

 KeyCite Red Flag - Severe Negative Treatment

Affirmed as Modified by Daniele v. Pain Management Center of Long Island, N.Y.A.D. 2 Dept., January 9, 2019

2016 WL 6476584 (N.Y.Sup.) (Trial Order)

Supreme Court of New York.

Trial Part: 7

Nassau County

Arlene DANIELE, Plaintiff,

v.

PAIN MANAGEMENT CENTER OF LONG ISLAND, Neil B. Kirschen, M.D., Winthrop
University Hospital, Linda W. Roberts, Prac and Adam Fiterstein, Defendants.

No. 0049362012.

March 10, 2016.

Trial Order

Arthur M. Diamond, Judge.

***1 TRIAL PART: 7**

NASSAU COUNTY

INDEX NO: 4936/2012

MOTION SEQ #: 5, 6

SUBMIT DATE: 2/8/16

The following papers having been read on this motion:

Notice of Motion (SEQ#5)	1
Notice of Motion (SEQ#6)	2
Opposition	3
Reply	4

The motion by defendant Neil B. Kirschen pursuant to CPLR §4404 (a) to set aside the verdict based upon error by the trial court, and the cross-motion by co-defendant Winthrop University Hospital and Linda W. Roberts' for similar relief, or in the alternative, reduce the jury award, is granted to the limited extent stated herein.

Defendants move to set aside the verdict primarily upon the ground that the court did not allow defense counsel to cross examine plaintiff's witnesses, Dr. Edelstein and Dr. Schneider, with regards to plaintiff's treatment by Dr. Obedian, the orthopedic surgeon, and Dr. Sonstein, the neuro surgeon, who treated plaintiff at Winthrop University Hospital from September 10, 2010 to September 17, 2010. Plaintiff's expert, Dr. Edelstein had testified that the purported delays in

the diagnosis and treatment of plaintiff caused a deprivation in care and therapy leading to a diminution or deprivation of a chance of success or decrease improved outcome in her upper extremities. PA Roberts had testified that plaintiff was admitted to Winthrop University on September 10, 2010 and was under the care of non party Dr. Obedian and Dr. Sonstein. Dr. Edelstein agreed that plaintiff did not have surgical intervention on her cervical spine until September 17, 2010. Defense counsel sought to cross examine as to whether the seven day delay in surgery by Dr. Obedian and Dr. Sonstein of the cervical spine until September 17, 2010 was a departure from accepted medical standards. Defendant sought to illicit from plaintiff's expert as to whether their delay in performing surgery on the cervical spine caused or contributed to the injuries sustained by plaintiff to her upper extremity. Plaintiff objected, and the court sustained said objection.

Defendants contend that they were entitled to pursue the potential malpractice of the non party treating doctors for purposes of apportionment of liability pursuant to CPLR Article 16. Defendant Kirschen pled in the Answer the sixth affirmative defense of Article 16. Likewise Defendants Winthrop and Roberts pled Article 16 in their second affirmative defense in their answer. Thus, plaintiff cannot claim surprise at trial when defendant seeks to obtain proof of culpability of unnamed tortfeasors when plaintiff was on notice of said defense, and could have demanded a bill of particulars prior to trial. (*Marsala v. Weinraub*, 208 AD2d 689). The crux of plaintiff's case was the alleged delay in diagnosis and treatment of the abscess that spread to the upper and lower extremities.

While the defendants are certainly correct in stating that the court limited their cross of the plaintiff experts about the treatment by the two non-party tortfeasors, they were all allowed to inform the jury that any injury to plaintiff's upper extremities were in all likelihood a result of the cervical abscess and not the spinal abscess. The plaintiff argued essentially that 'but for' the delay in diagnosing the spinal abscess the discovery of the cervical abscess was likewise delayed which caused additional injury. The defense argued against that theory. The jury apparently accepted the argument of the plaintiff.

*2 As to the excess amount of future pain and suffering above \$500,000.00, the parties shall appear for a hearing pursuant to CPLR §5031 [c] for a determination of present day value of the stream of payments after applying a discount rate.

As to the defendant's claim that the jury verdict with regards to past and future loss of earnings was not supported by the weight of the evidence, the court finds that the verdict was not speculative as claimed by defendants and the award is left undisturbed. Plaintiff had met the burden of showing past loss of earnings by introducing into evidence past tax returns for 2008, 2009, and 2010 along with plaintiff's testimony. (*Papa v. New York*, 194 AD2d 527 [2nd Dept. 1993]). Future loss of earnings can be predicated upon an assessment of plaintiff's pre-accident earnings capacity. (*Shubbuck v. Connors*, 15 NY3d 871 (2010)). Plaintiff had introduced into evidence the tax return for 2010 which was the year she suffered injuries, and that tax return reflected a drop off in income.

The remainder of defendants' arguments to set aside the verdict is without merit

DATED: March 10, 2016

ENTER

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HON. ARTHUR M. DIAMOND

J.S.C.