

**Daniels v Jerome**

2021 NY Slip Op 30128(U)

January 8, 2021

Supreme Court, Kings County

Docket Number: 47476/03

Judge: Ellen M. Spodek

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At an IAS Term, Part 63, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8<sup>th</sup> day of January 2021

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

RACHELLE DANIELS, as the Administratrix of the Goods,  
Chattels and Credits of DUKE DANIELS, Deceased

*Plaintiff,*

**-against-**

Index No. 47476/03

**DECISION/ORDER**  
Hon. Ellen M. Spodek

ERIC L. JEROME and NEPHRO-CARE, INC.,

*MS # 22 & 23*

*Defendants*

<b>Papers</b>	<b>Numbered</b>
Notice of Motion and Affidavit.....	___ 1-2 ___
Order to Show Cause and Affidavits Annexed.....	_____
Answering Affidavits .....	___ 3-5 ___
Replying Affidavits .....	___ 6-7 ___
Exhibits .....	_____
Memorandum of Law in Support of Motion.....	_____

Upon the foregoing papers, defendant Eric L. Jerome ("Dr. Jerome"), moves for an order (1) pursuant to CPLR 4404(a) setting aside the jury's verdict in favor of plaintiff as against defendant Eric L. Jerome, and directing judgment in favor of defendant Eric L. Jerome; (2) pursuant to CPLR 4404(a), setting aside the jury's verdict in favor of plaintiff as against defendant, Eric L. Jerome, and directing a new trial as to

defendant Eric L. Jerome; (3) setting aside the jury's verdict in favor of plaintiff as against defendant, Eric L. Jerome, and directing a new trial on the issue of apportionment, unless plaintiff stipulates to a substantial reduction of the jury's determination as to the apportionment of fault attributable to defendant, Eric L. Jerome; and (4) setting aside the jury's verdict in favor of plaintiff as against defendant, Eric L. Jerome, and vacating the wrongful death award or directing a new trial on the issue of damages, unless plaintiff stipulates to a substantial reduction of the jury's awards; (5) directing that any proposed judgment in this matter be served with Notice of Settlement; and (6) for such other and further relief as this Court deems just and proper. Plaintiff opposed the motion.

Plaintiff moved (1) pursuant to CPLR 4404 (a) directing Judgment Notwithstanding the Verdict as a Matter of Law against defendant Nephro- Care, Inc., based on vicarious liability under an ostensible apparent agency theory for the malpractice of defendant Eric L. Jerome ; (2) pursuant to CPLR 4404 (a) setting aside that portion of the jury verdict that found defendant Nephro-Care, Inc, not liable for acts of malpractice, and ordering a new trial on this issue, in the interest of justice, based upon errors in the jury charge, errors made in questions on the jury verdict sheet regarding defendant Nephro-Care, Inc., errors in evidentiary rulings made during the trial, errors in rulings made prior to jury selection during motions in liminie, as well as the verdict being contrary to the weight of the evidence; (3) pursuant to CPLR 4404(a) setting aside that portion of the jury verdict on the issue of percentage of total fault that found defendant Eric L. Jerome and nonparty Dr. Roland Purcell both 50% percent at fault, and 0% percent against defendant Nephro-

Care ,Inc., and ordering a new trial on the issue of apportionment which would include Nephro-Care, Eric L. Jerome, and Dr. Roland Purcell only, in the interest of justice, based upon errors on the verdict sheet, errors made in evidentiary rulings, including errors in rulings made prior to the start of the trial during motions in liminie, as well as the jury verdict on the issue of apportionment being contrary to the weight of the evidence;

(4) awarding to the plaintiff as pecuniary damage the stipulated funeral bill expenses in the amount of six thousand eight hundred fifty three dollars (\$6,853.00) and (5) for such other and further relief as this Court may deem just and proper. Both Dr. Jerome and Nephro-Care opposed the motion.

This medical malpractice wrongful death action arises from treatment that was rendered by the defendants in the winter of 2001. On December 18, 2001, plaintiff's decedent, 71-year-old Duke Daniels, was undergoing dialysis at Nephro-Care via an arteriovenous (AV) graft in his right arm. The Nephro-Care nurses observed blood oozing around the graft site when they attempted to initiate dialysis, and they alerted Dr. Jerome, the decedent's treating nephrologist. Dr. Jerome instructed the nurses to cease dialysis and send the decedent to the Emergency Room at Interfaith, where Dr. Jerome was an attending. Over the course of the next four days, the physicians who examined the decedent, including Dr. Jerome, noted the bleed, ordered blood tests to confirm that the decedent was suffering a suspected infection, and instituted a plan for the surgical team, headed by Dr. Purcell, to examine and operate on the decedent. However, Dr. Purcell never performed the necessary surgery – or even physically examined the decedent – and the decedent passed away on the morning of December 21, 2001.

The trial of this action began on January 10, 2020, and resulted in a verdict against the defendant Dr. Jerome on February 28, 2020. The jury apportioned the fault fifty percent against Dr. Jerome and fifty percent against Dr. Purcell, the non-party surgeon. The jury found no liability for defendant Nephro-Care, and no liability for the non-part Dr. Kwok.

Dr. Jerome moved to set aside the verdict and asked for a directed verdict in his favor, arguing that there was no evidence that he departed from good and accepted medical practice, and that even if a departure was found, it was not a substantial factor in causing the death of Mr. Daniels. Dr. Jerome argues that there was no departure because he ordered the surgical consult for Mr. Daniels, directed the surgical consultation to Dr. Purcell, and called Dr. Purcell to notify him of the urgency for the surgery to replace the graft. Dr. Jerome also contends that he was responsible only for ensuring that the surgical team at the hospital, headed by Dr. Purcell, was aware of the decedent's condition so that the team could perform the required surgery, which was exactly what happened in this case, so there was no departure from good and accepted medical care.

Dr. Jerome also argues that the verdict must be set aside and a new trial directed because the jury's verdict was inconsistent. Dr. Jerome argues that any alleged departure that he may have caused could not have been the proximate cause of Mr. Daniels death. He contends that as the jury found that Dr. Kwok did not depart from good and accepted medical care, (in that Dr. Kwok had informed Dr. Purcell, the surgeon, of the emergent need for the surgery to repair the graft), and Dr. Purcell was aware of the emergent situation, irrespective of what Dr. Jerome may or may not have told Dr. Purcell,

any departure by Dr. Jerome could not have been a proximate cause of Mr. Daniels' death. Dr. Jerome argues that as he was not the proximate cause of Mr. Daniels death, the verdict must be set aside and directed verdict issued in his favor.

Dr. Jerome also argues that if the verdict is not set aside or a new trial ordered, the apportionment of fault as to Dr. Jerome must be considerably reduced or, alternatively, a new trial on apportionment should be ordered because no rational reading of the evidence would show that there is equal apportionment of fault for the death of Mr. Daniels. As Dr. Purcell never saw Mr. Daniels and never performed the required emergency surgery, Dr. Jerome argues that the apportionment of fault must be reduced against him. Dr. Jerome also asserts that in the event this Court sustains the liability findings against him, a new trial is also required unless plaintiff stipulates to a substantial reduction of the jury's pain and suffering award. Specifically, he asserts that the jury's award of two million one hundred thousand dollars (\$2,100,000) for pain and suffering is wildly excessive. He also contends that the jury's pecuniary award of six hundred twenty five thousand dollars (\$625,000) to the decedent's four adult children is unsupported by the evidence and should be vacated. At a minimum, he asserts that the award must be significantly reduced.

Plaintiff argues that the jury's finding of no liability against Nephro-Care must be set aside because she has met the burden of showing that as a matter of law Nephro-Care was vicariously liable for the malpractice of Dr. Jerome under a theory of ostensible or apparent agency. Plaintiff argues that based upon the records produced by Nephro-Care at trial that Dr. Jerome and Dr. Purcell were designated by Nephro-Care as doctors

number 2 and 3 to treat Mr. Daniels when hospitalized, and based on the testimony by Dr. Jerome that Mr. Daniels was made aware of this fact and the fact that Mr. Daniels always accepted Dr. Jerome's medical services when hospitalized, Nephro-Care should be held vicariously liable for the actions of Dr. Jerome.

Plaintiff also argues that the portion of the verdict that found Nephro-Care not liable for affirmative acts of malpractice must be set aside because the Court erred in not giving the jury a charge regarding vicarious liability and not having a question on the verdict sheet regarding Dr. Jerome being the apparent or ostensible agent of Nephro-Care. Plaintiff contends that the evidence at trial provided the minimum requirements to create an issue of fact to be submitted to the jury on the issue of vicarious liability of Nephro-Care for Dr. Jerome's actions. Plaintiff also argues that the no liability finding for Nephro-Care must be set aside because the Court erred in denying plaintiff's motion to strike Nephro-Care's answer as a sanction for failing to produce a substantial portion of Mr. Daniels medical records, or alternatively, based upon the Court's error in denying plaintiff's request for an adverse inference charge. Plaintiff contends that the missing records were critical in proving affirmative acts of negligence by Nephro-Care, and that there was evidence that the records existed but were never produced, and as a result their expert was prevented from testifying at the trial as to any departures by Nephro-Care. Plaintiff contends that the lesser sanction of an adverse inference charge should have been given to the jury regarding the missing medical records.

Plaintiff also asserts that the jury verdict be set aside and a new trial ordered with respect to Nephro-Care, because the Court erred in not granting plaintiff's request to

charge the jury on the Noseworthy Charge and circumstantial evidence. Plaintiff contends that the Noseworthy charge should have been given because it would have allowed a lesser degree of proof pertaining to the weight which the circumstantial evidence would be afforded by the jury as to the malpractice of Nephro-Care. Plaintiff asserts that the circumstantial evidence charge should have been given because there was circumstantial evidence that related to the subacute infection process found on the autopsy to the time period applicable to the malpractice by Nephro-Care prior to December 18th, 2001. Plaintiff argues that the failure to give these charges created substantial injustice for her.

Plaintiff also contends that the Court erred in not having a question on the verdict sheet stating "Did Nephro-Care, Inc. from September 27th, 2001 through December 18th, 2001 depart from good and accepted medical practice by failing to timely treat Duke Daniels for an infected AV graft." Plaintiff also argues that the Court erred in not having questions on the verdict sheet stating "Did Eric L. Jerome depart from good and accepted medical practice on December 19th, 2020 [sic], by not communicating with Dr. Roland Purcell on December 19th, 2001 the need for surgery after the PA Consult?" and "Did Eric L. Jerome depart from good and accepted medical practice on December 20<sup>th</sup> in not ordering and not ensuring that Duke Daniels not receive Non- Steroidal anti -inflammatory medication after he bled on December 20, 2001." Plaintiff contends that because there were two departure questions relating to Dr. Purcell, and only one for Dr. Jerome, this gave the impression to the jury that Dr. Purcell was equally or more at fault for the death of Mr. Daniels, which caused substantial injustice and prejudice to her by placing her at

an unfair disadvantage, and affected the outcome of percentage of fault, in favor of defendant Dr. Jerome.

Plaintiff argues that the Court also erred in allowing Dr. Jerome to testify as to the conversations he had with Dr. Purcell. Plaintiff asserts that this caused substantial prejudice to her and affected the jury's determination on the issue of fault with respect to Dr. Purcell and therefore a new trial must be ordered on the issue of apportionment of fault between Dr. Jerome, Dr. Purcell and Nephro-Care.

#### **DR. JEROME'S MOTION**

On a motion to set aside a jury verdict, "[a] trial court may direct judgment in a defendant's favor pursuant to CPLR 4401 where, affording the plaintiff every favorable inference from the evidence submitted, there is no rational process by which the jury could find in the plaintiff's favor." *Elias v. Bash*, 54 A.D.3d 354, 357 (2d Dept. 2008). In order to prove medical malpractice there must be "a deviation or departure from good and accepted standards of medical practice, and evidence that such departure was a proximate cause of the injury." *Id.*

After a review of all of the papers, the Court concludes that there was no rational basis for the jury to find that Dr. Jerome was liable for malpractice in the death of Mr. Daniels. Looking at the evidence presented at trial as to whether Dr. Jerome departed from good and accepted standards of medical practice, Dr. Jerome did what he was required to do as the attending nephrologist for Mr. Daniels, which included specific notations in the chart that he required surgical intervention for a "bleed". Dr. Jerome was not a vascular surgeon. His expertise was nephrology. Dr. Jerome referred Mr. Daniels

for a surgical consultation, and spoke to the head of the surgical team, Dr. Purcell, about the urgency of Mr. Daniels' situation and his need for surgery to fix the graft. As Dr. Jerome was not a surgeon, he could do no more than refer Mr. Daniels for a surgical consult, expressing the urgency of the situation, which was done. Mr. Daniels was examined by two doctors from the surgical team, Dr. Zacariah and Dr. Kwok. Dr. Kwok testified that he told Dr. Jerome that Mr. Daniels was going to go for surgery. There was nothing more for Dr. Jerome to do at this point. Plaintiff's expert Dr. Weisboard testified that any medical provider who looked at the decedent's chart prior to December 21 would have been aware that a graft infection was suspected and treatment was necessary. Dr. Weisboard also testified that there was nothing ambiguous about Dr. Jerome's notations in the medical records as of the morning of December 19 – he clearly wrote that the decedent needed "surgery for removal of the graft or ligate". It is clear from the testimony and evidence that there was nothing more for Dr. Jerome to do for Mr. Daniels, and he owed no further duty to Mr. Daniels.

In *Elias v. Bash*, 54 A.D.3d 354, 357 (2d Dept. 2008), the Second Department set aside a jury verdict against a cardiologist, finding that the doctor "fulfilled his duty as a consulting cardiologist by reporting his findings to the attending physician, and making appropriate suggestions for follow-up treatment." *Id.* The Court found that the cardiologist had repeatedly advised the attending obstetrician of the need to check for a post-operative intra-abdominal bleed, and as the doctor was a cardiologist and did not specialize in obstetrics, gynecology or surgery, "there is no rational basis to support a jury finding that [the doctor] departed from good and accepted practice by failing to take steps,

beyond the normal scope of his role as a consulting cardiologist and outside of his area of specialization, to resolve a suspected post-surgical bleed.” *Id.* at 358. Just as in *Elias*, Dr. Jerome did not depart from good and accepted practice in this case, he referred Mr. Daniels for a surgical consultation for “a bleed”, for which he called the head of the surgical team, Dr. Purcell, and explained the urgency of the situation. The Court finds that there is no rational basis for the jury finding against Dr. Jerome, and the verdict must be set aside. The Court directs a verdict in favor of Dr. Jerome.

Pursuant to CPLR 4111[c], when a verdict is internally inconsistent, “the court shall require the jury to further consider its answers and verdict or it shall order a new trial.” In this case, the jury’s verdict against Dr. Jerome must be set aside as it was internally inconsistent. An inconsistent verdict exists “when a verdict on one claim necessarily negates an element of another cause of action.” *Barry v Manglass*, 55 NY2d 803, 805 (1981). The jury in this case found that Dr. Jerome departed from good and accepted medical practice by not communicating the decedent’s emergent condition to Dr. Purcell following the surgical consultation on December 20, 2001 and that this departure was a proximate cause of the decedent’s death. However, the jury also found that Dr. Kwok did not depart from accepted medical practice on December 20, 2001 by not advising Dr. Purcell that the decedent required surgical intervention following the surgical consultation. The jury also found that Dr. Purcell did depart from accepted medical practice by not operating on the decedent before his death and that this departure was a proximate cause of the decedent’s death. These findings are inconsistent. The jury believed that Dr. Kwok advised Dr. Purcell of the need for surgical intervention, and Dr. Purcell had this

knowledge and did not perform the surgery. Therefore Dr. Jerome cannot be found to have been a substantial factor in the death of the decedent, as Dr. Purcell was already aware of the urgent need for the surgery, and did not act upon that urgency. Dr. Kwok's notice of the urgency to Dr. Purcell negated any alleged departure by Dr. Jerome being a substantial factor in Mr. Daniels' death. If the Court had not already directed a verdict in favor of Dr. Jerome, the verdict against Dr. Jerome would need to be set aside as inconsistent.

The jury's pain and suffering award must be reduced, as it is excessive and cannot be sustained, for what the testimony shows was five minutes of pain and suffering. The Court finds that the award should be reduced to two hundred fifty thousand dollars (\$250,000), based upon the sustained verdicts of four hundred thousand dollars (\$400,000) in cases where there was eleven to twenty minutes of pain and suffering.

The jury's award of pecuniary damages for loss of parental guidance must be set aside as there was no evidence presented at the trial to sustain the award. In *Perez v St. Vincent's Hosp. and Medical Center of New York*, 66 AD3d 663 (2d Dept 2009), the Appellate Division vacated the jury's four hundred thousand dollar (\$400,000) wrongful death award "because there was no evidence as to any pecuniary injury to those [two adult] children caused by the decedent's death." The same is true in this case, and the damages award must be set aside.

As the Court has directed a verdict in favor of Dr. Jerome, the issue on apportionment is moot.

**PLAINTIFF'S MOTION**

Plaintiff's motion to set aside the verdict in favor of Nephro-Care is denied. Plaintiff's motion to direct a verdict against Nephro-Care is also denied. Plaintiff's argument that Nephro-Care is vicariously liable for the actions of Dr. Jerome is moot as the Court directed a verdict in favor of Dr. Jerome. However, if the Court had left the verdict in place against Dr. Jerome, the Court finds that there is no vicarious liability by Nephro-Care as a matter of law. Plaintiff did not sustain her burden of proof to show ostensible or apparent agency. See *Hill v. St. Clare's Hospital*, 67 N.Y.2d 72, 81 (1986). The criteria for ostensible agency are words or acts by the purported principle, which give the appearance of authority to the alleged agent, and reasonable reliance by the patient on those words or actions. *Dragotta v. Southampton Hosp.*, 39 A.D.3d 697, 698 (2d Dep't 2007). Dr. Jerome testified that he first saw Mr. Daniels as a patient at St. Mary's Hospital, and when a referral for dialysis was needed, he referred Mr. Daniels to Nephro-Care. Dr. Jerome testified that he continued to see Mr. Daniels at his private office. He testified that he was an independent contractor. There is no evidence that (1) Nephro-Care made representations to Mr. Daniels that it would be providing a nephrologist to admit him to the hospital, if needed; (2) that Mr. Daniels accepted treatment from Dr. Jerome because of those representations; or (3) that Mr. Daniels had knowledge that Dr. Jerome was making the treatment decisions at Interfaith. The notation in the medical records of Nephro-Care that Dr. Jerome was doctor 2 and Dr. Purcell was doctor 3 is insufficient to find that Nephro-Care is vicariously liable for the actions of Dr. Jerome as a matter of law.

Plaintiff argues that the Court erred in not striking the answer of Nephro-Care or

giving an adverse inference charge, when she moved for spoliation sanctions for failure to produce medical records, that she alleged were critical to her case against Nephro-Care. Plaintiff never proved that the documents existed, which is necessary for a spoliation sanction. See *Wilkie v. New York City Health & Hosps. Corp.*, 274 A.D.2d 474 (2d Dep't 2000). There was no testimony from anyone with personal knowledge on the creation of the records, and testimony that documents "would be" in the patient's chart doesn't prove that the documents were actually created.

Another necessary factor to prove spoliation is that the party seeking the sanction must prove "that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense". *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543 (2015), Plaintiff never proved that the documents she was seeking were relevant to her claims. Her expert's affirmation in support of the motion for spoliation was filled with conclusory statements of relevance. Dr. Weisboard then testified at trial that none of the allegedly missing documents would have included proof of the presence of a diagnosable infection during the months at issue. Plaintiff failed to prove the documents were relevant to her claims, therefore plaintiff failed to sustain her burden of proof for the spoliation sanction.

As for the failure to give an adverse inference charge, that is of no merit. It is plaintiff's burden to prove that "the document in question actually exists, that it is under the opposing party's control, and that there is no reasonable explanation for failing to produce it." *Id.* at 474-475. As there is no proof that the documents existed the Court did not err in failing to give an adverse inference charge.

Plaintiff's motion asks the Court to set aside the verdict in favor of Nephro-Care because the Court erred in not giving a Noseworthy charge and a circumstantial evidence charge to the jury. There was no circumstantial evidence in this case to allow for the circumstantial evidence charge or the Noseworthy charge to be given. Plaintiff argues that whether the alleged subacute infectious process found on the autopsy would have been recognizable prior to December 18, 2001 was the circumstantial evidence, but the testimony by plaintiff's own experts as to this issue rendered direct evidence regarding that issue, not circumstantial.

Plaintiff's arguments regarding the court's errors in the jury questions regarding Dr. Jerome are moot, as the verdict against Dr. Jerome is set aside and a directed verdict issued in his favor. However the Court will say there was no error in the amount of departure questions as between Dr. Jerome and Dr. Purcell, as Dr. Jerome's departure was all encompassing for the relevant time period, and Dr. Purcell required two departure questions because he also failed to perform the surgery, which Dr. Jerome could not have done as he was not a surgeon. As for the issue of allowing Dr. Jerome to testify as to his conversations with Dr. Purcell, plaintiff failed to initially object to this testimony as hearsay. As plaintiff failed to timely object, he waived any objections. *See see Sanchez v Kato, Inc.*, 115 AD2d 646 (2d Dept 1985). Even though Dr. Purcell had settled the complaint against him, he was still on the verdict sheet, so any admissions testified to by Dr. Jerome were admissions by a party and considered an exception to the hearsay rule. *See Reed v McCord*, 18 AD 381, 385 (2d Dept 1897).

Any remaining arguments by plaintiff are moot as the verdict against Dr. Jerome

has been set aside and the verdict in favor of Nephro-Care is upheld.

**CONCLUSION**

In summary, Dr. Jerome's motion to set aside the verdict and direct a verdict in his favor is granted. The pain and suffering award is reduced to two hundred fifty thousand dollars (\$250,000) and the pecuniary damages award is set aside. Plaintiff's motion to set aside the verdict in favor of Nephro-Care is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER

Ellen Spodek

JSC HON. ELLEN M. SPODEK

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CLERK OF COURT  
KINGS COUNTY