

Osorio v New York City Health & Hosps. Corp.

2018 NY Slip Op 34456(U)

October 29, 2018

Supreme Court, Queens County

Docket Number: Index No. 708187/14

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Mario Osorio and Maria Ortiz,

Index
Number: 708187/14

Plaintiffs,

- against -

Motion
Date: 10/15/18

New York City Health and Hospitals
Corporation and David Bressler,

Motion Seq. No.: 3

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendants to set aside the verdict or in the alternative, to reduce the verdict as excessive.

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion-Affirmation-Exhibits..... | 1-4 |
| Affirmation in Opposition-Exhibit..... | 5-7 |
| Reply..... | 8-9 |

Upon the foregoing papers it is ordered that the motion is decided as follows:

That branch of the motion by defendants, pursuant to CPLR 4404(a), directing judgment in favor of defendants for failure of plaintiffs to establish a prima facie case is denied. Defendants did not move for a directed verdict after plaintiffs rested and, thus, may not move so now.

That branch of the motion, pursuant to CPLR 4404(a), in the alternative, to set aside the jury's verdict on liability against them as being against the weight of the evidence and for a judgment in favor of defendants notwithstanding the verdict, is granted.

In this medical malpractice action, plaintiff alleged that defendant Dr. David Bressler departed from good and accepted medical practice in the care and treatment of plaintiff by tearing the meniscus in his left knee during a physical examination at Elmhurst Hospital in Queens County on January 8, 2014.

Plaintiff presented to Dr. Bressler with complaints of pain in

his right knee, and Dr. Bressler tested his right knee by performing various manipulations and then repeated the tests on his unaffected left knee. It is undisputed that plaintiff presented to Dr. Bressler at Elmhurst Hospital with a complaint of pain in his right knee, and Dr. Bressler performed various provocative tests on the right knee and also on his left knee for comparison purposes, and that at the time of the alleged injury, plaintiff was lying prone (on his back) on an examination table (which Dr. Bressler and the medical experts for the parties called a plinth) that was against a wall, with his right side facing Dr. Bressler and his left side, by deduction, facing the wall. Plaintiff alleges that as Dr. Bressler manipulated his left knee, he felt intense pain. It is undisputed that plaintiff suffered a tear of his meniscus in his left knee. However, Dr. Bressler denied tearing plaintiff's meniscus during the examination.

It was plaintiff's theory of malpractice, put forward by his expert physician, Dr. Hervey S. Sicherman, that Dr. Bressler departed from good and accepted medical practice by performing a test termed a McMurray test on plaintiff's left knee while standing at the right side of plaintiff and reaching across plaintiff's body to manipulate the left knee, instead of having plaintiff lie in the opposite direction with his left side facing Dr. Bressler so that his left knee could be on the side where Dr. Bressler was standing. It was undisputed that because the plinth was against, or nearly against, a wall, that Dr. Bressler did not, and could not, walk around to the other side of the plinth to examine plaintiff's left knee from that side.

There was one departure question on the verdict sheet: Question number 1 read, "Did defendant Dr. David Bressler depart from good and accepted medical practice by examining plaintiff Mario Osorio's left knee from the other side of the examining table which correlated with the manner in which Dr. Bressler manipulated Mr. Osorio's left knee during his examination on January 8, 2014? The jury answered "yes" to this question, and also answered "yes" to question number 2 which asked, "Was this departure a substantial factor in causing injury to plaintiff Mario Osorio?" The jury awarded \$100,000 for past pain and suffering, \$500,000 for future pain and suffering over a period of 20 years, \$200,000 in medical expenses for knee replacement surgery anticipated to have to be performed over the next 20 years, \$150,000 for physical therapy, equipment and medications over the course of 20 years and \$100,000 to Mario Osorio's spouse, Maria Ortiz,, for past loss of consortium.

Dr. Sicherman opined that plaintiff's description of what Dr. Bressler did in his examination of plaintiff's left knee described a McMurray test and that based upon the testimony of Dr. Bressler and plaintiff that plaintiff was lying prone with his right side facing Dr. Bressler, and based upon plaintiff's counsel's hypothetical posed to him accepting as given plaintiff's description of the test that was performed on him and that Dr. Bressler could not have examined his left knee from the side that knee was on because the plinth was so nearly against the wall that Dr. Bressler could not have stood on that side, he reached over plaintiff to manipulate his left knee. He further opined, based upon plaintiff's testimony that he felt something break in his left knee when Dr. Bressler pushed on it and immediately experienced severe pain and screamed, that Dr. Bressler tore plaintiff's meniscus in the process of manipulating his left knee.

Dr. Sicherman's opinion elicited by plaintiff's counsel on direct examination that it was a deviation from the accepted standard of care to have performed a McMurray test on the left knee from the right side of plaintiff, however, was merely, "It was a nonstandard way to attempt that test. I've never - every description I've ever seen or heard of always includes the examiner on the side of the affected limb or knee." Such explanation, however, that it was a deviation from accepted medical practice because it was not a standard way to perform the test, without setting forth any objective basis for his conclusion as to why such nonstandard method of performing the test was a departure and constituted malpractice, did not establish a departure.

Therefore, plaintiff's counsel then tried to elicit from Dr. Sicherman an explanation that would translate this nonstandard way of performing the McMurray test into a departure by asking, "And the basis for your answer is?" Sicherman merely responded, "Again, my knowledge and experience and - general, I guess, continued medical education. I've never seen it described or - the original description involves being on the same side of the knee, No. 1. No. 2, any and all descriptions I've ever seen or videos or demonstrations have always been with the examiner on the side of the affected knee."

Thus, Dr. Sicherman, after being asked twice, only offered as the basis for his opinion that it was a departure to perform a McMurray test on the left knee from the right side of plaintiff's body that he has never in his experience seen the test performed or read or heard of that test being performed from the side opposite the affected knee and did not offer an explanation as to why this would constitute malpractice or a departure.

Plaintiff's counsel then asked him, in leading fashion without objection from defendants' counsel, in order to elicit an objective

basis for concluding that performing a McMurray test of the left knee from the right side of plaintiff's body was a departure, to explain "what specific difficulties does a practitioner have when they were performing the McMurray's maneuvers from the other side of the table with respect to the amount of force or load or stress that they're applying on the knee". Dr. Sicherman replied, "You're not really controlling the thigh or the hip. The hip is loose so you - you have - you have an uncontrolled situation, especially when the knee's in flexion, and if you're causing any pain, discomfort, the patient will jump and kind of move around in an uncontrolled manner." The McMurray test, as explained by plaintiff's and defendants' medical experts, involves the patient lying on his back with his leg bent (flexed) at a 90 degree angle and the examiner holding the patient's calf and knee and pushing his knee into his chest while moving it left and right to test whether there is damage to the meniscus. It is one of the tests that is termed a provocative test because it is meant to provoke a reaction (of pain) if indeed there is an existing injury.

When thereupon asked whether Dr. Bressler's examination was within the accepted standards of care, based upon that answer and his further acceptance of plaintiff's testimony as to what happened and his testimony that Dr. Bressler was doing the test very quickly and very roughly and that plaintiff felt something break in the knee and felt pain, and that Dr. Bressler then discontinued the test and left the room, Dr. Sicherman merely opined, "Well, again, what happened was the uncontrolled - because of improper positioning of the examiner there was a lack of control of the knee, and if you - I don't know if you've ever been examined roughly, generally that means that whoever the examiner is, is exceeding - exceeding your own limits. If - if you weren't exceeding your limits, well, you might say it was kind of quick or he or she was kind of quick or kind of perfunctory or whatever, so it just seems to me that the lack of the - position, the lack of control of the limb, and the rapid movement all contributed to the tearing of the cartilage, and I believe that the positioning - the nonstandard manner of performing the test was a cause of the meniscal injury."

Plaintiff's counsel again asked Dr. Sicherman whether Dr. Bressler deviated from the standards of acceptable care and, after Dr. Sicherman replied that he did, then asked once again what the basis of his opinion was. Dr. Sicherman again opined that the examiner must be on the same side of the knee being examined in order to have control over the patient's knee "so as not to cause harm".

Thus, Dr. Sicherman's testimony was that performing a McMurray test from the side opposite the knee being tested would be a departure because it would not allow the examiner to have control

of the knee while manipulating it and, therefore, based upon the assumption that a McMurray test was performed upon plaintiff's left knee from his right side, that Dr. Bressler departed from good and accepted medical practice by so performing a McMurray test upon plaintiff's left knee.

Dr. Bressler testified that although he had no independent recollection of his examination of plaintiff, and thus could not say with one hundred percent certainty that he did not perform a McMurray test on plaintiff, he also testified that it was highly unlikely that he did so because it was not documented in his notes and he would have documented it in his notes that were written within a minute or two of the examination. He also stated that since he documented the other tests he performed, it would be inconceivable that he would not have documented a McMurray test if such test had also been performed. He also explained that, according to his notes, plaintiff felt considerable pain when his right knee was bent to 120 degrees and, therefore, he would not have gone on to perform a McMurray test since it would not have been necessary to do so and considering that a McMurray test involves flexing the knee to a far greater range than 120 degrees, since plaintiff was in pain with the right knee that he was complaining of when it was flexed to 120 degrees, an examiner would not then force plaintiff's knee to 140 degrees trying to perform a McMurray test. Indeed, explained Dr. Bressler, he would not have been able to have even put plaintiff in a position to do the McMurray test. For these reasons, Dr. Bressler concluded that he did not perform a McMurray test. He further testified that had he performed a McMurray test on plaintiff's left knee, he would have inverted him on the table so that his left side would be facing Dr. Bressler instead of his right side. In this regard, he testified that he does not perform a McMurray test on a knee from the opposite side, not because it would result in any injury, which he opined it would not, but because the specific positioning of the examiner's hands and fingers on and under the knee would make it impracticable to do while reaching across the table.

Defendants' expert, Dr. Edwin Richter, testified that even if, arguendo, Dr. Bressler had performed a McMurray test on plaintiff's left knee while standing on the opposite side of the patient, such would not be a departure, but would have been merely an unconventional way of performing the test since it is much easier to perform the test on the leg closer to the examiner. But he opined that it is not a departure in terms of causing harm to the patient. He also opined that a new traumatic meniscus tear cannot be caused by the performance of a McMurray test since there is not enough force from a doctor's hands to cause such an injury.

Finally, according to the deposition and trial testimony of plaintiff, he stated that he was lying down on the table and that

Dr. Bressler stepped or knelt on his foot and pushed his knee roughly and as he did so plaintiff felt something break in his left knee and felt immediate pain which caused him to scream. He testified that Dr. Bresler thereupon stopped the test and told him it was o.k., left the room and came back with another doctor who had a discussion with him and then left, and Dr. Bressler then gave plaintiff a prescription for pain medication. On cross-examination, Dr. Sicherman admitted that plaintiff's testimony in this regard described the test that was performed as the Anterior/Posterior Drawer test, which was documented in Dr. Bressler's notes as having been performed, and not the McMurray test. This test is also performed while the patient is lying in the prone position on his back with his knee bent, but the leg and knee are not raised and brought to the chest, but rather the shin and knee are pushed and pulled while the examiner is kneeling on the foot so the leg and knee cannot move. And this test is performed while the examiner is at the foot of the table, not on the side. Dr. Sicherman agreed, and the undisputed testimony at trial was, that the Anterior/Posterior Drawer test was not a test for injury to the meniscus and could not cause a meniscal tear.

Nevertheless, Dr. Sicherman credited plaintiff's testimony and the history plaintiff had given him during his examination of plaintiff in 2017 that Dr. Bressler examined and manipulated his left knee and "all of a sudden" plaintiff had left knee pain and discounted Dr. Bressler's testimony and prior deposition testimony in coming to his opinion that Dr. Bressler departed from good and accepted medical practice by performing a McMurray test from the side of the examining table opposite the left knee and this departure caused plaintiff's left knee injury.

Dr. Sicherman's position was, as he explained on cross-examination, that "you have one person who says this is exactly what happened and the other one says, Gee, I don't remember what I did, but if I did I would have done it". He also stated, "Again, you have - you have the physician who doesn't remember exactly and then you have the - the patient who says exactly. I thought the preponderance of the evidence, at least in my mind, favored Mr. Osorio's -...relating what happened to him."

Plaintiff's spouse, Maria Ortiz, who was present at plaintiff's examination by Dr. Bressler, had also clearly testified in her earlier deposition that plaintiff cried out in pain when Dr. Bressler stepped on his foot and manipulated his knee, but at trial testified that it was not when Dr. Bressler stepped on plaintiff's foot and manipulated his knee while at the foot of the table that plaintiff felt pain, but after he stepped down from the table and went to the side of the table and manipulated plaintiff's leg from that position. When asked on cross-examination, "Now, you believe that Mr. Osorio and his wife are telling the truth about what

happened to them, right", Dr. Sicherman replied, "Yes." When thereupon asked, "And you don't believe Dr. Bressler, right?", he answered, "Well, if you - if you're making it black and white, then yes."

Therefore, the only basis for Dr. Sicherman's opinion that Dr. Bressler departed from accepted medical practice by performing a McMurray test on plaintiff's left knee from plaintiff's right side was that he found plaintiff credible in his account of what happened and found Dr. Bressler not credible. It is, however, exclusively the province of the jury to weigh the credibility of witnesses. Dr. Sicherman could not properly have elicited a departure against Dr. Bressler by crediting plaintiff's narrative account of experiencing pain when Dr. Bressler manipulated his left knee and disregarding Dr. Bressler's testimony and his contemporaneous medical notes, based upon his own weighing of their credibility and the "preponderance of the evidence".

Furthermore, notwithstanding that Dr. Sicherman conceded that it would be extremely rare for a physician to cause a meniscal tear during an examination, and especially rare to cause bone contusions of the femur, as was the case here, and notwithstanding that he conceded that a meniscal tear is more likely to be caused by an accident or sports injury, and that a motor vehicle accident is a common cause of bone contusions of the femur and tibia, which is what plaintiff suffered, Dr. Sicherman also did not consider the evidence that was presented that Flushing Hospital records note that plaintiff presented to its emergency room complaining of left knee pain subsequent to his examination by Dr. Bressler and prior to his claim that Dr. Bressler caused his left knee meniscus tear and reporting that he was in a motor vehicle accident. Dr. Sicherman, having improperly weighed the credibility of plaintiff and Dr. Bressler and having decided to believe plaintiff's account, testified that he disregarded the Flushing Hospital record entry concerning plaintiff's claim of being in a motor vehicle accident as being merely an error on the part of the hospital. Thus, his failure to consider Dr. Bressler's testimony, his contemporaneous notes and the hospital records, based upon his own improper usurpation of the jury's role, renders his opinion that Dr. Bressler departed from good and accepted medical practice entirely speculative.

Not only was Dr. Sicherman's opinion the result of his working back from the injury itself and speculating upon a departure that may have caused it, but he did so by assuming the veracity and accuracy of plaintiff's story of suddenly feeling pain in his left knee upon Dr. Bressler's manipulation of it and presenting a theory of liability to the jury to support plaintiff's account. In doing so, moreover, by recapitulating the history that plaintiff gave and testifying that he found plaintiff more believable than Dr.

Bressler, he improperly bolstered plaintiff's testimony and gave it a veneer of veracity by impressing upon the jury that he, as a medical professional, found plaintiff's account more credible than Dr. Bressler's, in effect, putting his thumb on the jury's balancing scale.

Moreover, as heretofore noted, Dr. Sicherman presented no objective medical testimony to explain why performing a McMurray test on the left knee from the right side of the patient is a departure from good and accepted medical practice. He merely stated that it is a nonstandard way to do the test and he has never seen it performed or described in that manner. In this regard, plaintiff's counsel repeatedly attempted, in vain, to get him to explain the basis for his opinion that it was a departure, at one point, as noted, even leading him by asking him to explain what difficulties would be presented in doing the test from the opposite side "with respect to the amount of force or load or stress that they're applying on the knee", thus hoping to lead him to opine that performing the test from that position would put some undue stress or force upon the knee that could cause a meniscal tear and therefore constitute a departure.

Dr. Sicherman would not so opine, but merely offered as an explanation that by performing the test from the other side of the table the examiner would not have "control" of the thigh and hip, without explaining what this lack of control involved or what the significance such lack of "control" would be in causing a meniscal tear. His only explanation as to the significance of this "uncontrolled situation" was that "if you're causing any pain, discomfort, the patient will jump and kind of move around in an uncontrolled manner." He did not opine, however, that such moving around could cause a meniscal tear.

In any event, this explanation is inapposite to plaintiff's testimony upon which Dr. Sicherman bases his opinion. Plaintiff did not testify that he had left knee pain and Dr. Bressler's manipulation of his knee made him feel pain that caused him to react by jumping or moving around, and that after he reacted to the initial discomfort by moving or jumping he then felt something break and felt the intense pain he alleges was the meniscal tear. Plaintiff's testimony was that he had no left knee pain and that immediately upon Dr. Bressler's kneeling on his foot and manipulating his left knee he felt something break and cause him immediate severe pain. Thus, not only was Dr. Sicherman's lack of control explanation bereft of any explanation of its medical significance, but it is inconsistent with plaintiff's account.

Plaintiff's counsel thereupon again asked him to give his opinion concerning departure by recounting to him plaintiff's testimony that Dr. Bressler was doing the test very quickly and

roughly, and asked Dr. Sicherman whether the manner in which the examination was performed was within the accepted standards of care given this added account that the examination was performed very quickly and roughly. As heretofore quoted, Dr. Sicherman merely replied, "Well, again, what happened was the uncontrolled - because of improper positioning of the examiner there was a lack of control of the knee, and if you - I don't know if you've ever been examined roughly, generally that means that whoever the examiner is, is exceeding - exceeding your own limits. If - if you weren't exceeding your limits, well, you might say it was kind of quick or he or she was kind of quick or kind of perfunctory or whatever, so it just seems to me that the lack of the - position, the lack of control of the limb, and the rapid movement all contributed to the tearing of the cartilage, and I believe that the positioning - the nonstandard manner of performing the test was a cause of the meniscal injury."

Again, Dr. Sicherman merely repeated his conclusory opinion relative to departure and causation concerning the nonstandard position of the examiner in performing the test which resulted in the lack of control of the limb, adding only that he believes that the rapid movement, in addition to the positioning and lack of control, all "contributed" to the tearing of the cartilage. There was no testimony or medical evidence presented that rapid movement of a patient's limb during a McMurray test could tear the meniscus, and there was no expert testimony or medical evidence presented that performing a McMurray test from the side opposite the knee being tested could tear the meniscus if performed fast.

His further statement that if you are examined roughly that means that the examiner is "exceeding your own limits" articulates no objective medical basis for his opinion that Dr. Bressler departed from good and accepted medical practice by performing a McMurray test from the opposite side of the table. He also did not define what he meant by "exceeding your own limits".

Dr. Sicherman's repeated conclusory statement that the examiner must be on the same side of the knee being examined in order to have control over the patient's knee "so as not to cause harm" also fails to support a prima facie case on departure or causation. He never gave an opinion as to how such lack of control could cause harm, including a meniscus tear. As heretofore noted, Dr. Sicherman proffered no objective medical testimony that performing a McMurray test from the side opposite the knee being tested or the lack of "control" of the limb generated, or could generate, any unusual or excessive stress or force that caused, or could have caused, the tear of plaintiff's meniscus in his left knee. In this regard, the testimony of Dr. Richter was that Dr. Bressler could not have caused plaintiff's meniscal tear in his left knee because a doctor does not have sufficient strength to

tear a patient's meniscus in the performance of any test. Dr. Sicherman did not testify otherwise. Indeed, his testimony was that it would be exceedingly rare for a physician to tear a patient's meniscus in the performance of an examination, and that the common causes of meniscus tears are accidents or sports injuries.

Finally, Dr. Sicherman merely testified that the nonstandard manner of performing what he speculated was a McMurray test "was a cause of the meniscal injury". He did not opine, however, that it was a substantial factor in causing plaintiff's meniscal tear. Thus, even had Dr. Sicherman elicited a departure, he did not establish causation.

CPLR 4404(a) provides that a trial court "may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law...where the verdict is contrary to the weight of the evidence". Here, the jury's finding that Dr. Bressler departed from good and accepted medical practice and said departure was a substantial factor in causing injury to plaintiff could not have been reached by any fair interpretation of the evidence (Taino v. City of Yonkers, 43 AD 3d 401 [2nd Dept 2007]; Evers v. Carroll, 17 AD 3d 629, [2nd Dept 2005]; Schiskie v. Fernan, 277 AD 2d 441 [2nd Dept 2000]).

Dr. Sicherman's opinion that Dr. Bressler departed from the standard of care and that such departure was "a cause" of plaintiff's left knee injury was speculative and devoid of any objective medical basis.

Accordingly, the jury's verdict is set aside and judgment is awarded in favor of defendants.

Defendants may enter judgment accordingly.

Dated: October 29, 2018



KEVIN J. KERRIGAN, J.S.C.

