

D'Alasi v Shavelson

2017 NY Slip Op 30053(U)

January 12, 2017

Supreme Court, New York County

Docket Number: 108185/2008

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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ANTHONY P. D'ALIASI AND PATRICIA DEGRACE-
D'ALIASI,

Plaintiffs,

Index No. 108185/2008

-against-

Decision and Order

DENNIS SHAVELSON, D.P.M., & LIFESTYLE
PODIATRY,

Defendants.

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

By motion sequence number 20, plaintiffs seek an order of this Court pursuant to Section 4404(a) of the Civil Practice Law and Rules setting aside the jury's verdict, which found that defendants did not commit malpractice in their treatment of plaintiff Patricia DeGrace-D'Aliasi, and directing a judgment on liability. Plaintiffs also state they should have been granted summary judgment. Defendants oppose any effort to set aside the verdict of the jury. By motion sequence number 21, plaintiffs seek, inter alia, leave to file late reply papers to this motion. Plaintiffs also ask this justice to recuse herself from this case and seek disqualification of, disbarment of, and sanctions against defendants' law firm. There is no opposition to the order to show cause submitted as motion sequence number 21. This Court did not sign the order to show cause, as under CPLR 4406 plaintiff may make only one post-judgment motion. The Court accepted plaintiffs' papers, however, solely as a reply to defendants' opposition here (motion sequence 20), and as opposition to defendants' motion regarding sanctions (motion sequence 19). The Court notes, in addition, that plaintiffs have sought the relief of recusal, and of disbarment of

and sanctions against defendants' attorney in prior motions, such as motion sequence number 12, and the Court has addressed plaintiffs' arguments in its earlier orders.

The matter was tried before a jury July 14, 2016, July 15, 2016, July 18, 2016, July 20-22, 2016, July 25, 2016, July 27-29, 2016, August 1, 2016, August 4, 2016, and August 5, 2016. Plaintiffs Anthony P. D'Alia and Patricia DeGrace-D'Alia alleged that Ms. DeGrace-D'Alia was damaged as the result of a negligently performed surgery to remove a Haglund deformity on plaintiff's foot and of defendants' overly tight casting. Ms. DeGrace-D'Alia developed a condition known as complex regional pain syndrome or reflexive sympathetic dystrophy syndrome (RSD).

Plaintiffs called the following individuals as witnesses: Dr. Shavelson, James W. Broatsch, M.S.W., Dr. Elizabeth Youngewirth, Randy Cohn, Dr. Melanie Levin, Dr. Wesley Merritt, Dr. Reva Holczer, Dr. Jack Gorman, Kara Lee Brunton, Dr. Earl Smith, Anthony D'Alia, Dr. Jessica Allen, Ms. De-Grace-D'Alia, Dr. Glen Z. Brooks, and Dr. Samuel Rappaport.¹ Defendants called Dr. Paul Greenberg, and Dr. Lloyd Saberski. At the conclusion of the trial the jury was given five questions with subparts. The jury rendered a verdict in favor of defendants on August 5, 2016. In response to question 1(a), the jury found that Dr. Shavelson did not deviate from the standard of care in failing to remove a sufficient amount of bone during the surgery to correct Ms. DeGrace-D'Alia's Haglund deformity. After considering question 2(a), the jury concluded that Dr. Shavelson did not deviate from the standard of care when, in applying the cast, he failed to account for the patient's high talus bone and failed to provide enough padding, and did

¹ Dr. Rappaport had examined Ms. DeGrace-D'Alia on behalf of defendants.

not deviate from the standard of care in applying the Unna boot. Question 3(a) asked whether there was a departure in the manner in which Dr. Shavelson applied the Unna boot after he removed Ms. DeGrace-D'Aliasi's fiberglass splint. The jury concluded that there was no malpractice in the manner in which he applied the boot. As the jury found no malpractice, it did not consider proximate cause. In addition, it did not reach the question of damages and did not determine whether Ms. DeGrace-D'Aliasi has RSD as a result of the alleged malpractice of Dr. Shavelson.

Plaintiffs now argue that the jury verdict must be set aside pursuant to Section 4404 of the Civil Practice Law and Rules. They first contend 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 next 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 (1st Dep't 2004); Nicastro v. Park, 113 A.d.2d 129 (2d Dep't 1985).²

In support of the motion plaintiffs assert that 1) they unequivocally established that Ms. DeGrace-D'Aliasi has RSD and has been treated for the condition for nine years, 2) defendants set forth no arguments showing that the RSD resulted from any nerve damage other than the alleged malpractice, 3) defendants' experts are professional witnesses who were paid to lie, and 4) Dr. Shavelson lied and contradicted himself on the stand, and plaintiffs established this at trial. They quote excerpts from plaintiffs' cross-examination of Dr. Shavelson, which allegedly proves that they established that Dr. Shavelson lied. They argue no valid line of reasoning can lead to the conclusions the jury reached and therefore the Court must enter a verdict in favor of plaintiffs. They cite testimony from Dr. Shavelson acknowledging that Ms. DeGrace D'Aliasi's talus was abnormal and that he did not remove all of the Haglund's deformity. They assert that the failure to remove all of the Haglund's deformity in itself is a deviation. They argue that Dr. Shavelson further deviated from the standard of care by repeatedly placing a compression dressing on Ms. DeGrace-D'Aliasi's foot, a deviation which plaintiffs allege caused the nerve injury.

In the alternative, plaintiffs argue that the jury's conclusion was contrary to the weight of the evidence. They allege that the Court should consider the arguments made above in

² Plaintiffs also present numerous arguments relating to proximate cause. The jury found that defendants did not deviate from the standard of care, however, so it did not reach the issue of proximate cause. Therefore, proximate cause only is relevant if the jury's decision that there was no malpractice is overturned. Similarly, plaintiffs' challenges to defendants' evidence relating to the degree and history of Ms. DeGrace-D'Aliasi's pain and the appropriateness of using ketamine treatment to relieve her pain are not at issue unless the jury's finding of no malpractice is without basis in reason.

considering whether a fair interpretation of the evidence supports the verdict. In addition, they state that support for their position exists in the medical records and the records of Ms. DeGrace D'Alia's treating physicians. Moreover, when weighing the testimony of Dr. Shavelson, plaintiffs contend, the jury apparently disregarded the ways plaintiffs impeached him with examples of inconsistent testimony. Plaintiffs further state that the jury was confused because of the misstatements and inconsistencies presented at trial, and as a result it was unable to render a fair verdict. They argue that this was confirmed by the short period of time it took for them to deliberate and reach a verdict, as it would have taken far longer to consider the evidence in all its complexity. For all of these reasons, they state, the Court must set aside the verdict and grant judgment to plaintiffs. Plaintiffs also argue that the interest of justice mandates that the Court set aside the verdict due to defendants' deceitful behavior, the Court's alleged partiality, and numerous alleged instances of improper rulings.

Defendants argue that there is ample evidence in the trial record to support the jury's verdict. They assert that plaintiffs offer a passionate but one-sided view of the testimony. They state that Dr. Shavelson and his witnesses offered credible testimony that there was no deviation in the standard of care. In particular, they point to their expert Dr. Greenfield's testimony, in which the expert stated Dr. Shavelson did not fail to remove a sufficient amount of bone during surgery, did not deviate from the standard of care in using a fiberglass cast, and did not commit malpractice in using the Unna boot. According to defendants, one of plaintiffs' experts agreed there was no malpractice with respect to the use of the Unna boot. Therefore, there is no basis to set aside the verdict. Moreover, they state that plaintiffs' arguments regarding proximate cause are irrelevant because the jury reasonably found there was no malpractice and therefore did not reach

the question of proximate cause. Here, defendants state, the jury found their evidence more compelling than plaintiffs' evidence. They state that in light of the extreme deference courts give to jury verdicts, this Court must deny the motion.

Plaintiffs, in reply, state the trial was prolonged due to defendants' witnesses' refusal to answer questions and their stalling tactics. They reiterate many of their earlier arguments. Among other things, they include a chart containing excerpts from the testimony of one of defendants' experts, which allegedly proves that defendants admitted liability and that they lied, and they include longer excerpts from the transcript in the body of the affidavit which supposedly support the same conclusion. They state that they unequivocally established their case at trial and the jury ruled against plaintiffs because they were confused by defendants' lies and contradictions. The Court has reviewed these and other arguments as they relate to plaintiffs' motion to set aside the verdict.

The Court evaluates jury verdicts with extreme deference. Unless no reasoning and no permissible inferences could in any way lead rational jurors to reach their conclusion based on the evidence that the parties presented at trial, the jury verdict must be upheld. Padilla v. Montefiore Medical Center, 119 A.D.3d 493, 494 (1st Dep't 2014). Compare to Tom v. Holtzman, 141 A.D.3d 420, 421 (1st Dep't 2015) (defendants did not provide any explanation as to why twenty-four-hour delay in examination of plaintiff was acceptable and within standard of care, and therefore retrial on this particular theory of liability was proper). When experts disagree on whether a plaintiff's injury is an accepted complication of a medical procedure or post-surgical treatment, is a jury issue. Feldman v. Levine, 90 A.D.3d 477 (1st Dep't 2011). The jury also may make

credibility findings, including those to resolve conflicts between the parties' experts' testimony. Douayi v. Carissimi, 138 A.D.3d 410, 410-11 (1st Dep't 2016). When one party accuses witnesses of lying on the stand, it is up to the jury to determine whether to accept this argument. See Cordero v. Yeung, 143 A.D.2d 72, -- (1st Dep't 2016). Moreover, "a trial court may not interfere with a jury's fact-finding process simply because it disagrees with its finding or would have reached a contrary conclusion based on different credibility determinations." Cholewinski v. Wisnicki, 21 A.D.3d 791, 791 (1st Dep't 2007) (reversing trial court decision to set aside the verdict). This would be an impermissible use of the court's discretion and would "usurp" the jury's function. McDermott Coffee Beanery, Ltd., 9 A.D.3d 195, 206 (1st Dep't 2004).

Sufficient evidence was presented at trial to defeat a motion to set aside the verdict as a matter of law. As to the issue of the weight of the evidence, the crux of the dispute relates to the question of whether Dr. Shavelson committed malpractice by not removing enough of Ms. DeGrace-D'Aliasi's bone during surgery, by casting the foot too tightly, or by improperly putting Ms. DeGrace-D'Aliasi into an Unna boot. The testimony of the defendants' experts was not incredible as a matter of law and a jury could conclude that their testimony was more persuasive than that presented by plaintiffs. Plaintiffs challenged defendants' witnesses' credibility and conclusions throughout the trial, on the same grounds they argue here, and the jury had the opportunity to accept or reject these challenges. Although the jury could have found that defendants' witnesses were not credible and could have ruled that there were deviations, its failure to do so does not mean that the jury acted irrationally. There is no compelling basis to set aside the jury verdict. Plaintiffs also strenuously argue that their evidence established beyond doubt that Ms. DeGrace-D'Aliasi suffers from RSD, but this question was not before the jury. Instead, the jury

had to decide if there was malpractice and if so, whether the malpractice caused her condition. As stated, the jury concluded there was no malpractice so did not reach the second issue.

The Court does not reach the issue of its allegedly improper evidentiary rulings, as those are to be considered by the Appellate Division as part of plaintiffs' appeal. The Court further concludes that plaintiffs have not satisfied the "interest of justice" standard under CPLR 4404. See Selzer v. New York City Transit Auth., 100 A.D.3d 157, 163-65 (1st Dep't 2012); Cholewinski, 21 A.D.3d at 792. Moreover, the arguments plaintiffs raise in their reply, including a chart with quotes from the testimony, do not alter the outcome. The chart displays the alleged inconsistencies in Dr. Shavelson's testimony along with statements allegedly establishing malpractice and alleged errors such as providing the incorrect definitions of "neuropathy" and "causalgia." Plaintiffs pointed out the alleged inconsistencies and errors at trial and they also argued that Dr. Shavelson essentially conceded malpractice. With all of this information before it, jury determined that, even if Ms. DeGrace-D'Alia has RSD and even if the condition resulted from the surgery or post-surgical treatment, there was no deviation from the standard of care when the doctor removed some but not all of the Haglund's deformity, when he applied the cast, or when he applied the Unna boot. While this is not the only conceivable verdict, it is not an irrational one. Accordingly, it is

ORDERED that motion sequence number 20 is denied. Motion sequence 21 is declined in a separate order, as indicated above.

Dated: *Jan. 12*, 2017

ENTER:



JOAN B. LOBIS, J.S.C.