

Doe v Sharma
2018 NY Slip Op 32951(U)
October 1, 2018
Supreme Court, Nassau County
Docket Number: 1324/14
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X	TRIAL/IAS PART 12
"JANE DOE"	
Plaintiff,	INDEX # 1324/14
-against-	Mot. Seq. 8, 9
MOHAN SHARMA, M.D., HIT A SHARMA, M.D.,	Mot. Date 8.13.18
CARING MEDICAL, LLC and SUKHDATA, LLC,	Submit Date 8.13.18
Defendants.	
-----X	

The following papers were read on this motion:	Documents Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1, 2
Answering Affidavit	3
Reply Affidavit.....	4

This motion by the defendants Mohan Sharma, M.D. and Caring Medical, LLC (defendants) for an order pursuant to CPLR 4404 (a) setting aside the jury verdict in this case or, in the alternative, an order setting aside the damages awarded to the plaintiffs is determined as provided herein. Cross-motion by the plaintiff for an order pursuant to 22 NYCRR 130-1.1 (a) sanctioning the defendants for frivolous conduct and holding them liable for the costs incurred by the plaintiff in opposing this motion is determined as provided herein.

In this highly unusual case, the plaintiff has advanced five causes of action: negligent retention and supervision of the defendant Mohan Sharma; assault, battery and endangerment; intentional; negligent infliction of emotional distress; professional negligence and malpractice. This action was tried before a jury for seven days. The jury found the defendant and his practice, defendant Caring Medical, LLC, liable. The jury found (1) that the defendant Mohan Sharma departed from "the accepted standards of medical practice by practicing medicine while impaired by a cognitive disability;" (2) that his departure was a substantial factor in bringing about the plaintiff's injuries; (3) that Caring Medical, LLC was negligent in permitting the defendant to

practice medicine while impaired by a cognitive disability; and (4) that Caring Medical's negligence was also a substantial factor in bringing about the plaintiff's injuries. Mohan Sharma was found 70% at fault and Caring Medical was found 30% at fault. The plaintiff was awarded \$700,000 for past pain and suffering and \$300,000 for future pain and suffering for the upcoming ten years. Mohan Sharma and Caring Medical, LLC, presently ask this court to set aside the jury's findings as against the weight of the evidence.

The plaintiff's claims arose from an incident occurring while the plaintiff was in defendant Mohan Sharma's medical office along with her grandmother to receive certain test results. It is undisputed that during this visit the defendant Mohan Sharma took his penis out of his pants, masturbated and ejaculated on the plaintiff Jane Doe. The plaintiff, who suffers from intellectual disabilities, testified in sum that she and her grandmother had gone to the defendant's office for a scheduled appointment on the day in question to obtain the results of urinary and blood tests and to have a bug bite on her grandmother's arm examined. They were both brought into the examining room, which was a usual practice for them when they saw the defendant. The defendant had the plaintiff's grandmother sit on the examination table facing the wall while he examined her back with a stethoscope. The plaintiff testified that he then approached her and stuck out his tongue and then "started unzipping his pants and took his penis out." She testified that "he was trying to make [her] force of touching him and doing disgusting things to [her] and he eventually 'semened' on [her] pants and on the floor." She further testified that she was able to take a video of his actions by pressing "record" on her phone. That video was shown to the jury. It shows the defendant exposing his penis, masturbating in front of the plaintiff, gesturing to her to touch his penis and to put her mouth on it.

The defendant Mohan Sharma maintains that the jury's finding that he departed from accepted medical standards with respect to his treatment of the plaintiff must be set aside because his conduct did not constitute "medical treatment" as it was not related to a "crucial element of diagnosis and treatment." In addition, the movant maintains that the damages awarded were excessive in view of the evidence as well as in light of verdicts awarded for comparable events.

"A motion for judgment as a matter of law pursuant to CPLR 4404(a) may be granted 'only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party' " (*Previtera v Nath*, __ AD3d __, 2018 WL 3999481 [2d Dept 2018], quoting *Tapia v Dattco, Inc.*, 32 AD3d 842, 844 [2d Dept 2006], citing *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Gaspard v Aronoff*, 153 AD3d 795, 796 [2d Dept 2017]). "[A] jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" (*Vittiglio v Gaurino*, 100 AD3d 987, 988 [2d Dept 2012], citing *Lolik v Big V Supermarkets*, 86 NY2d 744, 745-746 [1995]; *Nicastro v Park*, 113 AD2d 129, 130 [2d Dept 1985]). Indeed, "[a] motion pursuant to CPLR 4404(a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of

evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise” (*Allen v Uh*, 82 AD3d 1025, 1025 [2d Dept 2011], citing *Matter of De Lano*, 34 AD2d 1031, 1032 [3d Dept 1970], *affd* 28 NY2d 587 [1971]; *Rodriguez v City of New York*, 67 AD3d 884, 885 [2d Dept 2009]; *Gomez v Park Donuts*, 249 AD2d 266, 267 [2d Dept 1998]). “The trial court must decide whether substantial justice has been done, and must look to common sense, experience, and sense of fairness in arriving at a decision” (*Allen v Uh*, 82 AD3d at 1025, citing *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]; *Bush v International Bus. Machs. Corp.*, 231 AD2d 465 [1st Dept 1996]).

It is settled that “[t]o establish a prima facie case of liability in a medical malpractice action, a plaintiff must prove (1) that the defendant deviated from accepted standards of medical practice and (2) that such deviation proximately caused the plaintiff’s injuries” (*Previtera v Nath*, __ AD3d at __, 2018 WL 3999481, citing *Gaspard v Aronoff*, 153 AD3d at 796; *Castro v New York City Health & Hosps. Corp.*, 74 AD3d 1005, 1006 [2d Dept 2010]). “In this case, the plaintiff sought to recover damages for medical malpractice and, thus, was required to prove that the defendant’s deviation from good and accepted medical practice proximately caused her injuries” (*Dupree v Giugliano*, 87 AD3d 975, 976 [2d Dept 2011], *aff’d as mod.* 20 NY3d 921 [2012], citing *Alvarez v Gerberg*, 83 AD3d 974, 975 [2d Dept 2011]; *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]; *Myers v Ferrara*, 56 AD3d 78, 83 [2d Dept 2008]). “The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts” (*Fragosa v Haider*, 17 AD3d 526, 526–27 [2d Dept 2005], citing *Smith v Pasquarella*, 201 AD2d 782, 783 [3d Dept 1974], quoting *Miller v Albany Med. Ctr. Hosp.*, 95 AD2d 977, 978 [3d Dept 1983]; *cf. Evangelista v Zolan*, 247 AD2d 508, 509–510 [2d Dept 1998]).

Generally, “an alleged negligent act constitutes medical malpractice when it can be characterized as a ‘crucial element of diagnosis and treatment’ and ‘an integral part of the process of rendering medical treatment to [the plaintiff]’ ” (*Spiegel v Goldfarb*, 66 AD3d 873, 874 [2d Dept 2009], quoting *Bleiler v Bodnar*, 65 NY2d at 72; *see also, Weiner v Lenox Hill Hosp.*, 88 NY2d 784, 788 [1996] [the “inquiry” in a medical malpractice action involves “an analysis of the medical treatment furnished”]). However, a physician’s conduct can be malpractice “where [it] constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment” (*Gross v Kurk*, 224 AD2d 582, 582 [2d Dept 1996]; *see also*, 1B NY PJ3d 2:150 at 49 [2018]; *Scott v Uljanov*, 74 NY2d 673 [1989] [“[M]edical malpractice is simply a form of negligence, no rigid analytical line separates the two. . . .”]; *Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]; *Bazakos v Lewis*, 12 NY3d 631, 634 [2009]). Significantly, “[i]n distinguishing whether conduct may be deemed malpractice or negligence, the critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached (*see Pacio v Franklin Hosp.*, 63 AD3d 1130 [2009]; *Ryan v Korn*, 57 AD3d 507, 508 [2008]; *Caso v St. Francis Hosp.*, 34 AD3d 714 [2006]).” (*Spiegel v. Goldfarb*, 66 A.D.3d 873, 874 [2d Dept 2009]).

The defendants' failure to submit a copy of the entire transcript or the exhibits from the trial does not "preclude a meaningful review" of this application (*McPherson v City of New York*, 122 AD3d 809, 810 [2d Dept 2014]; cf. *Gorbea v Decohen*, 118 AD3d 548, 549 [1st Dept 2014] [quotations and citations omitted]).

The crux of the defendant's motion is that the plaintiff's testimony, which has been provided, establishes that the defendant's conduct when he assaulted her was not "a 'crucial element of diagnosis and treatment' or 'an integral part of the process of rendering medical treatment to [her]' " (*Spiegel v Goldfarb*, 66 AD3d at 874 [quotations and citations omitted]) and thus, cannot constitute malpractice.

In particular, the plaintiff testified as follows:

"October 11, 2013, I remember going to see Mohan. My nanny— we had to go for a urinary and blood test for the results. And my nanny had a bug bite on her arm and we were in the room. So he called us in. He called us in the room and he said to have my nanny sit down on the bed and I said "Like on the side?" And he had her face the wall, to check her back with the thing....The heart stethoscope. And he was—had her face the wall, he would go to me and give me like tongue out like this and he started unzipping his pants and took his penis out."

When asked if he did anything else, she testified "[h]e was trying to make me forced of touching him and doing disgusting things to me and he, eventually he 'semened' on my pants and on the floor."

Defendants' argument conflates the question that was posed to the jury in the instant case with the more prevalent circumstance where a physician intentionally sexually abuses a patient. In the majority of such cases, the acts of the physician have been found to constitute an intentional tort outside of the treatment of the patient, rather than malpractice. (*Dupree v Giugliano*, 87 AD3d at 977 [there is a "generally unobjectionable proposition that a doctor's sexual relationship with his or her patient is not malpractice unless the sexual relationship was part of, or related to, treatment"]; (*De La Cruz v Nour*, 134 AD3d 883, 884 [2d Dept 2015] [sexual assault of patient's mother during office visit was an intentional tort with a one year statute of limitations]; *Fragosa v Haider*, 17 AD3d at 527; *Trott v Merit Dept. Store*, 106 AD2d 158, 160 [1st Dept 1985]).

The parties did not dispute that due to an aggressive form of frontal temporal dementia, the defendant Mohan Sharma was incapable of forming intent at the time of the sexual abuse. A stipulation was read to the jury consisting of the following: the defendant "was arrested for the acts committed against [the plaintiff] on October 11, 2013 and criminally charged with endangering the welfare of an incompetent or physically disabled person in the first degree in violation of Penal Law § 260.25, a Class E felony, and sexual abuse in the second degree, in violation of Penal Law § 130.60, a class A misdemeanor. . . ." The stipulation advised the jury

that those charges were dismissed because the defendant himself was determined to be an "incapacitated person." The stipulation also included a statement that "[t]he acts committed against the [plaintiff] by [the defendant] were not intentional but rather were involuntary acts caused by complex partial seizures accompanied by masturbatory automatic behaviors resulting from his cognitive disorders."

The jury also heard testimony that the defendant had exposed himself to an employee in January 2013, eight months before the subject incident, and the stipulation contained the January victim's sworn statement that "Dr. Sharma pulled his penis out of his pants and grabbed my hand and tried to make me touch it" and noted that those contentions were never adjudicated because of the defendant's incapacity. The jury was further advised via the stipulation that on February 26, 2013 Mohan Sharma stated that he engaged in other instances of conduct similar to his misconduct in January 2013.

The defendant's expert acknowledged that he was impaired by a cognitive disorder that was progressive and degenerative at the time of the plaintiff's assault and that this disability was severe. In fact, he testified that the defendant was in the throes of a major cognitive event when the abuse occurred.

The question ultimately presented by this case, and the question posed to the jury was whether Mohan Sharma "depart[ed] from the accepted standards of medical practice by practicing medicine while impaired by a cognitive disability" and whether this departure was a substantial factor in bringing about plaintiff's injury. The jury was instructed, in addition to the being provided with the standard definition of negligence and the relevant portion of New York Education Law § 6530, that "malpractice is professional negligence and medical malpractice is the negligence of a doctor." The jury was further instructed that such "negligence is the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would do under the circumstances, it's a deviation or departure from accepted practice." The jury was told that it was to determine whether Dr. Mohan Sharma was impaired by a mental disability at the time of the alleged incident or should have been aware of his disability, and whether his continued practice constituted a deviation or departure from accepted practice of the profession.

The unique circumstances of this case thus require one to consider whether the defendant Mohan Sharma departed from the accepted standards of the medical profession by continuing to practice medicine under a disability that he knew (or should have known) caused him to exhibit masturbatory automatisms and whether because the plaintiff was the unfortunate victim of one of these automatisms while a patient in Mohan Sharma's office, these events can be said to "bear substantial relationship to the rendition of medical treatment" to the plaintiff.

There was ample testimony that the plaintiff was a long-term patient of doctor Mohan Sharma and was present in his office, indeed in the exam room, to receive the results of tests related to a condition that causes her to have low blood pressure. The plaintiff's expert witness

testified that the plaintiff's presence in the examination room was related to her diagnosis and treatment because she was "[i]nteracting with a doctor. Finding out about medical tests would include treatment in a broad sense." There is little question, then, that the plaintiff's status as a patient placed her in the exam room at the time that the sexual abuse occurred.

Next, the defendant's own expert testified, as a general matter, that "[m]alpractice, one of the things in malpractice is that you have a condition that renders you unable to deliver the care or commit the malpractice. . . . So to commit malpractice, he would have had to have known he had a problem that rendered him unable to deliver the care properly. . . ." Consistently, plaintiff's expert testified that practicing medicine while impaired by a mental disability is a violation of the standards of care in New York because "[o]ur patients deserve good care. And they deserve to not be hurt. One of the things, rules of medicine, is above all else do no harm." Plaintiff's expert further opined that Mohan Sharma violated the standard of care in this case because "he had an impairment in his cognition and he was aware of that he had an impairment."

The following cases are informative.

In *N.X. v. Cabrini Medical Center*, 97 NY2d 247 [2002], the Court of Appeals denied summary judgment to the defendant hospital where the plaintiff was sexually abused by a surgical resident while she was sedated and in the recovery room following surgery. At the time of the abuse, the nurses in the recovery room indicated that they were attending to a patient just a few feet away, without the curtains drawn, and acknowledged that residents were not directly assigned to the recovery room. The court, allowing plaintiff's direct negligence claim to proceed, stated that it was not imposing a "gatekeeping" function upon nurses to stand guard and monitor physician interactions with patients. (*N.X.*, 97 NY2d at 255). Rather, the court stated that "this confluence of factors provides a sufficient basis from which a jury could determine that the nurses unreasonably disregarded that which was readily there to be seen and heard, alerting them to the risk of misconduct against plaintiff" (*Id.* at 254).

In *Raschel v. Rish*, 110 AD2d 1067, 1068 [4th Dept 1985], the Appellate Division, Fourth Department denied summary judgment on the issue of whether defendant hospital breached its duty to investigate a physician's competence before renewing his staff privileges. The court found that "the failure of a hospital to develop and adhere to reasonable procedures for reviewing a physician's qualifications creates a foreseeable risk of harm thus establishing an independent duty to such papers."

These cases, though not directly analogous, highlight the standard to guard patients from foreseeable risks. So, too, the unique facts presented require independent consideration rather than rote application of general rules. Upon the evidence presented, a reasonable jury could determine that the plaintiff was present in the examination room at the time of the abuse as a patient of Dr. Mohan Sharma and that the events that unfolded were substantially related to her treatment. Further a reasonable jury could have determined that Dr. Sharma's knowledge of his cognitive decline and his own past acts, together with his failure to protect his intellectually

disabled patient from an unreasonable risk of harm was a breach of his professional duty, amounting to professional malpractice. Accordingly, the branch of defendants' motion to set aside the verdict is denied.

As to the branch of defendant's motion to set aside the damages award as excessive, CPLR 5501 (c) indicates that an award may be excessive or inadequate "if it deviates materially from what would be reasonable compensation." Plaintiff testified that as a result of the incident, she experienced, and continues to experience symptoms of PTSD and depression, night terrors, incontinence and flashbacks. Her mother confirmed these manifestations. Plaintiff's expert testified that her PTSD is particularly impactful due to her disabilities and continues to interfere with her social relationships. He further explained that the plaintiff would likely deal with the physical and psychiatric effects of this event for the rest of her life.

Defendant's own expert affirmatively testified that following the incident, the plaintiff was suffering from post traumatic stress disorder but with treatment, the symptoms have resolved. He based this opinion on records relating to plaintiff's therapy, which show that the plaintiff ceased seeing a therapist in February of 2016 and for a number of sessions prior, "plaintiff denied any issues." However, plaintiff and her mother testified that she continues to treat with a psychiatrist and takes Zoloft® for depression. Based on this record, the court finds that the jury's determination was not contrary to a fair interpretation of the evidence.

As to the plaintiff's motion for sanctions, the court finds that the defendants' motion was not frivolous or wholly without argument in law. To the contrary, the issues raised by these motions have been the subject of significant consideration.

However, the court does find that the defendants improperly failed to attach the trial transcript to their motion and the plaintiff is entitled to the costs associated with having to provide the same. In this regard, counsel for the plaintiff shall provide an affidavit itemizing such costs and a proposed order for the court's signature.

For the foregoing reasons, it is hereby

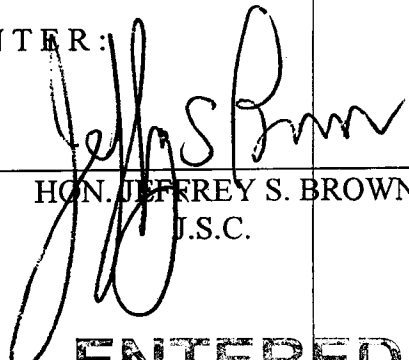
ORDERED, that defendants' motion to set aside the verdict pursuant to CPLR 4404 (a) is **denied**; and it is further

ORDERED, that plaintiff's cross-motion is **granted** to the extent that the plaintiff is awarded costs associated with providing the trial transcript as outlined above, and is otherwise **denied**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 1, 2018

ENTER:


HON. JEFFREY S. BROWN
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OCT 02 2018

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