Feinstein v Norwegian Christian Home & Health Ctr., Inc.
2013 NY Slip Op 34039(U)
April 4, 2013
Supreme Court, Kings County
Docket Number: 157/2009
Judge: Ann T. Pfau
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At an IAS Term, Part 45 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of April, 2013.

P R E S E N T:

HON. ANN T. PFAU,
Justice.

- X

ANDREW FEINSTEIN and LINDA COHEN, as Co-Administrators of the Estate of FRANCES FEINSTEIN, and ANDREW FEINSTEIN and LINDA COHEN, individually,

Plaintiffs,

-against-

NORWEGIAN CHRISTIAN HOME & HEALTH CENTER, INC., and OLENA KSOVRELI, M.D.,

Defendants.

- X

DECISION and ORDER
Index No. 157/2009

ANN PFAU, J:

The following papers numbered 1 to 5 read on motion 05:	Papers Numbered
Notice of Motion, Affidavits (Affirmations) in support and Exhibits Annexed	1 – 3
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In this matter, which sounds in both medical malpractice and negligence, plaintiffs' decedent, their mother Frances Feinstein (Ms. Feinstein), was a resident at defendant Norwegian Christian Home and Health Center, Inc. (Norwegian), an assisted-living facility, and a patient of defendant Dr. Olena Ksovreli (Dr. Ksovreli). During the time of decedent's residency at Norwegian, and while under the care of Ksovreli, decedent, who had been diagnosed with dementia prior to her residency, became increasingly disoriented and experienced falls. Following a fall on July 8, 2006, the decedent was taken to a hospital and then to a nursing facility, where she was maintained until her death in September 2007.

Ms. Feinstein became a resident of Norwegian in February of 2006, following an admissions process conducted by Norwegian in which it was revealed that she had a history of dementia, limited vision and had experienced a fall. Soon after becoming a resident at Norwegian, she became confused and disoriented, exhibiting signs of depression and anxiety. Her relationship her roommate deteriorated, she demonstrated confusion in her interactions with staff, and she became incontinent. Medication and monitoring were ordered. In April Ms. Feinstein was found with a bruise on her cheek, but without any recollection of how she obtained the bruise. Also in April, she was observed having a burn on her forehead. On May 1, 2006, Ms. Feinstein was found sitting on the floor and unable to say how she came to be there, and in June Ms. Feinstein was reported by her roommate to have fallen. Thereafter, on July 8, 2008, Ms. Feinstein was found on the floor with a knock on her forehead. She was transferred to Lutheran Hospital

the next day, and thereafter she was transferred to a nursing home where she remained until her death.

During the period that Ms. Feinstein was a resident of Norwegian, she was under the care of Dr. Ksovreli, who had an independent medical practice and was not an employee of Norwegian.

The plaintiffs, her children and co-administrators of her estate, alleged negligence against Norwegian and malpractice against Dr. Ksovreli for the pain and suffering and loss of enjoyment of life for the period following her July 8, 2006 fall until her death on September 14, 2007. They claim that the July 8 fall caused Ms. Feinstein to sustain a chronic subdural hematoma and develop tonal clonic seizures, rendering her bedridden, in a fetal position due to contractures, and unable to speak–resulting in pain and an inability to communicate with her family for approximately 14 months.

Following a jury trial, a verdict of $1.5 million was rendered in favor of the plaintiffs, with a finding that Dr. Ksovreli was 70% liable and Norwegian was 30% liable. Dr. Ksovreli now moves pursuant to CPLR 4404(a) for an order setting aside the verdict and directing that verdict be entered in favor of the defendant or, in the alternative, reducing the amount of the award to the plaintiffs or, in the alternative, ordering a new trial of the action.

Dr. Ksovreli alleges that the verdict should be set aside because (1) plaintiffs did not product competent expert testimony to establish that Dr. Ksovreli departed from good and accepted medical practice in her treatment of plaintiffs'

decedent and that such departure was a proximate cause of decedent's injury, (2) that the verdict by the jury as to damages was excessive and without basis in evidentiary fact, and (3) that the question of possible juror misconduct was not adequately explored.

A motion to set aside a jury verdict should not be granted unless the preponderance of the evidence is so great that the verdict could not have been reached by any fair interpretation of the evidence (*Salazar v. Fisher*, 147 AD2d 470, 472 [2nd Dept. 1989] [citations omitted]). The Court of Appeals has stated that "[e]vidence is legally insufficient to support a verdict if 'there is simply no valid line of reasoning and permissible inferences which could possible lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial'." (*Lang v. Newman*, 12 NY3d 868, 870 [2009], *citing Cohen v. Hallmark Cards*, 45 NY2d 493, 499 [1978]). Appellate courts repeatedly have cautioned that fact finding is the province of the jury and the trial court should be wary of overstepping its bounds and unnecessarily interfering with the proper jury function (*Nicastro v. Park*, 113 AD2d 129, 133 [2nd Dept. 1985] *quoting Ellis v. Hoelzel*, 57 AD2d 968, 969 [3rd Dept. 1977]; *and see Zolli v. Dubois*, 88 AD2d 951 [2nd Dept. 1982]).

Dr. Ksovreli first claims that the jury's verdict was against the weight of the evidence and legally insufficient because plaintiff did not produce competent expert testimony to establish that she departed from good and accepted medical practice in her treatment of Ms. Feinstein during her residency at Norwegian and that such departure was a substantial factor in causing Ms. Feinstein's injury.

In support of this claim, Dr. Ksovreli addresses the testimony of expert, Dr. David Marks. Prior to Dr. Marks' testimony, following defendants' voir dire of Dr. Marks, the issue was raised concerning Dr. Marks' qualifications with regard to the New York State regulatory standards for assisted living facilities. It was determined that Dr. Marks did not have experience with the statutes or rules that apply to assisted living facilities in New York. Accordingly, the Court ruled that Dr. Marks did not qualify as an expert in the New York regulatory standards that govern assisted living facilities, and he was specifically precluded from testifying as to the appropriateness of retention in New York assisted living facilities (Nelkin Aff., ¶9). Dr. Marks was, however, allowed to testify as a geriatric expert with regard to medical standards of care and to general good and accepted practice at assisted living facilities (*id.*).

The expert disclosure served on defendants by plaintiff pursuant to CPLR 3101(d) included with regard to Dr. Marks that he would testify that "the medical evaluation by Olena Ksovreli, M.D., is incomplete and negligent, as she failed to observe and diagnose that the decedent required a higher level of care given her psychotic history, her history of falls, difficulty with ambulation, lack of independence with activities of daily living, incontinence, and disorientation." (Carter Aff., ¶20). Dr. Marks so testified with regard to deviations from the standard of care provided by Dr. Ksovreli, stating that the failure to assess Ms. Feinstein as requiring a higher level of care was a departure from good and accepted practice when she had sustained prior falls, had a deteriorated mental

status, required one-on-one supervision, was incontinent and required assistance walking (Carter Aff., ¶30). Dr. Marks also testified that Dr. Kosvreli departed from good and accepted practice when she failed to inform her patient and the family of the proper care required for Ms. Feinstein (Carter Aff., ¶31).

Specifically, Dr. Marks stated that, in his opinion, the assessment of a patient by an assisted living facility does not supplant the judgment, evaluation, assessment, plan and recommendations of a physician, and that a physician's recommendations for a patient are not restricted to the care provided at the patient's residence (Carter Aff., ¶45). Testimony of one of plaintiff's expert witnesses, as well as that of one of Ms. Feinstein's treating doctors, also was presented to the jury that the seizure that Ms. Feinstein experienced in the hospital after her fall in the assisted living facility most likely resulted from the head trauma from the fall.

In determinating a motion brought under CPLR §4404, 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 (*Ahr v. Karolewski*, 48 AD3d 719 [2nd Dept. 2008], *citing Yau v. New York City Transit Auth.*, 10 AD3d 654, 655 (2nd Dept. 2004); *McDonagh v. Victoria's Secret, Inc.*, 9 AD3d 395, 396 [2d Dept. 2004] [other citations omitted]). Moreover, in determining issues of credibility of witnesses, the determination of the jury is entitled to great deference, given its opportunity to hear and observe the witnesses (*Wilson v. Hallen*

Constr. Corp., 40 AD3d 986, 988 [2nd Dept. 2007]; *Shi Pei Fang v. Heng Sang Realty Corp.*, 38 AD3d 520, 521 [2nd Dept. 2007]).

Here, it cannot be concluded that the verdict of the jury was not based on any fair interpretation of the evidence presented. Accordingly, the motion by defendant Dr. Ksovreli for a directed verdict or a new trial on the grounds that the verdict was contrary to the weight of the evidence is denied.

Dr. Kosvreli next argues in support of her motion that the amount of damages awarded by the jury was excessive and contrary to the weight of the evidence. The verdict sheet completed by the jury stated in question six "State the amount of damages award, if any, for Frances Feinstein's conscious pain and suffering and loss of enjoyment of life caused by her brain injuries from July 8, 2006 to September 14, 2007." The jury concluded that damages should be awarded in the amount of $1.5 million, with Dr. Kosvreli responsible for 70% of the damages.

Dr. Kosvreli contends that there was no competent testimony to permit the jury to award any damages for conscious pain and suffering and that if the award was solely for loss of enjoyment of life the award was "clearly excessive." (Nelkin Aff., ¶36).

In support of plaintiff's claim for damages for Ms. Feinstein's pain and suffering, plaintiff presented testimony of Dr. Lechtenberg, who stated that in his opinion pain medications were given to Ms. Feinstein because of the "perception of the staff that she was in discomfort." and that medications were ordered "to ameliorate her discomfort." With regard to Ms. Feinstein's level of consciousness,

Dr. Lechtenberg testified that "there are indications at various points during that confinement at Sephardic that she was responsive to the staff, she was alert on some occasions...she couldn't communicate effectively, but her level of consciousness, her apparent awareness of her environment...went from apparently quite intact at points to quite out of touch at other points and this varied throughout the months that she was there right up until she died (Nelkin Aff., ¶38). On cross examination, Dr. Lechtenberg testified that he did not recall seeing any notes from the Sephardic record saying that Ms. Feinstein was in pain (Nelkin Aff., ¶30).

Plaintiff, in opposition, points to testimony stating that after Ms. Feinstein fell on June 8, 2006, she became unable to speak or to ambulate and she was rendered bedridden such that her arms and her legs were drawn into her body in a fetal condition due to contractures. Plaintiff also points to the testimony of Ms. Feinstein's daughter that her mother would cry out in pain and that Ms. Feinstein was given Tylenol by the staff at Sephardic three times a day on a daily basis.

The amount of damages to be awarded for personal injuries is primary a question of fact for the jury (*Rodriguez v. City of New York*, 191 AD2d 420 [2nd Dept. 1993]), with great deference accorded to the jury's assessment of damages (*Fryer v. Maimonides Medical Center*,31 AD3d 604 [2nd Dept. 2006]; *Crockett v. Long Beach Medical Center*, 15 AD3d 606 [2nd Dept. 2005]). An award may be set aside when it deviates materially from what would be reasonable compensation (*see*

Miller v. Weisel, 15 AD3d 458 [2nd Dept. 2005] [*quoting Iovine v. City of New York*, 286 AD2d 372, 373 [2nd Dept. 2001]).

Guidance as to the determination of reasonable compensation may be found from prior damage awards in cases involving similar injuries (*Senko v. Fonda*, 53 AD2d 638 [2nd Dept. 1976]). In this regard, plaintiff cites prior instances in which awards similar to the amount determined here were upheld for pain and suffering. Those cases include *Jump v. Facelle*, 275 AD2d 345 (2nd Dept. 2002) [$1.3 million for past pain and suffering from abdominal surgery experienced by decedent during his eight-month hospitalization prior to his death]; *Twersky v. Busche*, 37 AD3d 704 (2nd Dept. 2007) [Jury award of $1 million for conscious pain and suffering supported by evidence of decedent's pain during one-half hour after being struck by van]. In addition, in *Schaffer v. Batheja*, 76 AD3d 970 (2nd Dept. 2010), the Appellate Division found reasonable compensation of $2.5 million for past pain and suffering when the decedent was sporadically aware of her condition while she remained in a nursing home for four years.

Dr. Kosvreli argues that there is insufficient evidence to support a conclusion that Ms. Feinstein was conscious while in Sephardic, and therefore the award of damages must be based solely on loss of enjoyment of life–asking the rhetorical question "how can an award for 'loss of enjoyment of life' in the amount awarded by this jury, not be excessive?" (Nelkin Aff., ¶41)

The award of damages by the jury, when viewed in light of prior determinations upheld by the Appellate Division, does not appear to deviate

materially from what would be reasonable compensation. Accordingly, that branch of Dr. Kosvreli's motion is denied.

Finally, Dr. Kosvreli seeks to overturn the verdict of the jury because of possible juror misconduct that was not investigated by the court.

When the jury was deliberating, on October 36, 2012, one of the jurors asked to be excused for a short period of time while he attended the funeral of his aunt. Later that same day, the juror returned and the jury returned its verdict. Following the reading of the verdict, counsel for Dr. Ksovreli asked to be able to voir dire the juror who attended the funeral. That request was denied. Dr. Ksovreli now argues that the denial of the opportunity to question the juror leads to uncertainty as to whether the death and funeral of the juror's family member caused him to empathize with the plaintiffs in this matter. This is particularly important, according to Dr. Ksovreli, because the jury was not unanimous with regard to either liability or damages.

Plaintiff argues in opposition that the court properly denied the application to voir dire the juror, as there is no evidence that his experience concerning his aunt's death improperly affected his jury service or influenced other jurors.

The Court of Appeals in *Alford v. Sventek*, 53 NY2d 743 (1981), stated that in general, a juror is not permitted to impeach his own verdict, with an exception made when jurors are subject to outside influence. The Court determined that no "ironclad rule" concerning juror misconduct existed, noting that each case

must be examined to determine the likelihood that the jury would be prejudiced (*Alford, supra, quoting People v. Brown*, 48 NY2d 388, 394 [1979]).

Thus, the court was found to have erred in not questioning a juror who stated in open court his hostility to one of the attorneys (*Mark v. Colgate University*, 53 AD2d 884 [2nd Dept. 1976], and another court was found not to have erred by failing to hold a hearing when a juror did independent research and disagreed with an expert (*Nicolla v. Fasulo*, 161 AD2d 966 [3rd Dept. 1990]).

There is nothing to indicate in the instant matter that the juror's loss of his aunt and attendance at her funeral during deliberations prejudiced either his vote or that of any other jurors. Simply the fact of the family death–known to the parties only when the juror asked to be excused for a brief period of time–without more does not rise to the level of requiring an inquiry into the possibility of juror misconduct such that it would impact the jury's verdict. Accordingly, the motion to overturn the jury's verdict based upon possible juror misconduct is denied.

For the reasons above, it hereby is

ORDERED that defendants' motion to set aside the verdict is denied.

E N T E R,

Ann T. Pfau
J. S. C.
HON. ANN T. PFAU

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