Burns v Antell
2026 NY Slip Op 31117(U)
March 23, 2026
Supreme Court, New York County
Docket Number: Index No. 450950/2019
Judge: John J. Kelley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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ANNE M. BURNS,

Plaintiff,

- v -

DARRICK E. ANTELL, M.D., MICHELLE KOZLOWSKY, R.N., LENOX HILL AMBULATORY SURGERY, P.C., (also known as COLUMBIA EAST SIDE SURGERY, also known as MANHATTAN RECONSTRUCTIVE SURGERY, also known as DARRICK E. ANTELL, M.D., P.C.),

Defendants.

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INDEX NO. 450950/2019

MOTION DATE 01/15/2026

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412

were read on this motion to/for SET ASIDE VERDICT.

This is an action to recover damages for medical malpractice based on alleged departures from good and accepted practice. The defendants Darrick E. Antell, M.D., and Lenox Hill Ambulatory Surgery, P.C., also known as Columbia East Side Surgery, also known as Manhattan Reconstructive Surgery, also known as Darrick E. Antell, M.D., P.C. (together the Antell defendants), move pursuant to CPLR 4404(a), 4406, and 5501(c) to set aside, as excessive, a jury verdict, rendered upon retrial, which was in favor the plaintiff, Anne M. Burns, and against it on the issues of damages in the sums of $1,750,000.00 for past pain and suffering from August 17, 2016 until October 20, 2025 and in the sum of $1,000,000.00 for future pain and suffering from October 20, 2025 for a period of 19 years thereafter, for a total award of $2,750,000. The plaintiff opposes the motion. The motion is denied.

On August 10, 2016, the defendant plastic surgeon performed medically indicated breast reduction surgery upon the plaintiff at his ambulatory surgery center. By August 11, 2016, the color of the plaintiff's left nipple-areola complex began to darken. Antell examined the plaintiff

on August 11, 2016 and August 12, 2016 in New York. Although, on August 11, 2016, Antell reportedly observed no evidence of any venous congestion that may have been causing the discoloration, he concededly observed some "mild" venous congestion at the August 12, 2016 examination, asserting that the nipple-areola complex was healing well, despite the plaintiff's expressed concerns about the discoloration. Upon completing the on August 12, 2016, examination, Antell elected not to treat the nipple-areola complex so as to open up the congested veins in the plaintiff's left breast by, among other things, administering nitro paste, loosening the sutures, employing a vacuum-assisted procedure, or performing a free nipple graft procedure. Rather, he elected to employ a "wait-and-see" approach. The plaintiff then returned to her home in Ithaca, New York, and electronically delivered color copies of photographs of her left breast to Antell's office, depicting a nipple-areola complex that had turned a deep purple color, and was beginning to turn black. Antell reviewed these photographs on August 17, 2016. After that review, Antell determined to defer any affirmative treatment of the plaintiff's left breast, including the nipple-areola complex, which by then had started to become necrotic. Antell again saw the plaintiff on August 25, 2016, but elected to defer any debridement of necrotic tissue until August 31, 2016. The plaintiff ultimately underwent surgery to remove the entirety of her left nipple-areola complex.

The initial jury trial in this action was conducted between February 21, 2024 and March 12, 2024. The court instructed the jury to consider four potential departures from good and accepted practice that Antell may have committed, specifically,

> whether Antell departed from good and accepted medical practice on August 11, 2016 by failing to treat venous congestion in the plaintiff's left nipple-areola complex, or recommending that she undergo a free nipple graft procedure,
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> whether Antell departed from good and accepted medical practice on August 12, 2016 by failing to treat venous congestion in the plaintiff's left nipple-areola complex or recommending that she undergo a free nipple graft procedure,
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> whether Antell departed from good and accepted medical practice on August 17, 2016, upon seeing photographs of the plaintiff's left breast taken earlier that day,

> and thereupon failing to instruct the plaintiff either immediately return to his office or to seek immediate medical attention in her hometown, and
>
> whether Antell departed from good and accepted medical practice on August 25, 2016 by failing to debride the necrotic tissue in the plaintiff's left nipple-areola complex, and instead waiting until August 31, 2016 to perform a debridement procedure.

After deliberating for approximately three days, the jury found that Antell did not depart from good and accepted medical practice on August 11, 2016, August 12, 2016, or August 25, 2016, but deadlocked three-to-three with respect to the question of whether he departed from good and accepted medical practice on August 17, 2016. The court thereupon declared a mistrial, and directed a retrial with respect to the alleged August 17, 2016 departure from good and accepted surgical practice.

In an order dated November 26, 2024, this court denied both the plaintiff's motion to set aside so much of the verdict as was adverse to her (MOT SEQ 007) and the Antell defendants' motion to for judgment as a matter of law in connection with the plaintiff's claim that he had departed from good and accepted practice on August 17, 2016 (MOT SEQ 008). A jury trial on the claim arising from Antell's treatment of the plaintiff on August 17, 2016, as well as on a claim that was inextricably intertwined with that claim, was conducted between October 7, 2025 and October 20, 2025.

At trial, the plaintiff testified that, during the weeks immediately following both the initial surgery and the surgery to remove the necrotic nipple-areola tissue, she suffered from pain and discomfort that lasted for a fairly significant period of time. She further testified as to her embarrassment and self-consciousness concerning her appearance after the loss of her left nipple-areola complex, the permanent numbness and loss of feeling in and around the surgical site, and the reasons why she elected not to undergo further plastic reconstructive surgery to make it look as that portion of her breast were still intact. She further testified that, within a month or two of losing her left nipple-areola complex, she suffered from a regularly occurring phantom, "stabbing" pain in her left breast, which, although the intensity had abated somewhat,

was continuing as of the time of the retrial, more than nine years after the surgery. The plaintiff's retained expert, plastic surgeon Michael Alperovich, M.D., not only testified that Antell departed from good and accepted practice on August 17, 2016 by failing immediately to refer the plaintiff for affirmative treatment of the necrotic breast tissue, or treat it himself, that Antell departed from good and accepted practice by failing to monitor the plaintiff between August 13, 2016 and August 24, 2016, and that those departures caused or contributed to the plaintiff's injuries and condition, but he also averred that the plaintiff's condition was permanent.

The court specifically instructed the jury to consider two alleged departures from good and accepted plastic surgical practice, and posed the following questions on the verdict sheet:

> "After receiving the August 17, 2016 photographs, did Dr. Antell depart from good and accepted medical practice by not advising the plaintiff to seek immediate treatment for her venous congestion from his office or another qualified professional?
>
> "Did Dr. Antell depart from good and accepted medical practice by not monitoring the status of the plaintiff's venous congestion before and after receiving the August 17, 2016 photos during the period from August 13 to August 24?"

The jury unanimously answered "yes" to both of those questions, and also unanimously found that these departures from good and accepted practice caused or contributed to the plaintiff's injuries, including the complete loss of her left nipple-areola complex. The jury awarded the plaintiff the sums of $1,750,000.00 for past pain and suffering from August 17, 2016 until October 20, 2025. Moreover, although the plaintiff's attorney only suggested a verdict of $750,000.00 for future pain and suffering, the jury instead awarded her the sum of $1,000,000.00 for future pain and suffering over a period of 19 years, beginning on October 20, 2025, the date of verdict. Thus, the jury's total award was $2,750,000.00

Generally, "[t]he amount of damages to be awarded for personal injuries is primarily a question for the jury, and the jury's determination is entitled to great deference" (*Coker v Bakkal Foods, Inc.*, 52 AD3d 765, 766 [2d Dept 2008]). Thus, a jury's determination with respect to awards for past and future pain and suffering will not be set aside unless the awards deviate

materially from what would be reasonable compensation (*see* CPLR 5501[c]; *Harvey v Mazal Am. Partners*, 79 NY2d 218, 225 [1992]; *Garcia v CPS 1 Realty, L.P.*, 164 AD3d 656, 659 [2d Dept 2018]; *Quijano v American Tr. Ins. Co*., 155 AD3d 981, 983 [2d Dept 2017]; *Harrision v New York City Tr. Auth*., 113 AD3d 472, 476 [1st Dept 2014]). "The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" (*Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]; *see Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 275 [1st Dept 2007]; *Reed v City of New York*, 304 AD2d 1, 7 [1st Dept 2003]; *Halsey v New York City Tr. Auth.*, 114 AD3d 726, 727 [2d Dept 2014]). "Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation" (*Miller v Weisel*, 15 AD3d 458, 459 [2d Dept 2005]; *see Garcia v CPS 1 Realty, L.P.,* 164 AD3d at 659 [2d Dept 2018]; *Vainer v DiSalvo*, 107 AD3d 697, 698-699 [2d Dept 2013]; *Reed v City of New York*, 304 AD2d at 7). Crucially, the amount constituting "reasonable compensation" must be assessed with due regard to the "circumstances presented" (*Luna v New York City Tr. Auth*., 116 AD3d 438, 438 [1st Dept 2014]).

> "While CPLR 5501(c) review has of course been used as a control on 'runaway juries,' the vast bulk of decisions have involved fractional reductions as a by-product of greater scrutiny in a legislatively mandated attempt to keep compensation reasonable and uniform . . . CPLR 5501(c) requires us to develop standards for material deviation as a by-product of our review of appealed verdicts. If, for example, case comparison demonstrates that individuals with similar injuries but without the ability to return to work have received smaller awards, the appealed award deviates materially. Other factors which may affect the reasonableness of an award include the need for future surgery as well as the nature and severity of subjective pain"

(*Donlon v City of New York*, 284 AD2d 13, 18-19 [1st Dept 2001]). Nonetheless, what constitutes reasonable compensation in one era might be insufficient in a later era. Thus, what might have passed for reasonable compensation in 1980 would not be considered reasonable in 2000, and what was reasonable in 2000 might not be considered reasonable in 2025, owing to increased costs of living, medical care, and personal care, and the better medical and scientific

understanding of the severity of certain injuries. As illustrative examples of the appropriateness of a court's change over time in assessing what constitutes a reasonable amount of compensation, the Appellate Division, First Department, determined that a 10-fold to 20-fold increase in awards from 1999 to 2019 for pain and suffering for almost identical injuries was reasonable (*compare Rydell v Pan Am Equities, Inc*., 262 AD2d 213 [1st Dept 1999] and *So v Wing Tat Realty, Inc*., 259 AD2d 373 [1st Dept 1999] with *Kromah v 2265 Davidson Realty, LLC*, 169 AD3d 539 [1st Dept 2019]).

In *Perez v Live Nation Worldwide, Inc.* (2020 NY Slip Op 32419[U], *14-15, 2020 NY Misc LEXIS 3549, *23-25 [Sup Ct, N.Y. County, Jul. 24, 2020] [Kelley, J.]), a jury in a 2019 trial awarded the sums of $10,500,000 for past pain and suffering over 6.46 years, and $75,250,000 for future pain and suffering over 43 years, to a plaintiff who had sustained a fractured skull and significant, progressive traumatic brain injury. The defendant did not initially challenge the award for past pain and suffering, but moved, among other things, to set aside the award for future pain and suffering, and for a new trial on that issue. The defendant cited numerous appellate determinations, from 2003 through 2012, in which the Appellate Division determined that the total fair and reasonable compensation for combined past and future pain and suffering, in connection with somewhat similar injuries, was between approximately $2,000,000.00 and $5,500,000.00. This court granted the defendant's motion to the extent of, inter alia, reducing the award for future pain and suffering from the sum of $75,250,000 over 43 years to the sum of $30,100,000 over 43 years (*see Perez v Live Nation Worldwide, Inc.* (2020 NY Slip Op 32419[U], *29, 2020 NY Misc LEXIS 3549, *49-50 [Sup Ct, N.Y. County, Jul. 24, 2020] [Kelley, J.]). In reaching this conclusion, this court determined both that the plaintiff's injuries were greater in magnitude than those of the plaintiffs in the cited cases because of the fact that the plaintiff was painfully aware of his cognitive decline over several years, which was projected to accelerate, and that the decisions cited by the defendant were not particularly recent. On appeal, the defendant did, in fact, challenge the jury's award for past pain and suffering, as well

as this court's reduction of the award for future pain and suffering. The Appellate Division reduced the award for past pain and suffering from the sums of $10,500,000.00 to $5,000,000.00 over 6.46 years, and further reduced the award for future pain and suffering from the sum of $30,100,000 over 43 years to the sum of $15,000,000.00 over 43 years, for a total of $20,000,000.00 (*see Perez v Live Nation Worldwide, Inc.,* 193 AD3d 517, 517-518 [1st Dept 2021]). Both of those reduced awards were greater by a factor of 4 than the highest awards described in the appellate decisions that the defendant relied upon. If individual breakdowns of past and future pain and suffering in those cited cases were compared with the Appellate Division's evaluations of the same awards in *Perez*, the awards in *Perez* for similar injuries were greater by a factor of 10 than some of the partial awards described in the cited decisions.

The Antell defendants have cited to several appellate determinations in which somewhat equivalent injuries, involving the loss of a breast or breast tissue, were evaluated at lesser amounts that the jury's awards here (*see Williams v New York City Health & Hosps. Corp*., 79 AD3d 440, 440 [1st Dept 2010] [32-year-old plaintiff established that she underwent unnecessary mastectomy; Appellate Division affirmed Supreme Court order directing a new trial on the issue of damages that ordered a new trial unless plaintiff stipulated to a reduction from $3,000,000 to $600,000 for past pain and suffering and from $3,500,000 to $400,000 for future pain and suffering]; *Finger v Brande*, 306 AD2d 104, 104 [1st Dept 2003] [plaintiff underwent bilateral breast reconstruction surgery, and developed multiple postoperative complications, including the need for an additional breast reconstruction surgery, an abdominal hernia repair, and the removal of a retained surgical clamp; Appellate Division affirmed Supreme Court's order directing a new trial on damages unless plaintiff stipulated to reduce total award from $400,000 to $250,000]; *Sutch v Yarinsky*, 292 AD2d 715, 717 [3d Dept 2002] [26-year-old plaintiff underwent bilateral breast reconstruction surgery and developed complications in the weeks thereafter, and ultimately underwent the removal of her entire left nipple-areola complex; Appellate Division affirmed jury awards of $300,000 for past pain and suffering and $500,000 for

future pain and suffering]; *Lopez v Bautista*, 287 AD2d 601, 602 [2d Dept 2001] [doctor failed to advise a patient of results of her mammogram, causing breast cancer to progress to the point where an otherwise unnecessary mastectomy was required; Appellate Division affirmed jury award of $750,000 for past pain and suffering and $250,000 for future pain and suffering]).

The court notes that the most recent of the cases cited was decided 15 years ago, while the other decisions were rendered 23, 24, and 25 years ago, respectively. Inasmuch as the Antell defendants cited no determinations of a more recent vintage that would assist the court in determining what would be fair and reasonable compensation in this action, it concludes that an award of $2,750,000.00 for an injury similar to that evaluated at $1,000,000.00 in cases decided 15 and 25 years ago, respectively, does not deviate from what would constitute fair and reasonable compensation in 2025 or 2026.

There is no merit to the Antell defendants' contention that the plaintiff's determination to forego cosmetic reconstruction surgery somehow required either the jury or this court to conclude that her awards should be reduced because she failed to mitigate her damages (*see generally Caldas v City of New York*, 284 AD2d 192, 193 [1st Dept 2001]). During trial, the Antell defendants focused almost exclusively on the adverse cosmetic effects of a lost nipple-areola complex, and essentially skipped over other items of damage, such as the permanency of other injuries such as numbness, ghost pain, and the like. "[A] plaintiff's purported failure to mitigate damages is generally an issue for the factfinder during trial" (*Liciaga v New York City Tr. Auth.,* 231 AD3d 250, 261 [2d Dept 2024]). The court explicitly instructed the jury that

> "[t]he plaintiff claims that she declined to have reconstruction because she is afraid that it could result in a worse outcome.
>
> "The burden of proving that the plaintiff failed to avail herself of a reasonably safe procedure that would have lessened her injury is on the defendant. If you find that the plaintiff is entitled to recover in this action, then, in deciding the nature and permanence of her injury, and what damages she may recover for the injury, you must decide whether the plaintiff acted as a reasonably prudent person by refusing to have reconstruction. In deciding that question, you will take into consideration the evidence concerning the nature of nipple-areola reconstruction, the extent to which reconstruction would involve danger to the plaintiff, and the

> results to be expected from it. If you find that the plaintiff, in deciding not to have reconstruction, acted as a reasonably prudent person would have acted, then she is entitled to recover for her injuries, as you find them to be, without regard to the possibility of reconstruction. If, however, you find that reconstruction is one that a reasonably prudent person would submit to, and that reconstruction would lessen the injury, you will take that fact into consideration in arriving at the amount of damages that you award."

The court must assume that the jury properly followed this instruction (*see People v Mero*, 43 NY3d 407, 413-414 [2024]), and found that the plaintiff acted reasonably in foregoing additional surgery, with all of its inherent risks and dangers, solely for cosmetic purposes (*cf. Bell v Shopwell, Inc.,* 119 AD2d 715, 716 [2d Dept 1986] [plaintiff articulated insufficient excuses at trial for his failure to pursue vocational therapy to strengthen injured knee]).

The Antell defendants' additional contentions are without merit.

Accordingly, it is,

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

3/23/2026
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**