

**Coyle v Lubliner**

2011 NY Slip Op 31894(U)

July 11, 2011

Sup Ct, NY County

Docket Number: 107065/05

Judge: Alice Schlesinger

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

IA PART 16

PRESENT: ALICE SCHLESINGER  
Justice

PART \_\_\_\_\_

Index Number : 107065/2005

COYLE, JOHN PAUL  
VS.  
LUBLINER, JERRY A. M.D.

SEQUENCE NUMBER : 001

OTHER RELIEFS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

Motion to/for \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

\_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

*Plaintiff's motion to set aside the jury verdict is denied in accordance with the accompanying memorandum decision.*

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

**FILED**

JUL 12 2011

NEW YORK COUNTY CLERK'S OFFICE

JUL 11 2011

Dated: July 11, 2011

*Alice Schlesinger*  
ALICE SCHLESINGER, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
JOHN PAUL COYLE and GINA COYLE,

Plaintiffs,

-against-

JERRY A. LUBLINER, M.D., and NEW YORK  
ORTHOPAEDIC & SPORTS MEDICINE, P.C.,

Defendants.  
-----X

SCHLESINGER, J.:

Index No. 107065/05  
Motion Seq. No. 001

**FILED**

JUL 12 2011

NEW YORK  
COUNTY CLERK'S OFFICE

On January 27, 2011, a trial of this action, *John Paul Coyle and Gina Coyle v Jerry A. Lubliner, M.D., and New York Orthopaedic & Sports Medicine, P.C.*, concluded with an unanimous verdict by the jury hearing it.

The case was well-tryed and involved a total knee replacement that Dr. Lubliner had performed on John Paul Coyle on February 20, 2003. Essentially, the controversy concerned the sizing of the femoral component used by the doctor. The plaintiff claimed that it was too big, which caused him to suffer a great deal of pain and an inability, despite months of physical therapy, to get the new knee to work properly. The evidence revealed that Dr. Lubliner had attempted to deal with this lack of progress by doing two manipulations of the knee under anesthesia, in April and July of 2003, but these were not successful.

Ultimately, Mr. Coyle went to another orthopedic surgeon, Dr. Fealy, who removed everything placed by the defendant and replaced the femoral component with a smaller size. This surgery was performed on December 9, 2003. Following this surgery, Mr. Coyle was able to successfully regain flexion and extension of the knee after physical therapy.

The defendant argued at trial that the sizing of the femoral component had been carefully chosen by Dr. Lubliner and carefully installed in the knee by him and that it was, in fact, the right size. Defendant attributed all of Mr. Coyle's pain and his inability to regain flexibility in the knee to his body's production of an excess amount of arthrofibrosis tissue that prevented proper movement of the knee. Finally, since Dr. Fealy was able in his later surgery to remove this tissue, the defendant argued it allowed the knee to respond positively to the physical therapy.

Pursuant to the above theories of the case, each one supported by expert testimony by an orthopedic surgeon, the Court with the help and input of counsel, fashioned the following two questions related to liability for the jury interrogatories. The first question 1(a) read as follows:

Did Dr. Jerry A. Lubliner depart from good and accepted standards of orthopedic surgical care in the sizing of the femoral component when performing John Paul Coyle's knee replacement surgery on February 20, 2003?

The jury was told to go on to answer 1(b) if their answer to 1(a) was "Yes"; in other words, if they found a departure. Then the second question 1(b), the proximate cause question, read as follows:

Was that departure a substantial factor in causing injury to John Paul Coyle?

As stated earlier, the jury was unanimous in its responses. They answered "Yes" to question 1(a), finding a departure, and "No" to whether it was a "substantial factor in causing injury." I think it is fair to say that no one expected this verdict. The reason is that the trial evidence concentrated almost exclusively on the size of the femoral component.

Further, although counsel did discuss causation in their closing arguments, in a limited way, arguing why and how Mr. Coyle got better with a smaller component, clearly the bulk of the arguments concerned the femoral component's size.

Therefore, not surprisingly, the plaintiff moved pursuant to CPLR §4401 and §4404(a) to set aside the jury's response on proximate cause, arguing that the verdict on this issue was "irrational" and "against the weight of the credible evidence." Also not surprisingly, the defendant vigorously opposed the motion, arguing that there was "ample evidence" for the jury to conclude both that the component was too large and that the size was not the cause of the plaintiff's difficulties.

In coming to my decision here, it must first be acknowledged that the plaintiff, in circumstances such as this, has a heavy burden in persuading the Court to disregard the decision reached by the jury. A verdict should not be set aside as against the weight of the evidence unless the verdict could not have been reached upon any fair interpretation of the evidence. *Nicastro v. Park*, 113 AD2d 129 (2<sup>nd</sup> Dep't 1985). Further, in circumstances like those here, where the jury has found that the defendant doctor did depart from accepted standards of medical care but has also found that such departure was not a proximate cause of plaintiff's injuries, the verdict is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find a departure without also finding proximate cause. *Rodriguez v. Elmont School Dist.*, 37 AD3d 448 (2<sup>nd</sup> Dep't 2007).

During the trial, defendant raised the issue of arthrofibrosis, which every doctor that testified agreed Mr. Coyle suffered from. This is a condition of scar tissue formation. The records of the treating surgeons here, Dr. Lubliner and Dr. Fealy, the doctor who performed

the revisionist surgery, noted its existence in their records. Also, Dr. Lubliner attempted to clear the knee of this tissue during his two unsuccessful manipulations. Dr. Fealy's operative note, as referred to in the defendant's closing argument (Transcript p 749), stated:

Significant amount of anterior scarring was encountered throughout the entire anterior knee joint. Significant amount of capsular releases were performed and lysis of adhesions. Scar tissue was removed from both the medial and lateral gutters ... an extensive lateral release was performed.

The two experts who testified, both orthopedic surgeons, Dr. Malin for the plaintiff and Dr. Bronson for the defendant, also opined on this subject and on the likelihood of scar tissue coming back. For example, also in his closing argument and after the Fealy reading, counsel then argued that the removal of all of the scar tissue "opened up that entire joint capsule for the plaintiff. That is why this patient had better range of motion after the procedure". Then counsel referred to his expert Dr. Bronson who had pointed out that in some cases scar tissue is going to come back (TR 750):

but in a certain percentage of cases that scarring will quiet down, particularly when it's all removed. This patient, fortunately, never redeveloped significant, exuberant scarring within that joint. Once the joint is opened up again by Dr. Fealy, there's more room for that knee to move.

On the plaintiff's side, his counsel also discussed the impact of Dr. Fealy's surgery, emphasizing his note that the "femoral component was quite large," and his actions, which included replacing the component with a smaller one. He also referred to the scar tissue by arguing that in all probability, it came back after Dr. Fealy's procedure in the same

manner that it had returned after Dr. Lubliner's surgery and two manipulations. In this regard, counsel pointed to his expert Dr. Malin who had testified that the scar tissue would have come back after the revision surgery because it was more extensive surgery. "It's a bigger surgery" (p 770).

Finally on this point, counsel told the jury (att p 771) that scar tissue "doesn't magically disappear."

You don't become a person who was an excessive scar tissue person, from Dr. Lubliner's care and treatment from February to October or September of 2003, and then you go to another doctor; you have a more severe and extensive procedure and all of a sudden magically, you are no longer an excessive-scar-tissue person. It doesn't work that way. That's not the way the body is set up. If he's going to scar up, he's going to scar up. If he scarred up too much once, he's going to scar up too much again.

But magically, because we have to fit it into the defense in this case, he's no longer that person. They leave out that little, little item, that this man went in — Dr. Fealy — and said, this femoral component was too - "quite large" and he took it out. He used a smaller size.

So although both attorneys did touch on the aftermath of the Fealy surgery and did acknowledge that Mr. Coyle had a successful rehabilitation after it, and although both agreed that the femoral component used in this surgery was smaller than the one that Dr. Lubliner had used, they each attributed the ultimate result to different things. More significantly, plaintiff's counsel discounted the scar tissue as a factor in Mr. Coyle's ultimate outcome, while defense counsel argued that it was the fact that the arthrofibrosis did not come back that accounted for the different outcome.

A verdict must be based on the evidence, and in a medical malpractice case it must have a basis in the testimony of an expert. For example, in the case *Buffolino v. Lieberman, et al.*, 30 Misc. 3d 1215(A) (Sup. Ct., Suffolk Co. 2011), which both side discuss in their post-trial papers, the court did set aside the verdict finding no proximate cause because the defendant had offered no oncological testimony from an expert to refute plaintiff's expert opinion as to causation. Therefore, whereas in that trial there was a sharp dispute in matters of liability, as there was here, there was no such dispute founded on expert testimony with regard to causation. There the issue on causation had to do with whether defendant's earlier intervention and diagnosis of cancer would have made a difference in prolonging the life of the decedent.

Similarly, in two 2002 Third Department cases, *Knish v. Meehan*, 291 AD2d 647 and *Calderon v. Irani*, 296 AD2d 778, the courts did set aside the verdict because of the failure by the defense to offer expert testimony on the issue of causation. In *Knish*, the jury determined that the defendant ophthalmologist had deviated from the standard of reasonable care, but it also found that the deviation was not a substantial factor in causing blindness in plaintiff's left eye. But the court found these results could not be reconciled as there was uncontradicted evidence that, had a proper diagnosis been made and timely therapy administered, it was more likely than not that the blindness would have been prevented.

In *Calderon*, the court also set aside the verdict, remarking (at p 779) that a jury's determination must be based on facts or opinion found in the record. The jury in *Calderon* had found that Dr. Irani, a gynecologist, had deviated from accepted standards of medicine

in failing to diagnose plaintiff's cervical cancer. The jury had also found that this deviation was not a substantial factor in causing plaintiff's injuries. But again, although the plaintiff had presented testimony from an expert, a gynecologic oncologist, on the issue of causation, testifying to the patient's better chance of survival with an earlier diagnosis, the defendant presented no such testimony. Thus, the defendant had failed to provide the jury with a reasonable justification for rejecting the testimony of the plaintiff's expert.

Obviously, the facts in the above cases are very different from the ones here. But the most significant difference leading to a different result is that here experts did testify for both sides and did opine on the probable reason for Mr. Coyle's better result after the revisionist surgery by Dr. Fealy.

Therefore, I first conclude here that the issue of liability (the sizing of the femoral component) and the issue of causation (the reason for Mr. Coyle's pain and inability to move his knee in the period between the surgeries) are not inextricably intertwined. I say this because of the added element of the existence of arthrofibrotic tissue between the surgeries.

I also conclude that the jury's determination of no causation appears to have been based on its conclusion that it was the arthrofibrosis that caused the problem, not the sizing of the femoral component. This conclusion did have a basis in the expert opinion of Dr. Bronson. While it is true that the jury probably rejected Dr. Bronson's opinion with regard to the sizing issue, in all probability they accepted it with regard to the scar tissue not returning after the Fealy surgery. This, they had a right to do.

Therefore, in conclusion, since the issues were not intertwined and since the jury did have a basis in the facts and opinion of an expert in their answer to the causation


question 1(b), I ultimately find that the verdict was based on a fair interpretation of the evidence. Such being the case, the verdict is entitled to be upheld.

Accordingly, it is hereby

ORDERED that plaintiff's motion to set aside the jury verdict is denied, and the Clerk is directed to enter judgment in favor of defendant based on the verdict rendered.

Dated: July 11, 2011

**JUL 11 2011**

  
J.S.C.  
**ALICE SCHLESINGER**

**FILED**

**JUL 12 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**