

8-26-11
AUG 26 2011

PART 17

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X
NOEL ABRAHAM ROSE, AS EXECUTOR OF
THE ESTATE OF HERMINE BROWNE,

Index No. 27430/2002

-against-

Hon. Diane A. Lebedeff

J.S.C.

DR. SALVATORE CONTE, SALVATORE
CONTE, M.D., P.C., CONTE AND MATFUS,
M.D., P.C., PHILIP J. KLAPPER, M.D., and PHILIP
J. KLAPPER, M.D. F.C.C.P.

-----X
The following enumerated papers were submitted on the instant motion:

	PAPERS NUMBERED
Notice of Motion - Exhibits and Affidavits Annexed	1
Opposing / Answering Papers - Affidavit and Exhibits	2
Reply Papers - Affidavit and Exhibits, Filed Papers	3, 4, 5, 6, 7

Defendant Dr. Salvatore Conte moves to vacate a jury verdict and remand the matter for a new trial (CPLR 4404 [a]) or, alternatively, vacate or modify the jury award of damages (CPLR 5501 [c]).

The underlying litigation sprang from the treatment rendered to plaintiff by defendant physicians Dr. Salvatore Conte and Dr. Phillip Klapper in 2001. The medical malpractice constituting the claim against Dr. Conte allegedly occurred when plaintiff, then aged 58-years old, was seen by him in February of 2001. At that time, Dr. Conte, an internist, allegedly departed from accepted standards of medical care by failing to timely and properly order a CT scan for plaintiff. It was also alleged that Dr. Klapper, a pulmonologist and internist, failed to order same in July of 2001. Plaintiff claimed that Dr. Conte's departure led to a delayed diagnosis of a rare extra gastrointestinal stromal tumor ("EGIST") and ultimately led to her death in September of 2007.

Throughout the course of the trial, plaintiff's treatment from February 2001 until the time of her death was examined through testimony and exhibits. Plaintiff was seen for a number of years by Dr. Conte for routine conditions, starting in 1987. Following a 21 month hiatus, during which time she was seen by another physician, plaintiff returned to Dr. Conte in February of 2001 and was seen by him on an almost monthly basis through March of 2002. Dr. Conte maintained that during one such visit, in September of 2001, he informed plaintiff of a non-tender mass in the left upper quadrant of her abdomen, and he referred her for an abdominal sonogram and a GI workup. Dr. Conte further maintained that plaintiff refused the referral on that occasion and on other subsequent occasions between October of 2001 through February of 2002, until a mass was discovered in March of 2002 when plaintiff had a sonogram during a visit to her gynecologist in Jamaica.

Plaintiff returned to Dr. Conte in March of 2002 with the results of the sonogram, and he referred the patient for a CT scan, in which a large mass was detected. Dr. Conte then referred plaintiff to Dr. Robert Plummer, a surgeon, who subsequently operated on plaintiff in May of 2002 and removed a portion of the tumor during an exploratory laparotomy. The attending pathologist diagnosed an EGIST arising from the retroperitoneum. Thereafter, Dr. Plummer referred plaintiff to an oncologist who treated the patient for an EGIST until the time of her death in September of 2007.

Plaintiff presented one expert witness, Dr. Barry Singer, an oncologist from Pennsylvania, in support of her claim of Dr. Conte's alleged departure and its proximate cause to her death. Although plaintiff's expert disclosure described Dr. Singer's testimony as to Dr. Conte's liability as "Failing to take any steps to diagnose, or rule out, the probability of the plaintiff suffering from metastatic extra gastrointestinal stromal tumor [EGIST]," during his testimony, Dr. Singer described plaintiff as suffering from a gastrointestinal tumor ("GIST"). This testimony was also inapposite with respect to the findings of plaintiff's surgeon, the attending pathologist and plaintiff's oncologist. The jury heard extensive testimony regarding the nature of a GIST being a tumor that gives rise to numerous symptoms and arises from a different area of the body from an EGIST which is silent and is asymptomatic.

On February 24, 2011, following a lengthy trial that included party and non-party witnesses, expert witnesses and multiple demonstrative exhibits, the jury returned a 5-1 verdict in favor of plaintiff as against Dr. Conte and a unanimous verdict in favor of Dr. Klapper. The jury awarded a total of \$880,000 in damages. These were itemized on the jury verdict sheet and included awards for pain and suffering for \$325,000. Economic loss damages were awarded as follows: Christine Donalds Rose \$10,000 over a period of five years, Marvelette Federico \$10,000 over a period of five years, Michael Donalds \$25,000 over a period of ten years, Richard Donalds \$500,000 over a period of ten years and Andrew Donalds \$10,000 over a period of five years. The jury was polled and was unanimous in its agreement on three questions and divided 5-1 on all remaining questions.

As to the branch of the defendant's motion pursuant to CPLR 4404 (a), defendant requests the court set aside the jury verdict and direct a new trial, based upon the argument that the evidence presented at trial was insufficient as a matter of law. This argument requires consideration of whether there is any "valid line of reasoning and permissible inferences which could possibly lead [a] rational [person] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

One critical issue now presented – given that the jury has eliminated any need to weigh the contribution of Dr. Klapper, the pulmonologist who evaluated the decedent's shortness of breath and related symptoms – is whether plaintiff's expert, Dr. Singer, presented testimony which was prejudicial and unfair to Dr. Conte's defense (*see Rivera v Greenstein*, 79 AD3d 564, 568 [1st Dept 2010]), "To succeed in a medical malpractice action, it is necessary for the plaintiff to show a departure from the accepted standard of medical practice, and that this departure was a proximate cause of the patients injuries. Competent medical proof as to causation is usually essential. An expert offering only conclusory assertions and mere speculation that a doctor could have discovered the condition and successfully treated the patient does not support liability"; internal citations omitted).

The jury heard no testimony during the trial to the effect that plaintiff could have been cured had Dr. Conte caused plaintiff to have a CT scan or a sonogram in February of 2001. Moreover, Dr. Singer himself merely speculated that plaintiff may have lived longer and the tumor may have been completely removed, but he also opined that there was a possibility that the tumor could reoccur in the future. Indeed, Dr. Singer's testimony, which was the foundation of plaintiff's case, varied in a number of areas from the bulk of the evidence introduced at trial, including directly contradicting his expert disclosure, the findings of plaintiff's surgeon, pathologist and oncologist. Moreover, he testified that had Dr. Conte diagnosed plaintiff's condition earlier, had the tumor resected and the patient treated with the drug Gleevec, plaintiff would have lived five years with no evidence of disease. This testimony was contrary to evidence learned over the course of the trial, such as that Gleevec was not available until 2002 and plaintiff lived six years following Dr. Conte's alleged departure.

Moreover, the trial presentation of evidence, as a whole, would have been subject to significantly different restrictions by the court had the court been advised at the outset that plaintiff would ultimately request a jury interrogatory question pertaining to Dr. Conte's liability singling out only one month, February 2001, as the single visit claimed to be a professional departure from an acceptable standard of care. Instead, the trial examined the entire period of time over which he rendered treatment to plaintiff, giving rise to undue surprise that unfairly prejudiced defendant's trying of the entire case. Specifically, the court concludes that, had defendant known prior to the beginning of the lengthy trial that the jury would be required to focus on one month of Dr. Conte's treatment only, when the trial focused on numerous months of treatment, the presentation of defendant's case at trial would have differed tremendously. Furthermore, the court found troubling the large amounts of testimony regarding the requested missing document charge – and that the import of Dr. Conte having made or not making a

notation in September 2001 of a recommendation of an abdominal sonogram was a far less significant matter in September of 2001 than it would have been later in the course of treatment.

If the court had been aware of the one month focus of liability on the jury interrogatory, plaintiff's missing witness charge request would have held substantially less merit and the trial and the defense would have proceeded in a substantially different matter.

In light of the foregoing, defendant Dr. Conte is entitled to a new trial.

Based upon the foregoing, the motion is granted to the extent indicated above.

This decision constitutes the order of the court.

Dated: August 18, 2011


Hon. Diane A. Lebedeff, JSC