

Yanyak v Rosenman
2014 NY Slip Op 30216(U)
January 14, 2014
Sup Ct, Suffolk County
Docket Number: 00402/2008
Judge: Jerry Garguilo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 00402/2008

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

PRESENT:

HON. JERRY GARGUILO
Supreme Court Justice

OLHA YANYAK and YURI YANYAK,

Plaintiffs,

-against-

ARTHUR J. ROSENMAN, M.D. and AMITY
 OBG ASSOCIATES, P.C.,

Defendants.

ORIG. RETURN DATE: 8/28/2013
 FINAL SUBMISSION DATE: 12/18/2013
 MOTION SEQ#001
 MOTION: MG

PLAINTIFFS' ATTORNEY:
 PEGALIS & ERICKSON, LLC
 1 Hollow Lane, Suite 107
 Lake Success, New York 11042
 (516) 684-2900

DEFENDANTS' ATTORNEY:
 GARSON & JAKUB, LLP
 39 Broadway-34th Floor
 New York, New York 10006
 (646) 863-8980

The Plaintiffs, Olha Yanyak and Yuri Yanyak, petition the Court for the following relief:

1. An order granting plaintiff judgment notwithstanding the verdict on the issue of liability and setting this matter down for a new trial on the issue of damages; or, alternatively
2. Setting this matter aside and granting the plaintiff a new trial as the jury verdict was against the weight of the credible evidence and/or setting this matter aside and granting the plaintiff a new trial in the interest of justice.

This matter was tried before the Court and a jury verdict was returned on June 5, 2013 in favor of the Defendant. The Complaint sought damages for personal injuries including pain, suffering and emotional distress as well as anguish associated with an alleged failure to appropriately diagnose and treat the Plaintiff, Olha Yanyak, resulting in a diagnosis of cervical cancer and the need for a radical hysterectomy and treatment.

Each party has submitted affirmations with exhibits.

JH

YANYAK v. ARTHUR ROSENMAN, M.D., ET AL
INDEX NO.: 00402/2008
PAGE 2

The Plaintiff submits to the Court that “a succinct and appropriate statement of the standard of care” is that cervical cancer is very rare in this country mostly because the PAP smear allows us to identify very early changes in the cervix, that while not cancer can go on to become cancer, and when properly treated avert a life threatening abnormality. The essence of the Plaintiff’s case before the jury was that the Defendant, Arthur J. Rosenman, M.D. failed to properly treat the Plaintiffs’ pre-cancerous condition by way of cone biopsy, allowing the pre-cancerous condition to linger until it matured to cancer of the cervix.

In contrast, the Affirmation submitted by the Defendant recites the issue as follows:

that Defendant failed to timely diagnose and treat cervical cancer because he did not perform proper diagnostic testing.

A review of the evidence does not translate into a failure to timely diagnose and treat cervical cancer. The theory propounded by the Plaintiff is that Mrs. Yanyak presented herself initially with not simply a surface abnormality (ectocervix) but rather a dysplasia which extended into the endocervix or glandular tissue. The Defendant chose to treat the abnormality with cryosurgery instead of what is known as a LEEP or a cone procedure. That upon finding a dysplasia which extended into the endocervix the treatment modality chose by the Defendant represented a departure from accepted standards.

Factually the Plaintiff initially presented herself to Dr. Rosenman on October 10, 2005 for routine gynecologic care. Dr. Rosenman performed a complete examination including a PAP smear. The PAP smear revealed epithelial cell abnormality with atypical squamous cells of undetermined significance. On November 10, 2005, Dr. Rosenman repeated a PAP smear in order to confirm the finding. It was confirmed. Thereafter, Dr. Rosenman recommended and performed a colposcopy to view areas of abnormality on the cervix, which were biopsied. Additionally, Dr. Rosenman performed an Endocervical Curettage in which scrapings of the lining of the endocervix were obtained and sent for pathologic examination. This was done on December 29, 2005. The findings were moderate to severe squamous epithelial dysplasia, with focal glandular extension. All parties agree that this represented a precancerous lesion. Dr. Rosenman performed cryosurgery on the Plaintiff during an office visit on February 17, 2006.

In July of 2006, the Plaintiff returned to the doctor’s office for a follow-up. A PAP smear was taken, which again revealed cervical dysplasia which resulted in a repeated cryosurgery on August 3, 2006.

YANYAK v. ARTHUR ROSENMAN, M.D., ET AL
INDEX NO.: 00402/2008
PAGE 3

The Plaintiff returned to the doctor's office in December of 2006 for her annual exam. A third PAP smear was performed and reported continuing cervical dysplasia. Dr. Rosenman recommended and performed a colposcopy in order to biopsy the abnormal tissue. Dysplasia was present.

It was in February of 2007 that the doctor telephoned Mrs. Yanyak to propose additional cryosurgery as well as an alternative of a cone biopsy. The Plaintiff chose to seek another opinion.

On March 20, 2007, Dr. Benjamin Schwartz treated the Plaintiff. A PAP smear performed by Dr. Schwartz's office revealed the continued presence of cervical dysplasia. The plan was to admit Plaintiff into a hospital to perform a cold knife Cervical Conization (a biopsy procedure performed under general anesthesia in which a large wedge of cervix is removed). This was done on April 8, 2007 and pathology revealed a squamous cell carcinoma in the specimen. Dr. Schwartz diagnosed this as a cancer albeit a very early stage. Dr. Schwartz performed the hysterectomy. This was done in June of 2007.

The jury was called upon to determine whether or not Dr. Rosenman departed from accepted standards of medical care during his care and treatment of the Plaintiff from October 10, 2005 through February 5, 2007. More particularly, the jury had to determine whether or not Dr. Rosenman departed from accepted standards of medical care in not performing a cone biopsy or LEEP procedure from October of 2005 through January of 2007.

Plaintiffs' counsel's Affirmation in support of her application relies almost entirely on the testimony of the Defendant's expert, Dr. Benjamin Schwartz. The jury was shown a video whereby Dr. Schwartz commented that "in fact, cervical cancer is very rare in this country mostly because the PAP smear allows us to identify very early changes in the cervix, that while not cancer can go on to become cancer, and when properly treated averts a life threatening abnormality." Additionally, Dr. Schwartz was asked the following:

Q. Can we agree it's rare that a lady going to a gynecologist regularly develops cervical cancer, cancer in the cervix?

A. Yes.

Q. So, in terms of your testimony here today, you agree that a cone biopsy, if done with a pre-cancerous condition that removes all the cells, that patient is potentially cured or treated

of that disease process?

A. Absolutely yes.

The jury, in essence, was called upon to determine that given an initial finding of glandular dysplasia into the endocervix or glandular tissue was there a departure in treating Plaintiff as Dr. Rosenman did. In essence, does finding focal extension into the glands require a LEEP procedure?

A jury verdict should not be set aside as contrary to the weight of evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*see Grassi v. Ulrich*, 87 N.Y.2d 954, 956; *Lolik v. Big V Supermarkets*, 86 N.Y.2d 744, 746; *Jean-Lewis v. City of New York*, 86 A.D.3d 628, 628). The jury's assessment of credibility of experts who provide conflicting testimony at trial, is "entitled to great weight, as is the jury that had the opportunity to observe and hear the experts." (*Saccone v. Gross*, 84 A.D.3d 1208, 1208-1209).

It is axiomatic that where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert (*Ferreira v. Wyckoff Hgts. Med. Ctr.*, 81 A.D.3d 587, 588).

It is Defendant's position that the testimony of the experts was conflicting and therefore, the verdict must stand.

The Court notes that Defendants' examination of witness concerning the absence of cancer during the Defendant's treatment focused on a non-issue.

"A trial courts grant of a CPLR § 4401 motion for a judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the non-moving party" (*Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556). The Court is mindful that "in considering such a motion, it must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered in a light most favorable to the non-moving party (*Miller v. Bah*, 74 A.D.3d at 763). The Court finds it indisputable that the treatment protocol utilized by the Defendant failed to eliminate the "pre-cancerous" condition. That the persistence of that protocol by the Defendant caused that pre condition to mature to cancer. Had the initial findings by the Defendant localized the bad cell process to the ectocervix, the treatment would have been appropriate. However, such

YANYAK v. ARTHUR ROSENMAN, M.D., ET AL
INDEX NO.: 00402/2008
PAGE 5

was not the case.

Here, viewing the evidence in the light most favorable to the Defendant, there is no rational process by which the jury could find the Defendant non-negligent. Accordingly, the Court grants the Plaintiffs' application for a judgment notwithstanding the verdict on the issue of liability. The Plaintiff shall cause the matter to be calendared for a trial on damages.

The foregoing constitutes the decision and Order of this Court.

Dated: January 14, 2014


HON. JERRY GARGUILO, JSC