

Tom v Holtzman

2013 NY Slip Op 32706(U)

October 29, 2013

Supreme Court, New York County

Docket Number: 117208/2006

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART ~~IA~~ PART 16

Index Number : 117208/2006
TOM, EDWARD
vs
HOLZMAN, ROBERT
Sequence Number : 004
VACATE STAY/ORDER/JUDGMENT

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 *granted to the extent provided in the accompanying memorandum decision.*

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

FILED
OCT 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

OCT 29 2013
OCT 29 2013

Dated: October 29, 2013

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
EDWARD TOM,

Plaintiff,

Index No. 117208/06
Motion Seq. No. 004

-against-

ROBERT HOLTZMAN,

Defendant.

FILED

-----X
SCHLESINGER, J.:

OCT 30 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

Between April 8 and April 26, 2013, a jury heard and decided the medical malpractice case brought by the plaintiff Edward Tom against the defendant Robert Holtzman, a neurosurgeon.¹

The case centered around Dr. Holtzman's care and treatment of Mr. Tom, an achondroplastic dwarf who presented to Cabrini Medical Center's Emergency Department on Saturday, April 9, 2005, by ambulance at about 1:00 p.m. complaining of an inability to walk due to pain, urinary incontinence for one day, and other problems. The initial diagnosis, upon examination by the Emergency Room doctor, Dr. Butterfass, was Cauda Equina Syndrome ("CES"). It was also the final diagnosis, confirmed by both defendant doctors before and after the spinal surgery that occurred on Tuesday, April 12, 2013 at Lenox Hill Hospital.

Dr. Holtzman was contacted on Saturday in the late afternoon, as he was Chief of Cabrini's neurosurgical service and was on call that weekend. Dr. Holtzman instructed Dr. Butterfass to admit Mr. Tom under his service. Several tests had already been done by that time, including a CT scan of the spine, which reinforced the initial

¹When the trial commenced, there was a second defendant, Dr. Narayan Sundaesan, another neurosurgeon who performed Mr. Tom's surgery along with Dr. Holtzman. However, during the trial, because of the illness of Dr. Sundaesan's attorney, the action against him was severed.

diagnosis of CES. It appears that Dr. Holtzman was given this information. Also, Dr. Holtzman acknowledged that he knew then that an MRI could not be done at Cabrini over the weekend.

At the trial, no medical witness disputed the fact that a diagnosis of CES required an MRI before surgery would be performed to relieve the compression of the nerves in Mr. Tom's lower spine. The MRI was necessary to identify precisely what parts of the spine to operate on.

On the Verdict Sheet, as Interrogatory #3, the jury was asked whether Dr. Holtzman had departed from accepted standards of neurosurgical care in the manner in which he had performed the decompression surgery on Mr. Tom's spine. The jury answered "NO" to this question, as they did to the two preceding questions. In the motion now before this Court, no arguments by plaintiff challenged the wisdom and/or sufficiency of the jury's answer to this third question. Therefore, the question was properly not addressed by defense counsel in opposition. Likewise, I have not dealt with it in this decision, and that part of the verdict will not be disturbed.

Rather, counsel for plaintiff urges the Court, pursuant to CPLR §4404, to set aside the verdict on questions #1 and #2. In the first instance, I am asked to set aside the verdict and direct judgment in favor of the plaintiff. Alternatively, I am asked to order a new trial on these questions because, it is argued, the verdict was contrary to the evidence. Defense counsel strenuously opposes the motion in the same adept manner that he aggressively defended his client at trial.²

²Before I begin my discussion here, I must comment on the impressive arguments made by both counsel, which displayed an exquisite familiarity with the 1700 page record. It compelled the Court to emulate that knowledge, which I tried to do.

The interrogatories at issue here on liability were as follows:

- 1(a). Did Dr. Robert Holtzman depart from good and accepted standards of neurosurgical care by not obtaining a lumbar MRI or CT myelogram for Edward Tom before 11:00 p.m. on Sunday, April 10, 2005?

The jury by a vote of 5-1 answered "NO". The second departure question read:

- 2(a). Did Dr. Robert Holtzman depart from good and accepted standards of neurosurgical care by not performing spinal decompression surgery on Edward Tom before Tuesday, April 12, 2005?

The jury unanimously answered "NO" to this inquiry. Since both questions 1(a) and 2(a) were answered in favor of the defendant, the jury did not answer either question 1(b) or 2(b), which were identical. Those questions asked if the preceding departure had caused Edward Tom "a loss of a substantial chance of physical improvement from surgery".

Thus, timing was the central issue on liability. Mr. Tom claimed that the defendant had delayed unreasonably, first in obtaining an immediate MRI for him and, second, in timely performing the required surgery. As to both of these claims, Mr. Tom supported his position with the testimony of Dr. James Macon, a Massachusetts board certified neurosurgeon with impressive credentials.

Dr. Macon opined on the subject of each of the interrogatories. But before doing that, he explained how spinal stenosis in the lower back adversely affects motor and other systems in the legs, the bladder and the bowel. In CES, when the nerves are squeezed or compressed, weakness in the legs and saddle area occurs. This

weakness leads to numbness and ultimately the failure of the affected organs and nerves to work.

Dr. Macon's position was that when the facts of Mr. Tom's condition were presented to Dr. Holtzman around 5:15 p.m. on Saturday, April 9, the standard of care was to relieve the pressure in the spine as soon as possible. First, a doctor must order an MRI or CT myelogram. It is critical to do the test and then the surgery as soon as possible because the more the nerves are squeezed, the worse the condition gets, ultimately with restricted blood flow to the areas in question. Therefore, with regard to the first question, Dr. Macon opined that it was a departure for Dr. Holtzman to have admitted Mr. Tom to Cabrini on Saturday afternoon when he knew an MRI could and would not be performed at Cabrini until Monday morning.

Dr. Macon, after reviewing the radiographic studies which showed compression primarily at L2-L3, stated that if the surgery had been done on April 10 or even on the 11th, Mr. Tom would have had a much better recovery than he did. But again, an MRI was a necessary prerequisite to the surgery and therefore had to have been done on an urgent basis, in other words, immediately.

Dr. Holtzman did not produce an expert witness on his own behalf. Rather, he explained his position, as best he could, at some length under the guidance of his skilled attorney. When he was being questioned by counsel for the plaintiff, however, Dr. Holtzman was rarely able to answer a question with a direct response.

Dr. Holtzman testified about having received the call on Saturday wherein he learned of Mr. Tom's situation. He agreed that he accepted Mr. Tom into his service at Cabrini, which made him the "admitting" doctor. He also acknowledged that an MRI

was necessary here but that the test was not done at Cabrini on weekends unless special requests were made. Dr. Holtzman made no such request here.

Dr. Holtzman did not see Mr. Tom or talk to him until the next day, Sunday afternoon, the 10th. Then, he spent a considerable amount of time with his patient and took a comprehensive history of his condition, which he recorded; his note consisted of three handwritten pages. Most important, Dr. Holtzman testified that he remembered Mr. Tom telling him that his urinary incontinence had occurred three days earlier, along with bowel symptoms. This part of the history was contained in the doctor's lengthy note.³

The three-day history of urinary incontinence was crucial to the defense here because it was Dr. Holtzman's position that, if the symptoms had existed for three days, then when Mr. Tom came under his care, the window of opportunity for a better result was virtually closed.

This factual issue, when the symptoms first appeared, was an important one. Therefore, as a factual issue, it was to be determined by the jury based on what they considered the credible or believable evidence. In fact, when this Court denied plaintiff's motion for a directed verdict at the end of the case, I said precisely that, that issues of credibility prevented the granting of any such motion.

³The issue of when this symptom began was sharply disputed by the plaintiff, who stated that the incontinence had just begun on that Saturday morning when he woke up with urine in his bed. The admission note for the hospital also included a one-day history of this problem. Finally, when Mr. Tom visited an Urgent Care facility and was examined by Dr. Steven Jacobs on Friday, April 8th, the records of that examination and the history taken there included no complaints of urinary and/or bowel problems. Dr. Jacobs testified at the trial and his records were admitted into evidence.

Now the Court is entertaining this motion brought pursuant to CPLR §4404 to set aside the verdict as contrary to the weight of the evidence. In considering whether to grant such a motion, I am aware of the principles that guide such a determination. Further, I am aware that great deference must be shown to a jury's decision, particularly one in favor of a defendant and particularly in a tort case.

However, I also know that the burden on the movant, while heavy, is not as heavy as the burden for a finding that the verdict is not supported by sufficient evidence. Such a finding is particularly harsh because it allows the entry of a judgment against the party who had prevailed at the trial. Thus, the extremely high burden in that circumstance is that the movant must show that there exists "no valid line of reasoning and permissible inferences which could possibly lead rational men (*sic*) to the conclusion reached by the jury on the basis of the evidence presented at trial." *Cohen v Hallmark Cards*, 45 NY2d 493, 499 (1978).

However, in deciding whether to set aside a verdict in favor of a defendant as contrary to the weight of the evidence and in ordering a new trial, the test that I must use is whether the jury could have reached its verdict on any fair interpretation of the evidence. *Nicastro v. Park*, 113 AD2d 129 (2nd Dep't 1985). And here, I find that as to the first question, concerning the delay of an MRI, the jury could not. In other words, when one reviews the evidence, primarily the testimony given by Dr. Holtzman, and accepting that testimony as credible, no fair interpretation of the evidence would allow a jury to conclude that Dr. Holtzman, as the plaintiff's treating physician, met acceptable standards of care in not insuring that a critical first step in Mr. Tom's care was taken,

namely, arranging for an MRI to be done before late Sunday night.⁴ What follows is some of the defendant's testimony, which supports my conclusion, with citations to the trial transcript.

- Dr. Holtzman, when asked about whether he thought "the patient should have a magnetic resonance imaging [MRI] study right away that day?" [Saturday, April 11th], answered, "Yes". (pp. 491-92).
- It was Dr. Holtzman's further view that Mr. Tom needed the MRI of the lumbar spine "to make further decisions as to whether this was a surgical problem." (p. 1233, l.14-17).
- As Chief of Neurosurgery at the hospital, Dr. Holtzman was familiar with the general unavailability of MRI's at Cabrini on weekends. He also knew that under certain circumstances, one could arrange for an MRI (pp. 494-5). However, Dr. Holtzman took no steps, nor did he know of any steps taken by others, to arrange for an immediate MRI (pp. 1247-48). On the contrary, the Cabrini records on admission indicated that an MRI would be done on Monday, April 11, 2005 (p. 512).
- Dr. Holtzman had no recollection as to why he waited approximately 24 hours before seeing Mr. Tom, but he stated that when he did see and examine his patient on April 10, he immediately began steps to have him transferred on an emergency basis to Lenox Hill Hospital for an MRI scan (p. 511).

⁴Mr. Tom was transferred on an emergency basis to Lenox Hill Hospital, with Dr. Holtzman at his side, late Sunday night where an MRI was performed at about midnight.

- Dr. Holtzman acknowledged that Mr. Tom's chart at Cabrini showed that the history taken by Hospital personnel on Saturday showed that urinary incontinence had just started that day (p. 514).
- Dr. Holtzman's differential diagnosis upon seeing Mr. Tom on Sunday, April 11th was Cauda Equina Syndrome (p. 518), which can be a surgical emergency where an MRI is one important modality (p. 1215).
- Dr. Holtzman agreed with Dr. Macon that as long as the nerve was still functioning, the likelihood of preserving that function is greater if the problem is nerve compression that can be surgically relieved (p. 1396). However, Dr. Holtzman did opine that the three-day history, which he said Mr. Tom had given him, caused him to believe that the bladder and bowel problems were permanent (p. 1425). The Cabrini chart makes no mention of a catheter being inserted in Mr. Tom during his stay there.

As stated earlier, no liability expert was called by the defendant. Therefore, there was no one to opine that Dr. Holtzman's decision to admit Mr. Tom as his patient at Cabrini on Saturday, knowing he probably had CES and knowing that an MRI could not be done for two days, instead of making efforts to have him admitted elsewhere on Saturday, was in accord with acceptable standards of medical care. Nor did Dr. Holtzman himself say that.

Rather, Dr. Holtzman concentrated on what he did when he finally saw his patient and how hard he worked from that point on in getting him transferred to Lenox Hill for an emergent MRI. Further, he suggested that despite those efforts, indicating the necessity for speed, there probably would not have been a different result had the

MRI been done sooner. Plaintiff's expert disagreed and testified that the delay did cause injury. But of course, the jury never did get to the issue of proximate cause here.

In light of the testimony of Dr. Holtzman as to the necessity for an MRI, in light of his failure to explain why he did not arrange for a transfer to another hospital on Saturday so that an MRI could be performed, in light of his failure to explain what he did for Mr. Tom in the 24 hours between admitting him on Saturday and seeing him on Sunday, and in light of Dr. Macon's testimony that all of the above was a departure from accepted neurosurgical care and his explanation as to why, I am at a loss to understand how the jury could have interpreted the evidence in the way that it did.

As stated earlier here, there was no need to evaluate conflicting testimony of experts, as was the case in *McDermott v Coffee Beanery Ltd*, 9 AD3d 195 (1st Dep't 2004), since no expert testified for the defense. Further, I am not rejecting any of the defendant's testimony. As stated earlier, the assessment of the credibility of witnesses is a matter solely for the jury. Here, the jury obviously liked the defendant and accepted his testimony. Therefore, I relied on Dr. Holtzman's own testimony as to why the MRI was so critical and his knowledge of the unavailability of the MRI at Cabrini during the weekend.

With regard to the second question and the jury's verdict that Dr. Holtzman did not depart by delaying the surgery until Tuesday, April 12, I can give a fair interpretation to that part of the verdict. Here, the jury may have accepted the various factors testified to by Dr. Holtzman as to why surgery was not done until Tuesday morning, once the spinal MRI was completed on Sunday at midnight. These included the need for a medical clearance for Mr. Tom, the need for an MRI of the brain (in addition to the

spinal MRI that had been done), and the superiority of a morning schedule for a long, complicated surgery as this one was, among other factors.

But once more and finally, in light of Dr. Holtzman's acknowledgment about the critical importance of an MRI and the critical importance of not delaying it, and the fact that plaintiff's expert offered a similar opinion and no witness disagreed on that point, I am unable to find evidentiary support for the jury's answer to the first interrogatory.

Therefore, I find that the verdict as to question 1(a) is against the weight of the evidence, and the motion by plaintiff is therefore granted to that extent.

Accordingly, it is hereby

ORDERED that plaintiff's motion to set aside the jury's verdict rendered in this case on April 26, 2013 is granted to the extent of setting aside the verdict as to question 1(a) and remanding the action for a new trial on that issue and damages.

Dated: October 29, 2013

OCT 29 2013


J.S.C.
ALICE SCHLESINGER

FILED

OCT 30 2013

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