

**Dermargosian v Cabrini Med. Ctr.**

2011 NY Slip Op 32190(U)

August 5, 2011

Sup Ct, NY County

Docket Number: 400872/09

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE  
J.S.C.  
*Justice*

PART 5

Index Number : 400872/2009  
**DERMARGOSIAN, DANIEL**  
VS.  
**CABRINI MEDICAL CENTER**  
SEQUENCE NUMBER : 001  
OTHER RELIEFS  
*CAL # 30*

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

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

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

Order 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

**FILED**  
AUG - 8 2011  
COUNTY CLERK'S OFFICE  
NEW YORK

DECIDED IN ACCORDANCE WITH  
COURT RULES AND/OR ORDER

Dated: 8/5/11  
AUG 05 2011

BARBARA JAFFE  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
DANIEL DERMAGOSIAN,

Index No. 400872/09

Plaintiff,

Mot. Date: 6/7/11

Mot. Seq. No.: 001

- against -

Cal. No.: 30

**DECISION AND ORDER**

CABRINI MEDICAL CENTER,  
CHRISTOS STAVROPOULOS, M.D.,  
RICHARD V. DELUCA, M.D., and  
KLAPPER & DELUCA PULMONARY ASSOCIATES, P.C.,

Defendants.

-----X  
BARBARA JAFFE, J.:

**For plaintiff:**

Marilyn Nelson-Cashman, Esq.  
Weiss & Rosenbloom, P.C.  
27 Union Sq. West #307  
New York, NY 10003  
212-366-6100

**For defendant Stavropoulos:**

Samantha E. Quinn, Esq.  
Schiavetti, Corgan *et al.*  
575 Eighth Ave., 14<sup>th</sup> Fl.  
New York, NY 10018  
212-541-9100

By notice of motion dated March 16, 2011, plaintiff moves pursuant to CPLR 4404 for an order setting aside the verdict rendered after trial on February 9, 2011 and directing a new trial. Defendant Stavropoulos opposes.

**I. BACKGROUND**

The instant medical malpractice action resolved plaintiff's claim that on October 4, 2005, he was injured during an operation performed by defendant who, while performing a left upper lobe wedge resection of plaintiff's left lung, unnecessarily attempted to sample a lymph node at level L6 and failed to avoid plaintiff's left recurrent laryngeal nerve, causing the paralysis of his left vocal cord. (Affirmation of Marilyn Nelson-Cashman, Esq., dated Mar. 16, 2011 [Nelson-Cashman Aff.]).

On January 31, 2011, the jury trial commenced before me and on February 9, 2011, a defense verdict in favor of defendant was rendered by the jury which answered in the negative the following two questions:

- (1) Did defendant depart from accepted medical practice in attempting to perform a lymph node sampling at level 6 during the left upper lobe wedge resection?
- (2) Did defendant depart from accepted medical practice in failing to avoid plaintiff's left recurrent laryngeal nerve while attempting to sample the lymph node at level 6?

## II. ANALYSIS

Plaintiff asserts that the following errors warrant a new trial: (1) plaintiff should have been permitted to comment on defendant's medical billing records in evidence; (2) the medical record of Dr. Richard Smith, a non-testifying doctor, should not have been admitted in evidence; and (3) the jury should not have been instructed on "error in judgment" (PJI 2:150). Plaintiff also argues that the verdict is against the weight of the evidence.

### A. Comment on defendant's medical billing records

Although plaintiff's medical chart, including the last page which reflects the cost of the lymph node sampling and the amount billed to plaintiff, was admitted in evidence, I did not permit plaintiff to question defendant and his medical expert about the cost of the procedure.

#### 1. Contentions

Plaintiff contends that the evidence of the cost is relevant to defendant's motive and/or reason for performing the procedure, and that his theory of the case was that defendant performed the unnecessary procedure to profit from it financially. By prohibiting him from questioning defendant about it, plaintiff maintains, I prevented him from eliciting evidence related to defendant's motive, thereby prejudicing his case. (Nelson-Cashman Aff.).

Defendant asserts that the cost of the procedure is irrelevant to whether he committed malpractice, and that plaintiff first raised the issue at the charge conference. (Affirmation of Samantha E. Quinn, Esq., dated Apr. 18, 2011 [Quinn Aff.], Exh. B).

In reply, plaintiff denies that the issue was first raised at the charge conference, asserting that he raised it when counsel attempted to question defendant and his expert about it, and that as defendant's entire medical record was admitted in evidence, counsel should have been permitted to comment on it during summation. (Reply Affirmation, dated May 3, 2011 [Reply Aff.]).

## 2. Analysis

The jury was asked to determine whether defendant committed medical malpractice by choosing to perform, and by the manner in which he attempted to perform, the sampling. Defendant's alleged financial motive in choosing to perform the procedure is irrelevant to these issues, and plaintiff cites no authority supporting his allegation that a defendant-doctor's financial motive is relevant to a medical malpractice claim. (See generally *People v Scarola*, 71 NY2d 769 [1988] ["[e]ven where technically relevant evidence is admissible, it may still be excluded by trial court in exercise of its discretion if its probative value is substantially outweighed by danger that it will unfairly prejudice other side or mislead jury."]; *Pourooshasb v Pourooshasb*, 4 AD3d 404 [2d Dept 2004] [determination as to relevancy of evidence generally left to sound discretion of trial court]).

### B. Admission of Dr. Smith's record

#### 1. Contentions

Plaintiff contends that I erred in admitting in evidence a medical record or report of Dr. Richard Smith, a physician who treated plaintiff after the operation, as the report was neither

certified nor authenticated, nor was a foundation laid for it. He alleges that I also erred in permitting Dr. Keller to comment on the report. (Nelson-Cashman Aff.).

Defendant maintains that as plaintiff's counsel indicated, before trial, that she intended to offer Dr. Smith's records at trial, that she informally agreed that all medical treatment records would be stipulated into evidence, and that the report was part of Montefiore Medical Center's records which were exchanged during discovery but inadvertently omitted from the records sent to the court pursuant to subpoena, plaintiff is estopped from complaining of the admission in evidence of the Smith report. (Quinn Aff.).

In reply, plaintiff argues that he was prejudiced by his inability to cross-examine Smith and that the jury relied on the Smith report in rendering the verdict. Counsel denies having agreed to the admission in evidence of all of the medical records, alleging that she agreed only to the records which had been properly certified and authenticated. (Reply Aff.).

## 2. Analysis

Having served defendant with a notice of intent to offer Smith's report in evidence at trial, and as the notice reflects that the report was "authenticated by certification," plaintiff is estopped, as she was at trial, from arguing that I erred in admitting it. Moreover, plaintiff's counsel agreed to stipulate into evidence any records received by the court pursuant to a subpoena and it is undisputed that the report should have been included in the certified and subpoena'd Montefiore Hospital records but was omitted unexpectedly and without explanation.

And, as Smith reported only on his post-operative treatment of plaintiff, which evidence pertains only to the mitigation of damages, plaintiff has not established that he was prejudiced by its admission as the jury never reached the issue of plaintiff's negligence or mitigation of

damages or that the admission of the report had any effect on the verdict. (*See Gilbert v Luvin*, 286 AD2d 600 [1<sup>st</sup> Dept 2001] [“where an error at trial bears only upon an issue that the jury did not reach, the error is harmless and may not serve as a ground for a new trial”]; as jury found defendant did not commit malpractice, it never reached issue of causation and thus even if admission of expert’s testimony on causation was in error, error harmless]; *see also Martin v Triborough Bridge and Tunnel Auth.*, 73 AD3d 481 [1<sup>st</sup> Dept 2010], *lv denied* 15 NY3d 713 [any error in permitting expert to testify regarding plaintiff’s negligence harmless as jury found defendant not negligent and never reached issue of plaintiff’s negligence]; *Farrell v Gelwan*, 30 AD3d 563 [2d Dept 2006] [admission of expert evidence related to causation harmless as jury found defendant did not commit malpractice and never reached issue of causation]; *Avezzano v Savoretti*, 14 AD3d 635 [2d Dept 2005] [admission of portion of plaintiff’s hospital records, even if in error, could not have affected jury’s verdict as it pertained only to proximate cause and jury never reached issue after finding defendants not negligent]).

### C. “Error in judgment” charge

#### 1. Contentions

Plaintiff asserts that I erred in charging the jury with PJI 2:150, the “error in judgment” charge (charge), absent any testimony or evidence that defendant had been faced with two medical alternatives in deciding to sample plaintiff’s lymph node. He denies that the error was harmless as the jury could have found that defendant departed from acceptable medical practice while relieving him of liability based on defendant’s allegation that any error he made was an error in judgment. (*Nelson-Cashman Aff.*).

Defendant denies that I erred in giving the charge as he chose between two medical

alternatives, namely, taking or not taking the sample. (Quinn Aff.).

## 2. Analysis

Here, the testimony at trial established that defendant chose between sampling the node and not sampling it. Consequently, the charge was warranted by the evidence. (*See eg Lenzini v Kessler*, 48 AD3d 220 [1<sup>st</sup> Dept 2008] [error-in-judgment charge proper as critical issue was whether doctor had been negligent in choosing not to act and only observe condition instead of performing immediate surgery]).

### D. Was the verdict against the weight of the evidence?

Pursuant to CPLR 4404(a), the court may set aside a verdict or judgment entered after trial, and direct judgment in favor of the moving party or grant a new trial, where the verdict is contrary to the weight of the evidence or in the interest of justice. In order to find that a verdict is against the weight of the evidence, the court must determine that “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial.” (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). Thus, if “it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence.” (*Id.* at 499).

A jury verdict should not be set aside as against the weight of the evidence “unless the jury could not have reached its verdict on any fair interpretation of the evidence,” and “[g]reat deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the

witnesses.” (*Desposito v City of New York*, 55 AD3d 659 [2d Dept 2008]). The jury’s resolution of disputed factual issues and inconsistencies in witnesses’ testimonies is also entitled to deference. (*Bykowsky v Eskenazi*, 72 AD3d 590 [1<sup>st</sup> Dept 2010], *lv denied* 16 NY3d 701 [2011]). And it is the jury’s function to determine whether a witness is credible and what weight ought to be given to the testimony of experts. (*Devito v Feliciano*, 84 AD3d 645 [1<sup>st</sup> Dept 2011], *citing Harding v Noble Taxi Corp.*, 182 AD2d 365 [1<sup>st</sup> Dept 1992]).

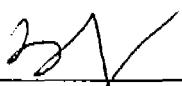
In light of the expert testimony reflecting that defendant’s decision to perform the sampling was within accepted medical practice, and that during such a procedure, damage or injury to the left recurrent laryngeal nerve occurs in one to two percent of the procedures and may occur despite the use of accepted medical standards and without any negligence or departure from accepted medical practice by the physician performing the procedure, it cannot be said that “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial.”

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion to set aside the verdict or direct a new trial is denied.

ENTER:

  
 \_\_\_\_\_  
 Barbara Jaffe, JSC

**BARBARA JAFFE**  
 J.S.C.

DATED: August 5, 2011  
 New York, New York

AUG 05 2011

**FILED**  
 AUG - 8 2011  
 COUNTY CLERK'S OFFICE  
 NEW YORK