

Decision and Order of the Honorable Joan M. Kenney,
dated August 17, 2009, Appealed From
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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART: 59

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ROSALIE DAVID and STEVEN DAVID,

Plaintiffs,

Index # 107490/06

-against-

DECISION & ORDER

MALLILO & GROSSMAN,
ANTHONY MALLILO, FRANCESCO POMERO, JR.,
and PATER GALLANTER,

Defendants.

-----X
KENNEDY JOAN M., J.C.C.

After trial, I hereby find and decide that:

This legal malpractice action arises out of plaintiffs' retention of the defendants¹ to prosecute a lawsuit against Maryann and Dennis Astrologo (Astrologo). It is undisputed, and the law of this case, that plaintiffs were rear-ended by the Astrologos, resulting in three car accident (the car accident). On January 25, 2003, plaintiffs' car was stationary when the accident occurred, and was hit so hard, that the car Rosalie David (Mrs. David) was sitting in, smashed into the car in front of it. Mrs. David was a front seat passenger and Steven David (Mr. David), her husband, was operating the vehicle.

On January 20, 2003, five days prior to the car accident, Mrs. David had a slip and fall in the laundry room of her apartment building (the slip and fall). On January 24, 2003, Mrs. David sought medical attention from an orthopedist, Dr. Jacob Rozbruch

The action was discontinued against Pater Gallanter.

(Dr. Rozbruch), for a bruise to her right shoulder. Dr. Rozbruch examined Mrs. David and diagnosed her with acute bursitis, arthritis and a "possible injury to the rotator cuff." Dr. Rozbruch testified, and his medical records corroborate, that Mrs. David's muscle strength was "perfectly normal." Dr. Rozbruch did inject Mrs. David's shoulder with lidocaine and kenalog "with good initial result."

After the car accident, Mrs. David was taken by ambulance to a local hospital. After x-rays were taken, she was treated and released with pain medication. On January 28, 2003, after Mrs. David returned to her home in New York City, she again sought medical attention for her right shoulder. After completing diagnostic testing, Dr. Rozbruch determined that Mrs. David had suffered a "a full thickness tear of the rotator cuff" in her right shoulder. On February 6, 2003, Dr. Rozbruch surgically repaired Mrs. David's rotator cuff.

It was undisputed at trial that after the accident, Mrs. Rosalie was bedridden for one week, and homebound for about 30 days. In March 2003, Mrs. David returned to work as a schoolteacher, but her duties were curtailed by her injury. Further, Mrs. David could not drive a car until June 2003.

Mrs. David's testimony was that she was unable to perform her personal grooming and bathing habits, nor her regular household duties for many months after the surgery. These duties and tasks

had to be done by Mr. David. Additionally, Mrs. David was prescribed physical therapy, three times per week, commencing shortly after the surgery and continuing until November 2003. Finally, Mrs. David stated that as late as 2008, she could not swim because she did not have the range of motion to do so. Mr. David testified that he and Mrs. David were unable to engage in sexual intimacy for "quite a while after the accident because it was impossible."

Plaintiffs retained defendants to commence a personal injury lawsuit against the Astrologos in or about February 2003. The action was venued in this court, and the index number was purchased in or about June 27, 2003.² At some point in time, this action was settled for \$25,000.00, the full jurisdictional amount of the Civil Court of the City of New York.

On September 26, 2007, after an enormous amount of motion and appellate practice, Hon. Manuel J. Mendez rendered a decision holding, among other things, that defendants were negligent as a matter of law, and that plaintiffs were entitled to a trial solely to determine: (1) if plaintiff's injury was proximately caused by the accident and (2) whether said injuries were "serious injuries," as that term is defined by Insurance Law §5102(d). Judge Mendez's decision was unanimously affirmed by the Appellate Term, First

²This malpractice action was brought in New York County Supreme Court and was transferred to this court pursuant to CPLR 325(d) in 2006.

Department, on May 27, 2008. In its affirmance, the Appellate Term stated that "triable issues [were raised] as to whether plaintiff would have prevailed in the underlying personal injury litigation "but for" defendants' negligence' (citations omitted).

The parties produced two doctors to testify as expert witnesses at trial. Dr. Rozbruch, was called because he was Mrs. David's board certified, treating orthopedic surgeon. Defendants called Dr. James Liguori (Dr. Liguori) a board certified adult neurologist and Dr. Anjani Singha (Dr. Singha), an orthopedic surgeon. Dr. Rozbruch's office and surgical records were also made a part of the trial record and were referred to by the expert witnesses.

Dr. Rozbruch testified that he was in his 29th year of practice, and he was a solo practitioner, who was engaged in "mostly general orthopedics," but had a subspeciality in "shoulder and spine." Dr. Rozbruch stated on direct examination, that he did not think Mrs. David had anything more than a bruise to her shoulder when he examined her on January 24, 2003, but found an impingement sign "AC arthritis and acute bursitis".

On January 28, 2003, after the accident, Dr. Rozbruch examined Mrs. David because she presented with "shoulder problems worse than she had originally, and her neck was additionally stiff." The magnetic resonance imaging that was performed, following the examination, indicated that Mrs. David had a full thickness tear of

shoulder "with a significant amount of muscle tightness her neck [sic], (he) thought was muscle injury, muscle tear and strain."

Dr. Liguori stated that after he graduated medical school in 1992, he completed an internship and residency in neurology in 1996. Dr. Liguori is board certified in neurology and maintains a private practice. Dr. Liguori testified on direct examination that he been retained by defendants' counsel to perform an independent medical examination (IME) of Mrs. David on June 21, 2007.

After taking Mrs. David's medical history Dr. Liguori performed "a standard neurological examination [and] did a range of motion specifically for the shoulder." Dr. Liguori testified further that he found "surgical scars over the right shoulder ... as well as three puncture wounds. There was full range of motion to both passive and active range of motion." Dr. Liguori's neurological findings were "normal." As part of his review of Mrs. David's medical status, Dr. Liguori reviewed Dr. Rozbruch's office records. Dr. Liguori also reviewed Mrs. David's emergency room records from the Hudson Valley Hospital Center where she was brought by ambulance immediately after the car accident. Dr. Liguori stated that the x-rays ordered by Dr. Rozbruch on the January 24th office visit and those taken immediately after the accident, showed a similar "irregularity at the greater tuberosity." In Dr. Liguori's opinion the same finding was made on both occasions, "[he] would find it hard to relate it to the

accident." Moreover, Dr. Liguori's expert medical opinion was that Mrs. David's shoulder condition "wasn't related to the car accident." Mrs. David's surgery was performed because she had "chronic changes" to her shoulder, that the car accident did not cause. On cross examination Dr. Liguori admitted that he did not "state specifically that [her] rotator cuff, but as far as her surgery goes, I don't think it was caused by the accident." Dr. Liguori acknowledged that he wrote a report on or about July 5, 2007, after he examined Mrs. David, which stated, *inter alia*, that it "is unclear as to the causal relationship of the MVA ... versus the prior fall..." Dr. Liguori's testimony changed at trial when he stated "...based on subsequent information I've gotten, I am not convinced that her shoulder is related to either or."

Defendants' second expert witness, Dr. Singha, testified on direct that he has been in practice for 25 years and that "I practice mainly knee and shoulder injuries ... orthopedic surgery." Dr. Singha examined Mrs. David in June 20, 2007. Dr. Singha took Mrs. David's medical history, examined her right shoulder and performed a range of motion examination. Dr. Singha found the range of motion be "normal." However, his review of Dr. Rozbruch's medical records, including the notes from the June 24th visit, led him to conclude that Mrs. David had "the impingement sign and arthritis and rotator cuff problem[s] that one has in day-to-day life, I'll say because she comes with the pain, loss of mobility,

range of motion."

Dr. Singha also testified that the x-rays taken before the accident on January 24th and the films taken on January 25th, both identified the same irregularity "in the greater tuberosity, consistent with a rotator cuff injury." Dr. Singha's ultimate opinion was that "this lady had all the changes before she had the accident, including a torn rotator cuff," and the afore-described chronic conditions, therefore Mrs. David's right shoulder injury "wasn't related to the accident."

On cross-examination, Dr. Singha was asked why his trial testimony conflicted with his report (defendant's Exhibit D in evidence), which concluded that "with a reasonable degree of medical certainty, it could not be determined whether the torn rotator cuff and the problem with [Mrs. David's] right shoulder is related to the accident or if it was a pre-existing on-going process." Unfortunately, plaintiff's counsel did not ask the follow-up question to determine why Dr. Singha's report contradicted his trial testimony.

The parties then rested and made post trial motions for a directed verdict in their favor.

Findings of Fact

Mrs. David suffered a serious injury as a result of the car accident that occurred on January 25, 2003.

Conclusions of Law

Plaintiffs' successfully proved by a preponderance of the evidence that Mrs. David's torn rotator cuff constituted a serious injury pursuant to Insurance Law §5102(d), see also, (*Bennet v Cruz*, 168 AD2d 307 [1st Dept 1990]). The New York Insurance Law § 5102(d) states, in pertinent part, that:

"Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

It should be noted that Mrs. David was unable to perform customary daily duties, such as driving a car, as statutorily required for a finding of "serious injury".

Defendants' case was based solely on the contention that Mrs. David's injury pre-existed the car accident. Defendants attempted to prove their case through the testimony of two paid experts, whose written reports contradicted their trial testimony. When a witness' sworn statement conflicts with their trial testimony, this court may disregard the testimony of such a witness. (see *Barbara Grace et al. v. City of New York et al.*, 4 AD2d 1022 [1st Dept

1957). In light of the foregoing, Dr. Rozbruch's testimony, as Mrs. David's treating physician, becomes more compelling and persuasive.

Plaintiffs' make a strong argument in their favor by invoking the principle of judicial estoppel. It is undisputed that defendant's represented plaintiffs in the action brought against the Astrolongos. In the pleadings attendant to that litigation, which defendants drafted and verified, represented that the car accident was the direct cause of Mrs. David's "serious injury." Additionally, if defendants thought Mrs. David's case lacked merit, they would not have agreed to represent plaintiffs in the first place. Plaintiffs' raise this issue in their post-trial memorandum, citing *D & L Holdings LLC v R.C.G. Goldman Company, LLC*, 287 AD2d 65 (1st Dept 2001), which states in pertinent part as follows:

"The doctrine of judicial estoppel prevents abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position."

This is the controlling law in this jurisdiction. Defendants have failed to convince this court that they did not intend to prosecute the action against Astrologos in Supreme Court.

Consequently, plaintiffs have successfully established by a preponderance of the credible proof a *prima facie* case that the car accident caused Mrs. David's torn rotator cuff.

Accordingly, it is

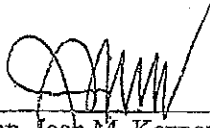
ORDERED, that after a trial the court finds for plaintiffs;
and it is further

ORDERED, that plaintiff, Rosalie David, is entitled to damages
for past pain and suffering, including loss of enjoyment of life in
the amount of \$250,000.00; and it is further

ORDERED, that plaintiff, Steven David, is entitled to damages
for his loss of services and loss of consortium claim in the amount
of \$25,000.00; and it is further

ORDERED, that the Clerk of the Court is hereby directed to
enter judgment against defendants individually and severally.

Dated: 8/17/09



Hon. Josh M. Kenney
J.C.C.