Sarao v Aronoff
2014 NY Slip Op 33233(U)
April 9, 2014
Supreme Court, Bronx County
Docket Number: 302587/2007
Judge: Sharon A.M. Aarons
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[* 1]
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

STEVEN SARAO and MICHELLE SARAO,
Plaintiff,
-against-

JEFFREY S. ARONOFF, M.D,
Defendant(s).

Index No. 302587/2007
Present: Hon. Sharon A. M. Aarons

Hon. Sharon A. M. Aarons:

Defendant moves post-trial pursuant to CPLR 4404(a) to set aside the verdict as against the weight of the evidence, and for an order directing judgment in favor of the defendant, or for a new trial on liability, and pursuant to CPLR 2201, for a stay of entry of judgment for 30 days after the order is entered herein. The plaintiff submits written opposition to the motion. The motion is denied.

This medical malpractice action was tried before this Court and a jury, resulting in a verdict in favor of the plaintiff in the amount of $200,000. At issue during the trial was how and when the plaintiff's bladder was perforated; whether the defendant perforated the plaintiff's bladder during surgery for diverticulitis on May 31, 2006; if the perforation did not occur during surgery, when it occurred; and whether defendant committed malpractice in failing to diagnose the bladder perforation post surgery.

Plaintiff was admitted by defendant to Lenox Hill Hospital on May 22, 2006, for recurrent diverticulitis. In February 2006, three months prior to admission to Lenox Hill Hospital, plaintiff suffered a pulmonary embolism, and was therefore receiving blood thinners, which would complicate surgery. A CAT scan indicated that the plaintiff's sigmoid colon was perforated. After

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waiting for nine days to determine if the perforation would heal without surgical intervention, defendant performed laparoscopic surgery on the plaintiff on May 31, 2006.

After the procedure was concluded, gross hematuria (blood in urine) was observed in the plaintiff's Foley bag. Defendant attributed the blood to the anticoagulants which the plaintiff had been taking prior to the surgery. As defense counsel states in support of defendant's post-trial motion, "He [defendant Dr. Aronoff] did not believe that the blood resulted from an intraoperative bladder injury, as he had taken painstaking efforts during surgery to protect the bladder."

A post-surgical consult was conducted with a urologist, Dr. Michael Brodherson, in view of the gross hematuria. Dr. Brodherson agreed with the defendant that the cause of the hematuria could have been the anticoagulants, or traumatic catheter placement. Defendant decided to monitor the patient carefully.

On June 2, by 2:00 p.m., plaintiff's vital signs changed. His abdomen was firm, and his creatinine level doubled to 2.0; his pulse was high. Dr. Brodherson ordered a cystogram. Defendant for the first time considered that the bladder was perforated. The defendant re-opened the plaintiff and performed surgery to repair an "obvious" hole in the bladder.

Defendant maintains that the bladder was not in fact perforated during surgery based on the following evidence:

> (1) Pictures of the bladder taken during surgery did not show a perforation;
> (2) No blood or urine was seen during surgery;
> (3) The defendant irrigated the surgical field at the conclusion of surgery, and no blood or urine was seen. The area could not have been suctioned dry if the bladder had been perforated, as urine would have been observed "pouring" into the pelvis area from the perforation.
> (4) The plaintiff's urine output was excellent post-surgery, suggesting that his bladder was holding urine and thus not perforated;
> (5) The patient "looked good" on June 1, had good vital signs (creatinine level 1.0), clear urine, and had a soft abdomen. Had a perforation existed, the

plaintiff wold have been acutely ill on June 1.

While the foregoing list sets forth the evidence relied upon by the defendant on the present motion, it does not reflect the plethora of countervailing evidence adduced at trial by plaintiff to establish that in fact a perforation occurred during surgery. Plaintiff's expert, Dr. Michael Holman, M.D., a board-certified general surgeon, testified that in his opinion, to a reasonable degree of medical certainty, the bladder perforation occurred during surgery, most likely when the defendant separated the inflamed colon from the inflamed area of the bladder. He further testified that the hematuria was a "very abnormal," clear sign of a bladder perforation, and defendant should have ordered a cystogram, or taken other action, to rule out the perforation.

As to defendant's argument that the plaintiff's condition was too healthy to reflect a perforation, the hospital chart reflected that the plaintiff had severe pain on the night of the surgery, and plaintiff disputes that he was in "good condition" on June 1, when he was visited by the hospital nutritionist.

Moreover, plaintiff's expert testified that it was unlikely that the hematuria was caused by blood thinners, as the blood would have been noted at the commencement of the surgery, and not at the end; in addition, the normal PT/PTT findings in the recovery room eliminated blood thinners as the cause of hematuria.

In addition, defendant testified at his deposition that "an iatrogenic bladder perforation was caused during the May 31, 2006 surgery." At trial, he stated that the surgery didn't cause the perforation, but that "the process of surgery caused it." As to the photographs taken during surgery, they were taken at the beginning and middle of the surgery, and did not rule out a perforation later during the course of the surgery.

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The jury was instructed to render a special verdict answering the following interrogatories regarding liability, and gave the following answers[1]:

> (1) Did JEFFREY S. ARONOFF, M.D. depart from accepted medical practice by perforating plaintiff's bladder during the surgery performed on May 31, 2006?
>
> (3) Did JEFFREY S. ARONOFF, M.D. depart from accepted medical practice by failing to exclude bladder perforation as a potential cause of the blood in plaintiff's urine seen on May 31, 2006?
>
> (5) Did JEFFREY S. ARONOFF, M.D. depart from accepted medical practice by failing to include bladder perforation as part of his differential diagnosis on May 31, 2006 and June 1, 2006?

The CPLR 4404 standard for setting aside a verdict as against the weight of the evidence is whether there exists a "valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial." (*Cohen v Hallmark Cards*, 45 NY2d 493, 499, 382 NE2d 1145, 410 NYS2d 282 [1978]). "[I]n the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict." (*Cholewinski v. Wisnicki*, 21 AD3d 791, 801 N.Y.S.2d 576 [1st Dept 2005].) Moreover, the facts in this case were sharply contested, but in deciding this motion the evidence supporting the verdict is entitled to every favorable inference. (*Broadie v. St. Francis Hosp.*, 25 A.D.3d 745, 807 N.Y.S.2d 656 [2nd Dept. 2006].)

Defendant now argues that the jury's verdict was irrational and inconsistent.[2] Much of

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[1]The numbering of these questions is as it appeared on the verdict sheet. Following each question was the question concerning proximate cause, which is omitted herein.

[2]As to inconsistency, defendant did not raise any issue of an inconsistent verdict before the jury was discharged, and thus any such argument was waived. (*Reis v. Volvo Cars of N. Am.*,

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defendant's argument is based on the premises that the jury, in answering "No" to Question No. 1 on the verdict sheet, found that as a matter of fact the defendant did not perforate the plaintiff's colon during surgery. He therefore argues that it was irrational for the jury to find that the doctor failed to exclude a bladder perforation as a potential cause of the hematuria on May 31 (Question 3), or in failing to include bladder peroration as part of his differential diagnosis on May 31 and June 1 (Question 5). Defendant implicitly assumes that the jury found that the perforation did not occur during surgery; that the perforation occurred on June 2, was not related to the post-surgical hematuria on May 31, and was speedily diagnosed and treated by the second surgery on June 2.

There was ample basis for the jury to reject the defendant's assumptions. The credibility of the witnesses and the resolution of conflicting proofs are matters properly for determination by a jury. (*Louis v Kimmelman*, 8 A.D.3d 206, 779 N.Y.S.2d 478 [1st Dept. 2004]). Viewing the evidence in the light most favorable to the plaintiff, the jury's verdict was rationally based on the evidence and plaintiff's expert testimony. As plaintiff's expert Dr. Holman conceded in his trial testimony (a concession noted by defendant in his present arguments), the plaintiff's colon could have been perforated during surgery even if the defendant and those assisting him "did nothing wrong." The jury clearly credited this frank concession in responding "No" to the first interrogatory. They clearly did <u>not</u> reject the plaintiff's theory of the case, which is based on a fair interpretation of the evidence, that a bladder perforation occurred during surgery, albeit not due to medical malpractice. Thus, in finding in response to Question 3 that the defendant departed from accepted medical practice in failing to exclude the bladder perforation as the cause of the hematuria on May 31, the jury clearly

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105 A.D.3d 663, 964 N.Y.S.2d 125[1st Dept. 2013] [rejecting argumnet based on inconsistent verdict where defendants did not raise this objection before the jury was discharged, although they had the opportunity to do so, and it was raised for the first time in their motion to set aside the verdict based upon the weight of the evidence].)

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indicated that it found as a matter of fact that the perforation occurred during the surgery. In determining whether the jury's finding that the bladder was perforated during surgery is supported by a fair interpretation of the evidence, the evidence supporting the verdict is entitled to every favorable inference. (*Broadie v. St. Francis Hosp., supra.*; *Ruiz v City of New York, supra.*),

Defendant argues that the post-surgery, Dr. Brodherson was responsible for diagnosing the bladder perforation, and that he was thus not responsible for the plaintiff's care in this regard, and that in any event taking a "wait and see" approach, and having the urologist perform an evaluation, was an accepted method of care. The jury was free to reject this view of the evidence, as clearly the plaintiff remained under the defendant's care, and it was defendant's obligation to repair the perforation which the jury found occurred during the surgery. In this regard, plaintiff's expert testified that it was the surgeon's duty to make a proper differential diagnosis.

The evidence showed that the defendant did not believe that a perforation occurred during surgery, or was the cause of the hematuria, and the evidence showed similarly that the consulting urologists did not believe that the bladder was perforated. Nor did the defendant believe that there were any signs of bladder perforation until June 2. Because defendant did not believe that there was in fact any perforation, the defendant was not making a choice between two accepted methods of responding to a bladder perforation – i.e., surgical repair or urological consult / "wait and see." For this reason, and "error in judgement" charge was not appropriate and was not given. In a similar case, where the alleged malpractice was failure to diagnose the plaintiff's true condition, the giving of an "error in judgment" charge was rejected:

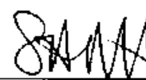
> "Plaintiffs' theory of liability against defendant was that he failed to adhere to accepted medical standards because he failed to diagnose plaintiff's bilateral pars defect, which resulted in his failure to consider the necessity for fusion. Although defendant testified that he considered fusion, he did not

> testify why he did so or that he was aware of the bilateral pars defect, and his exercise of judgment in treating plaintiff was based upon an inaccurate diagnosis of plaintiff's condition (*see generally Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 139-141, 840 NYS2d 508 [2007]). Because plaintiffs' theory of defendant's alleged malpractice arises from defendant's alleged lack of due care in assessing plaintiff's condition, the issue before the jury was whether defendant's failure to diagnose plaintiff's bilateral pars defect constituted a deviation from medically accepted standards of care. "That being the case, an instruction that the physician 'is not liable for an error in judgment if [he or she] does what [he or she] decides is best,' even if accompanied by the 'reasonably prudent doctor' language . . . , creates a risk that a jury will find that, because a physician exercised his or her best judgment, there can be no liability despite a failure to adhere to generally accepted standards of care" (*id.* at 141; *see Nestorowich v Ricotta*, 97 NY2d 393, 399-400, 767 N.E.2d 125, 740 NYS2d 668 [2002]). Contrary to defendant's contention, we conclude that the error in giving the charge cannot be deemed harmless (*see Anderson*, 44 AD3d at 141-142; *cf. Nestorowich*, 97 NY2d at 400-401). Plaintiffs, therefore, are entitled to a new trial." *Vanderpool v. Adirondack Neurosurgical Specialists, P.C.*, 45 A.D.3d 1477, 846 N.Y.S.2d 832 [4th Dept.2007]).

No basis for a stay has been established.

Accordingly, the motion is denied in its entirety.

Dated: April 9 , 2014



SHARON A. M. AARONS. J.S.C.