

**Galloway v Mogul**

2015 NY Slip Op 32101(U)

January 28, 2015

Supreme Court, New York County

Docket Number: 115320/2010

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

EA  
2/2/15  
E

PRESENT: \_\_\_\_\_  
Justice

PART 6

Tyera Galloway  
-v-

INDEX NO. 115820-10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 2

Stuart J. Magul, D.P.M., ET AL.

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2

Replying Affidavits \_\_\_\_\_ No(s) 3

Upon the foregoing papers, it is ordered that this motion is

**THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
& Order**

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FEB 02 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 1/28/15

[Signature], J.S.C.

JOAN B. LOBIS

- 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  
NEW YORK COUNTY: IAS PART 6**

-----X  
TYESA GALLOWAY,

Plaintiff,

Index No. 115320/2010

-against-

**Decision and Order**

STUART J. MOGUL, D.P.M., and STUART J. MOGUL,  
D.P.M., P.C.,

Defendants.

**FILED**

-----X

FEB 02 2015

**JOAN B. LOBIS, J.S.C.:**

**NEW YORK  
COUNTY CLERKS OFFICE**

By this motion plaintiff seeks an order of this Court pursuant to Section 4404(a) of the Civil Practice Law and Rules directing a judgment on liability and setting the matter down for a trial on damages or in the alternative granting plaintiff a new trial. Defendants oppose any effort to set aside the verdict of the jury. For the reasons stated below plaintiff's motion is denied.

The matter was tried before a jury over the course of five days in mid-July of last year. The plaintiff Tyesa Galloway alleged that she was damaged as the result of a negligently performed Akin Osteotomy on plaintiff's left great toe. An Akin Osteotomy is a surgical procedure to fix a foot deformity commonly referred to as a bunion. The condition occurs when the great toe moves closer to the second toe. The Akin Osteotomy attempts to straighten the toe to restore proper alignment by cutting bone and then fixating the bone with surgical hardware, in this case a surgical screw. The positioning of the screw was a major issue of contention during the trial.

The plaintiff called three witnesses: Dr. Mogul, herself, and an expert, Dr. Jerome Bagner. She also read testimony of a treating podiatrist, Ann Nylund. The defendant called two

podiatrists, Dr. Thomas DeLauro as his liability expert and Dr. Edwin Wolf, the podiatrist who examined the plaintiff. At the conclusion of the trial the jury was given two liability questions. The first question was whether Dr. Mogul had departed from good and accepted podiatric practice in the manner he inserted the screw during the surgery he performed on April 4, 2008. The second claim was whether informed consent had been obtained from Ms. Galloway prior to the surgery. The jury found in favor of defendant on both claims and therefore did not consider damages.

Plaintiff now argues that the jury verdict must be set aside pursuant to two theories of relief provided in Section 4404 of the Civil Practice Law and Rules. She first contends that as a matter of law there is no factual support in the record for a finding of liability. Courts have held that this basis requires the movant to show that “there are is simply no valid line of reasoning and permissible inferences which could possibly lead rational [jurors] to the conclusion reached by the jury on the basis of the evidence presented at trial.” Cohen v. Hallmark Cards, 45 N.Y.2d 493, 499 (1978). It is the same analysis as the Court makes in determining a motion for a directed verdict. If granted, judgment should be awarded to the moving party.

The other claim is that the verdict is contrary to the weight of the evidence. This standard requires the Court to conclude that the jury could not have reached its verdict in any fair interpretation of the evidence. In reaching this conclusion a court must give great deference to the jury. It is a more discretionary standard. A finding on this basis results in a new trial – not entry of a judgment in favor of any party. McDermott v. Coffee Beanery, Ltd., 9 A.D.3d 195 (1<sup>st</sup> Dep’t 2004); Nicastro v. Park, 113 A.d.2d 129 (2d Dep’t 1985).

In support of the motion plaintiff asserts that she unequivocally established that the screw was in the interphalangeal joint space. She argues that both sides offered testimony that the placement of a screw in a manner that had part of the screw in the joint space was malpractice. She asserts that the radiographic images in evidence unequivocally show the screw penetrating into the joint space. She argues no valid line of reasoning can lead to the conclusion reached by the jury; therefore, a verdict in favor of the plaintiff must be entered by this Court and the matter set down for a trial on damages.

In the alternative, she argues that the jury's conclusion was contrary to the weight of the evidence. The Court should consider the arguments made above in considering whether a fair interpretation of the evidence supports the verdict. In addition she argues that support for plaintiff's position can be found in the records of her subsequent treating podiatrists Ann Nylund and Daniel Ecktein and their comments regarding the placement of the screw. Moreover, when weighing the testimony of Dr. DeLauro the jury apparently disregarded the ways plaintiff impeached him with examples of inconsistent testimony. On this basis the Court must order a trial de novo.

The defendant argues that there is ample evidence in the trial record to support the jury's verdict. He asserts that plaintiff's argument grossly misrepresents the testimony. He asserts that defendant and his witnesses offered credible testimony that there was no deviation in the standard of care, that the placement of the screw in plaintiff's cartilage was not improper. He contends that the Court must show great deference to the findings of the jury. Here the jury found

the defendant's evidence more compelling than plaintiff's. Therefore, there is no basis to set aside the verdict.

In reply, the plaintiff argues that defendant's expert is not a credible witness. She posits that his testimony is manifestly untrue and contrary to common experience. Under these circumstances it is proper for the court to determine that Dr. DeLauro's testimony is incredible as a matter of law. Once his testimony is disregarded there is no support for the jury's determination.

The crux of the dispute between the experts is how they characterize the joint space, whether it includes the cartilage that is present in the joint. The plaintiff's expert concluded that the screw was in the joint space because it penetrated into the cartilage cap of the top of the proximal phalanges. The defendant's expert took the position that the screw needed to traverse the joint for it to be considered impropriety placed. The testimony of the defendant's expert was not incredible as a matter of law and could be considered as more persuasive than the case presented by plaintiff. There is no compelling basis to set aside the jury verdict and the motion is denied.

This constitute the decision and order of this court.

Dated: *Jan. 28*, 2015

**FILED**  
FEB 02 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:

*JB*  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.