

**Lawrence v Nassau Health Care Corp.**

2013 NY Slip Op 31342(U)

April 19, 2013

Supreme Court, Nassau County

Docket Number: 4759/05

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

HUGHETTE LAWRENCE and BRIAN LAWRENCE,

TRIAL/IAS, PART 3  
NASSAU COUNTY

Plaintiffs,

-against-

MOTION SEQ. NO.: 010  
MOTION DATE: 10/21/12

NASSAU HEALTH CARE CORPORATION, SOUTH  
NASSAU COMMUNITIES HOSPITAL, HORIZON  
WOMEN'S MEDICAL CARE, P.C., EDMUND  
TOMLINSON, M.D., ANNETTE BAGOTT, M.D.  
and AMALIA KELLY, M.D.,

INDEX NO.: 4759/05

Defendants.

The following papers having been read on the motion (numbered 1-6):

Notice of Motion.....1  
Affirmation in Opposition.....2  
Affidavit in Opposition.....3  
Affirmation in Reply to Horizon's Opposition.....4  
Reply Affirmation to the Affidavit in Opposition of  
South Nassau Communities Hospital.....5  
Arguments on Motion.....6

This is a motion by Hughette Lawrence and Brian Lawrence (collectively, plaintiffs) to set aside the verdict pursuant to **CPLR §4404(a)** and to grant a new trial as to liability and damages on the grounds that the jury verdict obtained on April 12, 2012 (the "Verdict") "is against the weight of the credible evidence, and in the interests of justice." Since the issue presented is limited to the claim by Hughette Lawrence, she will be hereinafter referred to as Plaintiff.

More particularly, the Plaintiff maintains that the admissions made by Edmund Tomlinson, M.D., Annette Bagott, M.D., Amalia Kelly, M.D. (in caption

but no case presented), Carolyn Oh, M.D. and Kenneth Altabeff, M.D. (Horizon Doctors) and the departures that were determined by the jury for which no commensurate causation was found, demonstrate that the Verdict reached was inconsistent with the evidence presented. The issue, narrowed even further, is that the Plaintiff contends that the defense expert failed to offer an alternative cause to dispute Plaintiff's proof that Plaintiff's shock, coma and spontaneous abortion were due to septic abortion and anoxic encephalopathy, the diagnoses which Plaintiff maintained were made at Nassau University Medical Center ("NUMC"). The third contention, that the Court believes brings focus to the Plaintiff's claims, is that the jury inconsistently found departures against one doctor which should have been against all doctors. Specifically, Plaintiff maintains that the jurors' answer of "yes" to questions 37 and 39 regarding the need for more detailed lab data necessitated an acceptance, by the jury, of the accuracy of the Plaintiff's position that the potential for sepsis existed requiring the Horizon Doctors to seek further information and to reject the defense experts' inconsistent opinions resulting in the necessity to answer the prior departure questions in plaintiff's favor. The Plaintiff maintains, as well, that all prior questions regarding departure and causation be answered in the affirmative in favor of the Plaintiff finding the Horizon Doctors departed from generally accepted practice and the corresponding causation questions (38 and 40) in the affirmative or "yes".

Even though the law is clear that a trial judge cannot supplant or substitute

his or her determination for that of the jury, in this case the defense and the Court, and from the Courts' perspective of the jury response as well, viewed this claim as being emotionally charged and consistent with a highly favorable reaction toward the Plaintiff. Such a reaction has carried forward through the entire trial process, inclusive of the determination of this motion. The Defendant noted it in his opening and closing and the Court continues to have that response. However, the Court has an obligation to examine the trial evidence in a micro and macro fashion, to see if there is a factual basis arising out of error in some form, from the Court, from the defense, or from the jury to determine whether error or misapprehension affected substantial justice or whether the jury could have rationally reached its determination. **Nicastro v Park**, 113 AD2nd 129. Even though the Plaintiff has, in effect, selected redress by means of **CPLR §4404(a)** in a manner that imposes the lowest standard available, namely, to set aside the Verdict and require a retrial as opposed to the Court's imposing a verdict in Plaintiff's favor, the cases recited by the Plaintiff and Defendant and based upon the Court's research, have an overarching requirement that the verdict be one that could not have been rationally reached. No case has been found that allows a Court to determine that a verdict should be set aside "in the interests of justice" which excludes consideration of all alternate theories of liability in some fashion, which the jury could have utilized. The Court will therefore consider Plaintiff's contention that there was no rational basis upon which the jury could have concluded or reached the Verdict that they did. If none is clearly articulated, the Court must examine the record, presentations

of counsel, its own appraisal of the trial and of the proof submitted, without crossing the blurred line that exists between the jurors' finding and the Court's substitution of its own version of the Verdict.

Considering the often repeated statement by both the Plaintiff and Defendants, throughout the trial "that patient safety is of paramount importance," the Court notes that this generic truism may or may not have been present from the initial visit at Columbia Presbyterian Hospital on August 29, 2003 through September 24, 2003. "May" is the operative word in the context of the evidence that was presented to the jury. The jury had to decide whether or not, based on the verdict sheet, the Horizon Doctors individually departed from generally accepted practice by not considering and recording concerns that they should have had about an existent or possible underlying E. coli infection. Eighteen departure questions of twenty presented to the jury had these basic underlying medical considerations to which they answered "no". Though the departure looked at the Plaintiff's claims from different perspectives with each of the Horizon doctors, the ultimate focus in this case was: did the doctor miss or fail to appreciate the possibility of the Plaintiff having an underlying pathology which could have led to a spontaneous abortion? Stated more succinctly, should the Plaintiff's signs and symptoms have indicated that pathology existed which required inclusion of a differential diagnosis and thereafter further testing to rule out or rule in an underlying disease?

The difficulty arises in the consideration of questions 37 and 39 which the

jury answered in the affirmative or "yes" that there was a departure. Plaintiff posits that the jury misapprehended the significance of the evidence in two essential ways. First, as to questions 38 and 40, the jury should have found that there was a causal link or "substantial factor" after determining that there was a departure on the part of Dr. Tomlinson because he did not consider the implications of vaginal bleeding and cramping as the source of a far more serious problem, namely the presence of a urinary tract infection that existed or may have existed since August 2003. An examination of the jury verdict sheet may not reveal, on the surface, those precise questions but the underlying claim by the Plaintiff is omnipresent: did the Defendant doctors miss the Plaintiff's medical problem by planning that the Plaintiff have a short stay at South Nassau Communities Hospital (question 37) and determining that she could be managed as an outpatient (question 39)?

The next issue arises in the context of the determination of the Plaintiff's condition on arrival at NUMC on September 25, 2003 and thereafter which could have been and should have been addressed by Dr. Tomlinson. That condition had to be diagnosed and had to relate back to a pervasive and continuing urinary tract infection. (The Court recognizes that this analysis may differ from the parties' contentions, at least in part, but it believes that it is expressive of the global case presented to the jury).

The jury was presented with a series of questions leading to questions 37 and 39 that would, of necessity for plaintiff, require that the missed diagnosis lead

to the fulminating condition that so profoundly affected the Plaintiff. Unfortunately, for all, the diagnosis of the Plaintiff's underlying condition was less than apparent to the physicians of NUMC. Thus, neither the Plaintiff nor the Defendants have the benefit of the diagnosis which would lead to a verdict in favor of the Plaintiff or demonstrate to the Defendants that an unrelated, unanticipated condition arose after they last saw her. The jury was faced with making a determination as to whether or not the Defendants were appropriately aware of signs and symptoms which included Urinary Tract Infection. If the answer was yes, as in question 37 and 39, then the jury was faced with the continuously illusive question of whether the departure was a substantial factor in causing her presenting condition at NUMC.

If this trial were confined to a question by question analysis of the Jury Verdict Sheet, without a contextual consideration of the totality of the evidence presented, the interest of justice could not be served. Courts have agonized over the delicate balance between "contrary to the weight of the evidence" and the substantiation of the trial judge's conclusion of what the verdict should be. *See Cohen v Hallmark Cards*, 45 NY2 493; *McDermott v Coffee Beanery, Ltd.* 9 AD3 195; *Nicastro v Park*, 113 AD2d 129. All the doctors were placed on the jury verdict sheet focusing on different aspects of the underlying questions pertaining to the care each provided-i.e. Did each depart from the standard of care and did that departure cause injury to the Plaintiff?

The Court's observation of the testimony given was that inconsistencies were universal for parties and experts for both Plaintiff and Defendants. As is always the

case, the parsing process was essential for the jury: were the inconsistencies determinative of the issues or inconsequential in light of the ultimate conclusion? The Court's analysis followed its own instructions to the jury, that they withhold their conclusions to the end of the trial. Unlike the jury, the Court notes that it was deprived of the all important deliberative process.

However, the Court found significant distinction between chorioamnionitis and chorionitis, in other words, the difference between chorioamnionitis or a general or diffuse uterine infection, and chorionitis, a focal or local infection. The jury could have concluded with respect to the Plaintiff's condition through September 24 and 25, that chorionitis was consistent with the weight of the evidence. If true, then the next question regarding the jury finding is: did the Horizon Doctors depart by not also considering chorioamnionitis? As part of the differential diagnosis did the standard of care or rules of practice require another course of action? In response to Plaintiff's question asked in the motion, "did the Plaintiff have to prove that she had an overt chorioamnionitis or sepsis?" The Court's response is no, in keeping with the **§4404(a)** standard. However, was the jury finding against the weight of the evidence or was the determination consistent with a rational assessment of all of the evidence?

This Court is concerned by the language of **CPLR §4404(a)** and the way it has been interpreted over the years. The portion of **CPLR §4404(a)** addressing the setting aside of the verdict and requiring a new trial is: "**Where the Verdict is contrary to the weight of the evidence, in the interest of Justice**" derived

from the 1848 codes through the 1920 CPA to the **CPLR §4404** in 1962. The interpretation of this portion of the **CPLR §4404(a)** has varied over the last fifty plus years with distinctions frequently arising over the comma between “evidence” and “in”. The question seems to be that some Appellate Courts believe in a conjunctive and others a disjunctive interpretation of the standard-weight of the evidence and interest of justice together (conjunctive) or separate thoughts or standards (disjunctive). The Court believes and thus determines that, consistent with rules for statutory construction the comma is disjunctive, as supported by case law hereafter discussed. Even though the commentaries to the rule express this predicament as a level of discomfort (McKinney’s Consolidated Laws of New York Annotated, Practice Commentaries by David D. Siegel, Trial Motions Art. 44, CPLR 4404.3), the cases ultimately rely on the presence of mistake or error to be present in sufficient quantity to be cognizable but insufficient to substitute a different verdict.

Plaintiff has posed the question also in her submission, if threatened abortion can be due to infection and might be a foreseeable danger to the Plaintiff, isn’t the departure: “what the danger was to her rather than the source of that danger?” The Court believes that the departure and causation issues are linked historically and present in this instance. In order for a jury to rationally find the Defendants liable, retrospective examination from an ultimate diagnosis is required and if not by a fact based direct determination than by inferential conclusion. If by inference, the greater the gap or leap between the departure, and the cause or substantial

factor in causing injury evidenced by the ultimate diagnosis, the more difficult for a jury to make a rational determination. The more frequent the limiting words such as can, could and might are used to describe the diagnosis and care in the context of an illusive ultimate diagnosis, the more difficult for juries to find for the plaintiff and the medical profession to understand how to provide increasingly improved safe effective patient care.

The Court thus concludes that the jury has not reached its verdict "as against the weight of the evidence" and must consider "in the interest of justice", in spite of the conclusion in **Nicastro** *supra*, that joins these two concepts, emerging with a single criteria for the Trial Court: the inability to reach the Verdict on any fair interpretation of the evidence or a rationally based conclusion by the jury. An irrationally based decision would result in a sustainable new trial determination. (Cohen v Hallmark, cited in Nicastro).

However, this Court looks to an evolution since **Nicastro** which requires error for the Trial Court to Order a new trial (see **Allen v Uh**, 82AD3d 1025 (March 22, 2011) and **Ortiz v Jaramillo**, 84 AD3d 766 (May 23, 2011)). The pendulum has moved, if ever so slightly, from a more generic application in 1985 to the more recent one in 2011. This Court firmly believes that the time has come for the pendulum to reverse direction and for the appellate Courts to remove the constraints on the Trial Courts by making that comma a disjunctive, and remove the necessity for a finding of error as a condition for invoking "in the interest of justice" under **CPLR §4404(a)**.

Though this Court finds that the interests of justice would be served by the

ordering of a new trial, because the substantial factor is sufficiently narrowed to permit an inference that there existed a causal link between verdict sheet questions 37 and 39 and the diagnosis reached by NUMC. As a result the negative departures found by the jury could easily have changed to an affirmative finding on questions 38 and 40 and with a finding of liability from 1 through 36. However, this Court declines to do so in contravention of the Second Department's prior declarations of the need for error to exist in order to find that a new trial be ordered "in the interest of justice".

Based on the foregoing, it is

ORDERED, that the motion by the Plaintiff to set aside the Verdict is **denied**.

This constitutes the Order of the Court.

Dated: April 19, 2013



J.S.C

**ENTERED**  
MAY 22 2013  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE