

Riccardi v Medical Arts Radiological Group, P.C
2012 NY Slip Op 33116(U)
December 21, 2012
Sup Ct, Suffolk County
Docket Number: 28630/2008
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX NO. 28630/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
Supreme Court Justice

 PATRICIA ANN RICCARDI, Individually and as
 Executrix of the Estate of GERALD D.
 RICCARDI, a/k/a GERALD DONALD
 RICCARDI, Deceased,

Plaintiffs,

-against-

MEDICAL ARTS RADIOLOGICAL GROUP,
 P.C. and ALLAN JAY KLINGER,

Defendants.

ORIG. RETURN DATE: 11/13/2012
FINAL SUBMISSION DATE: 12/12/2012
MTN. SEQ. #002
MOTION: MD

PLAINTIFF'S ATTORNEY:

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DEFENDANTS' ATTORNEY:

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The Plaintiff, Patricia Ann Riccardo, Individually and as Executrix of the Estate of Gerald D. Riccardo, a/k/a Gerald Donald Riccardo, Deceased, petitions the Court by way of motion for an order pursuant to CPLR § 3124 granting the Plaintiffs the following relief:

- A) granting the Plaintiff Judgment Notwithstanding the Verdict (JNOV) on the issue of liability and setting this matter down for a new trial on the issue of damages; or
- B) granting the plaintiff a new trial on all issues.

The Defendants, Medical Arts Radiological Group, P.C. and Allan Jay Klinger, oppose the application. Before the Court are the following submissions:

- 1. Plaintiff's Notice of Motion, counsel's Affirmation In Support with Exhibits A through D;
- 2. Defendants' Affirmation In Opposition; and
- 3. Plaintiff's Reply Affirmation.

Factual allegations of the Plaintiff center around a chest x-ray performed at the Defendants' facility on April 28, 2006. Plaintiff alleged that this chest x-ray showed a density of approximately 1 cm in size in the upper left lobe of the chest. The dispute at trial centered around the nature of the thing defined by Plaintiff as "a density approximately 1 cm in size in the left upper lobe of the chest."

The case was submitted to the jury by way of questionnaire. Three liability questions submitted, read as follows:

- 1(a) Did the April 28, 2006 chest x-ray reveal a suspicious abnormality and if so, did the defendant, ALLAN KLINGER, M.D. depart from good and accepted medical practice by not recommending a CT scan?,
- 2(a) Did the April 28, 2006 chest x-ray reveal a suspicious abnormality and if so, did the defendant, ALLAN KLINGER, M.D. depart from good and accepted medical practice by not obtaining and reviewing the patient's prior chest x-ray?, and
- 3(a) Did the April 28, 2006 chest x-ray reveal a suspicious abnormality and if so, did the defendant, ALLAN KLINGER, M.D. depart from good and accepted medical practice by not including the abnormal findings in his report?

The jury answered all three (3) questions "No."

Dr. Coralie Shaw testified on behalf of the Plaintiff. Dr. Shaw is Board certified in Diagnostic Radiology, Professor Emeritus of Diagnostic Radiology at Yale University School of Medicine, former Professor of Diagnostic Radiology at Yale University School of Medicine and Director of the Diagnostic Radiology Residency Program at Yale University School of Medicine. Dr Shaw offered expert testimony that there was an abnormality, or nodule, on the April 28, 2006 chest x-ray interpreted by Dr. Klinger.

Dr. Richard Hirschman also testified on behalf of the Plaintiff as an expert. Dr. Hirschman is also Board Certified in Internal Medicine, Board Certified in Hematology and Board Certified in Medical Oncology. He was the chief of Oncology at Cabrini Medical Center as well as Director of Hematology and Oncology Services at that hospital. He is a Clinical Associate Professor at Mount Sinai School of Medicine and an Attending Physician at Beth Israel Medical Center. He is the former Chairman of the Cancer Tumor Board at Cabrini Medical Center as well as former Chairman of the Cancer Committee and President

of the medical Staff at Cabrini.

Dr. Hirschman offered testimony concerning the April 28, 2006 chest x-ray. He opined that the chest x-ray revealed a 1 cm abnormal density in the left upper lobe which he testified is the same location where a 4 cm cancerous tumor was located at the time lung cancer was diagnosed in July, 2007. Dr Hirschman offered testimony in the nature of "doubling time" of cancer cells to mathematically deduce that the aforementioned 4 cm cancerous tumor was at least 1 cm in size in April of 2006 and in the same location as the April 28, 2006 "abnormal density."

On behalf of the Defendant, Dr. Bashist, offered radiological testimony. Plaintiff notes, in this petition that he (Dr. Bashist) "conceded that a radiologist could interpret the density as a nodule and he would not disagree with radiologist who found that this density was a nodule."

It is often said, that if you allow me to frame the issue, I cannot loose an argument. Plaintiff appropriately points out that Dr. Bashist conceded that a radiologist could interpret the density as a nodule and he would not disagree with a radiologist who found this density was a nodule that good and accepted medical practice would require a further work up, including a CAT scan, a study of the "abnormality." However; Dr . Bashist nor Dr. Klinger ever conceded, admitted or testified that the area depicted and shown in the April 28, 2006 x-ray was "a suspicious abnormality."

The jury was left with conflicting expert testimony as to the nature of the thing appearing in the 2006 x-ray.

The jury was instructed by the Court concerning expert witnesses. The jury was told the following:

When a case involves a matter of science or art, or requires special knowledge or skill, not ordinarily possessed by the average person, an expert is permitted to state his or her opinion for the information of the Court and jury. The opinions stated by each expert who testified before you were based on particular facts, as the expert obtained knowledge of them and testified to them before you, or as the attorney who questioned the expert asked the expert to assume. You may accept an experts' opinion if you find the facts to be different from those which formed the

basis for the opinion. You may also reject the opinion if, after careful consideration of all the evidence in the case, expert and other, you could disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion; that it is entitled to such weight as you find the experts' qualifications in the field warrant and must be considered by you, but it is not controlling upon your judgment.

During the trial, the Defendant, Dr. Klinger, offered his interpretation of the structures that were depicted in the area in question. He testified that the area represented a combination of structures, namely the front of the second rib with costocartilage, lung tissue, blood vessels and the posterior of the fifth rib that had "no clinical significance and were not abnormal."

In a nut shell, the jury was asked to digest all the information and determine whether or not the April 28, 2006 x-ray revealed "a suspicious abnormality."

Both parties correctly point out that a Judgment Notwithstanding the Verdict (JNOV) may not be available unless its proponent can establish that there is "no valid line of reasoning and permissible inferences which could possibly lead a rational person to the conclusions reached by the jury on the basis of the evidence presented at trial." *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 410 N.Y.S.2d 282, 285 (1978); *Nicastro v. Park*, 113 A.D.2d 129, 495 N.Y.S.2d 184 (2nd Dept. 1985). Furthermore, as noted in *Nicastro v. Park*, trial courts discretionary power to set aside a jury verdict must be exercised with considerable caution. That court noted that "fact finding is a province of the jury, not the trial court, and a court must act warily lest over zealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and unnecessarily interfere with the fact finding function of the jury to a degree that amounts to an usurpation of the jury's duty." The Court does not accept Plaintiff's contention that the jury's verdict (that the Defendants did not depart from good and accepted medical practice) is not supported by any valid line of reasoning, or that Defendants did not offer any evidence to contradict Dr. Hirschman's testimony on the issue of causation. Therefore, this Court denies Plaintiffs' application to set aside the jury verdict and enter a verdict on the issue of liability and causation in favor of the Plaintiffs. Additionally, the Court will not exercise its discretion pursuant to CPLR § 4404(a) which provides that a court may set aside a verdict "where the verdict is contrary

to the weight of the evidence.”

The jury was faced with conflicting expert testimony. As noted hereinabove, the jury is instructed that they may accept in whole, reject in whole, or accept or reject in part any portion of an experts’ testimony. The Court cannot find that the jury deliberation was either irrational or not based upon a sound appreciation and understanding of the evidence.

Plaintiffs’ petition is ***DENIED***.

The foregoing constitutes the decision and Order of this Court.

Dated: December 21, 2012


HON. JERRY GARGUILO, JSC