In sum, I found that plaintiffs have failed to show that the jury's verdict should be set aside for any of the grounds argued in this motion. Accordingly, plaintiffs' motion for

judgment notwithstanding the jury's verdict or to set aside the jury's verdict and for a new trial is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 8, 2010

ENTER

Hon. Saliann Scarpulla, J.S.C.