Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Graciela Terra,

Plaintiff,

- against -

George J. Tsioulias, M.D.,

Defendants.

----------X

Index Number: 705294/15

Motion Date: 6/11/18

Motion Seq. No.: 3

The following papers numbered 1 to 7 read on this motion by defendant to set aside the verdict.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition	5-6
Reply	7

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

Motion by defendant, pursuant to CPLR 4404(a), to set aside the jury's verdict on liability against him as being against the weight of the evidence and to direct that judgment be entered in favor of defendant dismissing the action is granted.

In this medical malpractice action, plaintiff alleges that she sustained left femoral neuropathy as a result of the improper use of a retractor by defendant Dr. Tsioulias during a laparoscopic-assisted colectomy performed by him on December 11, 2012 at Mt. Sinai Hospital in Queens County.

It is undisputed that plaintiff was diagnosed with left femoral neuropathy - damage to her femoral nerve - following her surgery. Plaintiff's sole theory of malpractice is that the injury was a compression, or crush, injury caused by the application of excessive and prolonged pressure on the femoral nerve by a Balfour retractor that Dr. Tsoulias improperly pressed down upon or leaned upon during the surgery.

Dr. Tsoulias explained, on direct examination, the surgical procedure that was performed. The surgery involved the removal of

a portion of plaintiff's colon, which first required raising the colon to skin level. In order to do so, the colon had to first be mobilized, i.e., freed, from the omentum, which is a blanket of fat on the transverse colon, by removing the omentum from the transverse colon. This portion of the procedure was done laparoscopically. The colon could now be brought to the surface of the skin. At that point, Dr. Tsoulias made an abdominal incision in the left lower quadrant to access the peritoneum, the abdominal cavity, and expose the contents of the abdominal cavity. To allow clear access to and visualization of the abdominal contents, Dr. Tsoulias used a Balfour retractor, which was placed in the incision, opened and locked in the open position to hold the incision open. He explained that the retractor he used had blades 2.5 inches deep and that the retractor would rest on the surface of the skin. The colon would then be brought to the surface and transected, i.e., cut off from the bowel, with a stapler. Once the portion of colon to be sent to pathology was removed, the remaining colon was replaced and reconnected to plaintiff's bowel and the incision closed. This reconnection is termed an anastomosis.

Dr. Tsoulias explained that in order to perform the anastomosis, plaintiff had to be placed into the lithotomy position, i.e., with her legs raised onto stirrups so he could access her peritoneum, which is the bottom area where the anus and buttocks are. Even though the anastomosis is the final phase of the procedure, the patient is placed in the lithotomy position prior to the start of the surgery.

The laparoscopic portion of the surgery, up to the point when the abdominal incision is made for the removal of the colon, could take over an hour. The abdominal incision then takes 1-5 minutes to perform. When asked how long it takes, in a straightforward procedure where no unexpected obstacles are encountered, from the time the Balfour retractor is placed, the colon lifted and transected, the anastomosis performed and the surgical instrument (i.e., the retractor) removed, Tsoulias answered, "It should take approximately 15 to 20 minutes. If the colon is mobilized and comes easily to the surface, that's approximately what it takes." When thereupon asked whether, in this case, the colon easily mobilized and came to the surface, he replied, "Yes, it did."

None of the foregoing testimony was disputed.

Plaintiff's expert, Dr. David C. Levine, testified that the only way plaintiff's femoral nerve could have been damaged was if the Balfour retractor were pushed down causing its blades to contact and put extreme pressure on the nerve. He opined, "The only way this could have happened in this operation was from the retractors being pushed down too deeply and too hard during the procedure causing extreme pressure on the femoral nerve in the

abdomen where it gives off its branches to the iliopsoas muscle, there is no other explanation for it." He came to this conclusion based upon his opinion that the femoral nerve runs underneath where the incision was made. He stated, "R]ight under the surgical site is the iliopsoas muscle, and underneath that muscle runs the femoral nerve, and that is exactly where the incision is made, where the retractor is made, that's exactly what is deep to the area and there is no other cause, no other possible cause." He reiterated, "The only way it could have - could be explained by normal human anatomy is the Balfour retractor was used in an inappropriate manner, it was not kept in proper positioning and it caused excessive pressure on the femoral nerve in the abdomen". When, therefore, asked what his opinion was "as to whether Dr. Tsoulias deviated from the standard of care by allowing the retractor blades to come in contact with Miss Terra's femoral nerve", Dr. Levine replied that his opinion was that "he did deviate from the standard of care with the inappropriate use of the retractor which came into contact with the pressure on the left femoral nerve" (sic).

However, when asked, "Doctor, can you describe the degree of compression necessary to Miss Terra's femoral nerve with the retractor that Dr. Tsoulias was using for him to have deviated from the standard of care?", Dr. Levine replied, "Yes. The simple act of a retractor touching the nerve isn't going to cause damage. It has to be a sustained pressure so that the blood supply is cut off. And nerves, peripheral nerves after two hours there will be permanent damage. So it's a sustained ongoing pressure cutting off the blood supply and the cells of the nerve die over a short period of time." When thereupon asked the follow-up question, "Now, how long would - how long would pressure need to be necessary to sustain the damage of this nature?", he answered, "At least one to two hours usually, unless it's a massive sudden injury to the thing, but a steady pressure from a retractor blade can take an hour or two." No massive, sudden injury is propounded. Rather, plaintiff's expert's only explanation for plaintiff's injury was that excessive downward pressure was placed on the retractor causing the retractor blades to contact the femoral nerve with heavy sustained pressure of a minimum of one to two hours. However, the unrebutted testimony was also that the retractor was only in place for a maximum of 20 minutes. This unrebutted testimony, combined with Dr. Levine's own admission that plaintiff's injury could only have occurred if the retractor blades had been pressed down onto the femoral nerve for at least 1-2 hours absolutely refutes plaintiff's theory of malpractice. Moreover, defendant's counsel, in his closing statement, emphasized to the jury that it was undisputed that the retractor was only in place for 15-20 minutes whereas plaintiff's own expert stated that plaintiff's injury could only have occurred if there were sustained pressure on the femoral nerve from the Balfour retractor for at least 1-2 hours, thus ruling out

plaintiff's sole departure.

At the close of plaintiff's case, after plaintiff rested, defendant moved orally for a directed verdict to dismiss plaintiff's malpractice cause of action premised upon the sole departure elicited by Dr. Levine. This Court reserved decision on the motion. This Court notes, parenthetically, that it reserved decision, not because it was undecided on the issue at that time, but in recognition of the established common practice of courts to do so as being the preferred practice, for reason of judicial economy (see, Siegel, NY Practice, 5th ed., §405, Post-Trial Motion for Judgment).

The verdict sheet contained one departure question as agreed upon by respective counsel for the parties. Question 1 of the verdict sheet asked, "Did defendant Dr. George J. Tsoulias depart from good and accepted medical practice during the abdominal surgery he performed on December 11, 2012 by allowing the retractor blades on the Balfour retractor to come into contact with plaintiff's femoral nerve?" Question 2 of the verdict sheet asked whether this departure was a substantial factor in causing injury to plaintiff. The jury was instructed to proceed to Question 2 only if it answered "yes" to Question 1, but to proceed no further and report to the Court if its answer to Question 1 was "no". The jury answered "yes", by a verdict of 5-1, to Question 1, and "yes" to Question 2, by the same 5-1 verdict. The jury then went on to award $100,000 for past pain and suffering, $402,500 for future pain and suffering, $14,710 for past medical expenses, $2,350 for future medical expenses, $100,000 for past lost earnings and $50,000 for future lost earnings.

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. Tsoulias departed from good and accepted medical practice by allowing the retractor blades on the Balfour retractor to come into contact with plaintiff's femoral nerve, and that such departure was a substantial factor in causing injury to plaintiff was clearly against the weight of the evidence, and 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. Caroll, 17 AD 3d 629, [2nd Dept 2005]; Schiskie v. Fernan, 277 AD 2d 441 [2nd Dept 2000]).

Accordingly, the jury's verdict is set aside and judgment shall be entered in favor of defendant dismissing the action. Defendant may enter judgment accordingly. Consequently, that branch of the motion for a directed verdict pursuant to CPLR 4401, upon which this Court originally reserved decision, is moot, having been

subsumed into defendant's motion pursuant to CPLR 4404.

This Court thus need not reach, and will not determine, the remaining arguments of defendant to set aside the verdict.

Dated: June 6, 2018

KEVIN J. KERRIGAN, J.S.C.