

Sokol v Lazar

2012 NY Slip Op 31833(U)

July 6, 2012

Supreme Court, New York County

Docket Number: 104216/10

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.

SCANNED ON 7/13/2012

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

IA PART 16

PRESENT: ALICE SCHLESINGER
Justice

PART _____

Index Number : 104216/2010
SOKOL, CAROL
vs.
LAZAR, PAUL A.
SEQUENCE NUMBER : 001
VACATE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is to set aside the jury verdict is denied. The Clerk may proceed to enter judgment in favor of the plaintiff based on the jury's award.

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

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUL 06 2012


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

FILED

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

JUL 11 2012

-----X
CAROL SOKOL,

NEW YORK
COUNTY CLERK'S OFFICE
Index No. 104216/10
Motion Seq. No. 001

Plaintiff,

-against-

PAUL A. LAZAR, DPM,

Defendant.

-----X
SCHLESINGER, J.:

This Court presided at a podiatric malpractice trial between April 2 and April 12, 2012. On the final day and after closing statements by counsel and my legal instructions, the jury hearing the case deliberated and reached a verdict in favor of Carol Sokol, the plaintiff. The jury found Dr. Paul Lazar negligent for three out of four departures submitted to them. These were unanimous findings, as was the jury's decision that all of these three departures were substantial factors in causing injury to Ms. Sokol.

The jury then awarded damages for past pain and suffering in the amount of \$300,000 and for future pain and suffering in the amount of \$600,000 for 25.5 years. At the time of the trial, Ms. Sokol was 58 years old and the "25.5 years" figure was in accordance with statistical life expectancy figures. During the trial, only one expert podiatrist Dr. Sloan Gordon, who testified on behalf of the plaintiff, gave an opinion as to the permanency of Ms. Sokol's injuries to her right foot, as caused by the surgery and the post-surgical care by Dr. Lazar. Dr. Gordon said that all the pain and disability Ms. Sokol now experienced was permanent.

Defendant has now moved to set aside the jury's award for future pain and suffering as excessive.¹ Though defense counsel during his summation never suggested any

¹ Defendant cites CPLR 5501(c), but the correct citation is CPLR 4404.

numbers if the jury found against his client, he now is suggesting that \$100,000 is a proper award in this category, and he is requesting a new trial on damages unless the plaintiff agrees to this number. In his closing argument, plaintiff's counsel asked the jury to award \$250,000 for past pain and suffering and "at least \$500,000 for the future".

On direct examination, only because defense counsel asked no questions on this point, Ms. Sokol described how her foot presently felt, beginning at page 786, line 2, of the transcript:

Q. Okay. And could you tell the jury now what activities you did before the first surgery that you no longer do now?

A. I don't do, I don't run. I don't do the treadmill. If I am at a gym I don't -- I'm constantly aware of my foot. Sometimes, I have pain, you know, like an acute pain. Sometimes, I just have discomfort.

I'm always aware of it.

Q. When you say you're always aware of it, can you describe it in any other way?

A. No.

Well, it's like most people or at least I am not aware of walking on my left foot. Like, I don't necessarily feel my toes all of the time. Or if I'm sitting down I don't feel my toes or my foot.

On my right foot I'm always, I always feel something. Sometimes it feels like I have got something stuck between the 4th and 5th. Sometimes, it feels like the 2nd is aching.

I'm just always aware of it. And then depending upon what shoe. I cannot find a shoe that is comfortable.

Q. Did you have any of those feelings before the surgery done by the defendant?

A. No.

Yes, I had some periodic throbbing and a bump on the side of my foot.

Q. The bunion?

A. Yes.

Q. Periodic?

A. Sometimes at night it would throb. A little bit if I was in a high heel or whatever during the day the bump would throb.

Q. Okay. Is that why you went to him in the first place?

A. Yes.
(Short pause)

Q. Are there any activities now? You said you don't run anymore. So, I have got that.

Are there any activities? I mean, any sort of things? I don't necessarily mean sports.

Anything else now that effects your right foot more than sitting in the jury box, in the witness chair, for example?

A. Yes, walking.

Q. What do you mean by that?

A. Prior to my foot surgery I used to walk a lot. All over the city.

I mean to walk, you know, 40 blocks would not be anything, you know, to me. Now it is.

Q. It is what?

THE COURT: Yes

I mean, now when you walk can you walk a few blocks without any problem?

THE WITNESS: Yes, I can walk two blocks.

If I'm going to be walking more than, you know, like 5, 10 blocks I'll definitely always be in a sneaker.

Q. I am sorry. I didn't hear you.

A. Always be in a sneaker. Ten blocks in a pair of shoes will make my foot uncomfortable. A little bit painful.

Q. Are there any other activities besides walking that bothers your foot more than prior to the first surgery?

A. Steps. Everything.

Q. Tell us about steps?

A. Everything bothers my foot.
I mean, my foot is not normal. It is not like my other foot. It is. I don't feel great in shoes. I can feel the difference in a sneaker.

Q. You just said steps. What do you mean by steps?

A. Stairs.

Q. Oh, stairs. I am sorry.
Tell us about stairs.

A. Stairs can hurt my foot.

Q. Can or do or --

A. Do.

Q. All of the time?

A. Not all of the time....

Q. Well, does your — if you're sitting or lying does your right foot cause you pain all of the time?

- A. Not all of the time. But, sometimes when I'm lying down I get a cramp in my right foot.
- Q. And you said something about an awareness of it.
Can you tell us what that means?
- A. I'm just always aware of my toes, various toes.
- Q. Okay?
- A. I'm not aware of my left foot. But, my right foot, depending upon how I move my foot sometimes I will feel my 2nd toe. Sometimes I will feel like there is something between my 4th and 5th toe.
- Q. Did you have that awareness before the surgery done by Dr. Lazar?
- A. No.

Moving counsel argues that pursuant to the CPLR, the Appellate Division has held that an award for damages should be set aside if it would deviate materially from what would be reasonable compensation. Further, that in making that evaluation, the Court is guided by comparable cases and their findings, particularly in the area of pain and suffering.

In this regard, defense counsel relies primarily on three appellate cases that she believes are analogous to the Sokol controversy. The first is *Barthelemey v. Spivack*, 41 AD3d 398 (2nd Dep't 2007). The second case is *Nuzzo v. Feinman*, 219 AD2d 624 (2nd Dep't 1995). The third is *DiGiacomo v. Cabrini Medical Center*, 21 AD3d 1052 (2nd Dep't 2005).

I find that *DiGiacomo* is not comparable. That was a *res ipsa* case where the plaintiff James DiGiacomo suffered from Type I diabetes and experienced extensive wound

healing difficulty after several toes on his left foot had been amputated. His surgeon suggested a tissue transplant for this foot from tissue taken from the patient's right thigh. After the surgery, where Mr. DiGiacomo had been placed under anesthesia, he discovered two blood blisters on his right foot, the healthy foot. These worsened to such an extent that he needed an amputation on his right leg below the knee. That fact pattern and injury have virtually nothing to do with a straightforward case of podiatric malpractice such as this one.

Although the other two cited cases are somewhat comparable as both involved podiatric malpractice, their use is extremely limited. In *Nuzzo*, after a trial held in 1993, the jury awarded \$750,000 as a combined award, presumably for both past and future pain and suffering. The case seems to be similar to Ms. Sokol's case regarding the performance inappropriate surgeries, but we do not know from the decision when these surgeries were done. This omission is important; all one is told is that Ms. Nuzzo was 47 years old at the time of the surgeries, but the decision does not indicate the plaintiff's age at trial and how many years had passed to serve as the basis for the past pain and suffering award.

We also only know that Ms. Nuzzo had testified that she could not stand for long periods of time or walk long distances. Ms. Sokol also testified that she could not walk long distances. Ms. Nuzzo had further testified that she could walk by shuffling her feet and could not "perform simple tasks without experiencing excruciating pain." 219 AD2d at 625. No further details were given. Therefore, it is impossible to know whether these injuries were permanent, when they occurred, how old the plaintiff was at trial and how else, if at all, her injuries affected her.

But having said that, the jury in the *Nuzzo* awarded the plaintiff \$750,000 19 years ago, while Ms. Sokol's jury awarded her \$150,000 more, or \$900,000.

8]

In *Barthelemey*, a 2005 trial, the decision reveals absolutely nothing about the plaintiff's pain and/or limitations and/or the permanency of the injuries. We do know that the trial court reduced the award for past pain and suffering from \$200,000 to \$185,000 and for future pain and suffering from \$300,000 to \$95,000. The Second Department modified the trial court's determination and reinstated the jury verdict as to the past award, while agreeing that the reduction in the future damages award was proper. The sole explanation given by the appellate court was a reference to the trial court's discretion and a citation to *Zukowski v Gokhberg*, 31 AD3d 633 (2004), a case where no facts are given.

Thus, the moving defendant in the case at bar has provided no viable comparable data for this Court to use to grant the requested reduction in the jury's award.

In *Crockett v Long Beach Medical Center*, 15 AD3d 606, 607 (2nd Dep't 2005), the Court stated, in upholding an award granted by the jury:

the amount of the award of damages for personal injuries is primarily a question for the jury ... whose determination is entitled to great deference

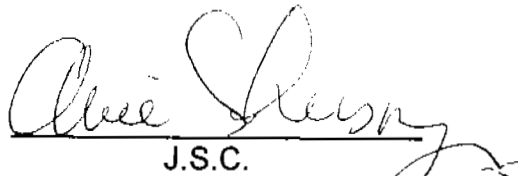
Here, the jury unanimously agreed that Dr. Lazar had committed podiatric malpractice in three separate ways. In reaching this decision, as well as the one concerning damages, the jurors had an opportunity to observe both the parties and their experts. They also had an opportunity to assess the way in which this malpractice has affected Ms. Sokol's life and will continue to affect her in the future. They determined that \$600,000 was fair compensation for the manner in which the rest of the plaintiff's life will be compromised due to her foot injuries. The moving defendant has failed to demonstrate anything here in this motion to convince this Court that the jury's award of future damages was excessive, improper, or in any way wrong.

Accordingly, it is hereby

ORDERED that the defendant's motion to set aside the jury's verdict as to future damages is in all respects denied.

Dated: July 6, 2012

JUL 06 2012


J.S.C.

ALICE SCHLESINGER

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE