Krasnov v Winegarten

2007 NY Slip Op 30382(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0115752

Judge: Marilyn Shafer

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SCANNED ON 3/28/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHAFER Justice PART 62

HON. MARILYN SHAFER, JSC

Krasnov, Denis

- v -

Dr. Bob Winkelmeier, et al.

INDEX NO. 115752/03

MOTION DATE ______

MOTION SEQ. NO. 08

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided pursuant to attached Decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAR 28 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/27/07

HON. MARILYN SHAFER, JSC J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 1]

HON. MARILYN SHAFER, JSC

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 62
Justice

DENIS KRASNOV,
Plaintiff,

-against-

DR. BOB WINEGARTEN, DR. CARLOS CARNIERO,
DR. MARK XENAKIS, DR. FALGUNI PATEL,
DR. TATIANA BERMAN, JERRY H. LYNN, D.D.S.,
SOL STOLZENBERG, D.M.D. d/b/a/ TOOTHSAVERS,
and TOOTHSAVERS,
Defendants.

INDEX NO. 115752/03

MOTION DATE ________

MOTION SEQ. NO. 008

The following papers, numbered 1 to 7, were read on this motion to renew and reargue the post-trial motion to set the verdict aside:

	PAPERS NUMBERED
Order to Show Cause — Exhibits	1
Affirmation in Partial Opposition	2
Affirmation in Partial Opposition	3
Reply Affirmation	4
Reply Affirmation	5
Notice of Cross-Motion	6
Affirmation in Support	7

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MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, the motion to renew and reargue the post-trial motions of defendants JERRY LYNN, D.D.S. and TOOTHSAVERS,

based in part upon the filing with this Court of the full and complete trial transcript, is granted, and, upon consideration thereof, it is ordered that (1) the motions of defendants JERRY LYNN, D.D.S. and TOOTHSAVERS, pursuant to Rule 4404(a) to set aside the verdict and enter judgment in their favor as a matter of law and/or ordering a new trial are denied; (2) the motion to set aside the Verdict as against defendant JERRY LYNN, D.D.S. and to dismiss the complaint against him is granted; (3) the motion for a declaratory judgment that TOOTHSAVERS DENTAL SERVICES, P.C. should not be substituted for DR. LYNN in the verdict is denied as moot; (4) the motion to set aside the defense verdict for defendant DR. CARLOS CARNIERO pursuant to Rule 4404(a) is denied; (5) the motion to reduce the finding of $150,000 for past pain and suffering is denied; and (6) the motion pursuant to G.O.L. § 15-108 to reduce the verdict by $18,000 is granted; and it is further ordered that the motion to renew and reargue the post trial cross motion of defendant DR. MARK XENAKIS is granted and, upon consideration, is granted; and it is further ordered that the plaintiff's post trial application to increase the jury verdict as to past and future pain and suffering is denied, for the reasons set forth below.

Introduction

This is a motion to set aside the jury verdict in a malpractice action against a dental corporation and some of the individual dentists who treated the plaintiff. The jury assessed 50% of the liability against the dentist/owner of the corporation, but found that his treatment of the plaintiff occurred beyond the statute of limitations, mandating dismissal.

Background

Plaintiff, DENIS KRASNOV, brought this malpractice action against a dental corporation, TOOTHSAVERS, and some of the dentists who treated him, including the owner of TOOTHSAVERS, DR. JERRY H. LYNN.

The evidence at trial showed that KRASNOV initiated treatment at TOOTHSAVERS on March 28, 2000, complaining of the cosmetic appearance of a single tooth. LYNN promised to make him a beautiful smile and, in a single visit, drilled down eleven teeth and had three root canals performed by another dentist. At the time that KRASNOV initiated his treatment, LYNN was (1) the sole shareholder of TOOTHSAVERS; (2) the owner of a dental laboratory, located on the same floor, which manufactured all of the crowns and bridges used by TOOTHSAVERS; and (3) the owner of a dental management company which managed several of the TOOTHSAVERS' offices.

Patients at TOOTHSAVERS were not assigned to a single dentist. Over the next three years, KRASNOV returned to TOOTHSAVERS approximately 50 times and was treated by at least 9 different dentists, 6 of whom are sued herein. KRASNOV's treatment included upper and lower bridges, crowns, root canals and extractions. Although TOOTHSAVERS' records showed long gaps between visits, KRASNOV testified that TOOTHSAVERS records were incomplete and his problems were continuous. Ultimately, the work done at TOOTHSAVERS was completely re-done by other dentists.

The record contained no information as to the dentists who treated KRASNOV after his initial visit in March, 2000 and prior to December, 2000, although substantial work was accomplished during this period. Defendant DR. CARLOS CARNIERO treated KRASNOV in December 2000, at which time he was "directed" to re-cement a "small bridge" which had fallen out 3 times, the last time 6 days earlier. CARNIERO testified that his examination of KRASNOV was limited to the teeth on which the bridge was to be re-cemented, although he admitted that an x-ray taken of KRASNOV on April 27, 2000 revealed that the bridge he re-

cemented was defective. CARNIERO further admitted that the April 27 x-ray revealed an ill-fitting crown and periodontal problems. He took no action with regard to other problems because he did not intend to "re-plan KRASNOV's whole dental treatment." CARNIERO inserted a post into one of the teeth supporting the bridge to keep the bridge from falling out. The tooth into which CARNEIRO inserted a post ultimately required extraction.

KRASNOV saw CARNIERO only once. The record contains no information as to the dentists who treated KRASNOV after CARNIERO and prior to defendant DR. MARK XENAKIS, who treated him in April and May, 2002. XENAKIS, who treated KRASNOV more often than any other TOOTHSAVER dentists, was unable to explain the purpose of or justification for treatment he rendered. He admitted that the problems evident in the April 27 x-ray, taken two years before, were still present and untreated when he saw KRASNOV. XENAKIS testified that he was ignorant of KRASNOV's overall "treatment plan"or of treatment performed by other dentists during the period that he treated KRASNOV.

The record showed, and XENAKIS did not deny, that he, *inter alia,* re-cemented ill-fitting bridges; re-cemented a bridge on a decayed tooth with a bone fracture; re-cemented an ill-fitting crown; worked on a tooth with an ill-fitting crown without addressing the ill-fit; recorded the re-cementing of a bridge on the wrong teeth; performed root canals without proper sanitation; failed to examine what appeared to be an incomplete root canal; and failed to note a missing filling in an adjacent tooth.

The record contains no information as to the dentists who treated KRASNOV from May 2002 until defendant DR. FALGUNI PATEL saw KRASNOV on March 8, 2003. KRASNOV came in on a Saturday because 2 bridges had fallen out. PATEL admitted that the bridges which

she re-cemented were ill-fitting, and that there was rot on the teeth supporting. She explained her failure to address these problems to the emergency nature of a Saturday visit and the fact that KRASNOV was not complaining about pain. PATEL advised KRASNOV to return during the week. KRASNOV testified that when he returned, he was experiencing great pain. The bridges were removed and PATEL extracted one of the bridge's supporting teeth, the tooth into which CARNIERO had inserted a post.

KRASNOV was treated by defendant DR. BOB WINEGARTEN on March 11, 2003 as well as PATEL. WINEGARTEN removed the 2 bridges which PATEL had re-cemented and took x-rays of KRASNOV'S mouth, the first x-rays that had been taken since April 27, 2000. WINEGARTEN testified that the April 27 x-ray was inadequate for diagnostic purposes, and admitted that the bridges and certain of the crowns were ill-fitting. WINEGARTEN did not x-ray KRASNOV'S entire mouth.

In or about December of 2001, LYNN surrendered his dental license. He sold TOOTHSAVERS to DR. SOL S. STOLZENBERG, a dentist employee of TOOTHSAVERS.[1] The record showed that: (1) there was no announcement to either the patients or the other dentists, many of whom didn't know STOLZENBERG; (2) the patients were never requested to consent to a change of dentists; (3) the name was not changed; (4) LYNN was present at TOOTHSAVERS everyday; and (5) STOLZENBERG seldom visited any office but the one in which he had worked prior to the sale.

KRASNOV initiated this action on September 8, 2003. Following two weeks of trial, during October and November 2005, the jury rendered defense verdicts in favor of all the

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[1] A dental corporation may not be owned by a non-dentist.

dentists except LYNN and DR. MARK XENAKIS. The jury awarded $76,505 for dental expenses and $150,000 for pain and suffering, allocating 50% liability to LYNN, 40% to XENAKIS, and 10% to TOOTHSAVERS.

The verdict sheet contained thirty interrogatories. The jury responded affirmatively to the following:

> 9a. Did DR. JERRY LYNN depart from good and accepted standards of dental care and practice in the manner in which he prepared the upper teeth for plaintiff DENIS KRASNOV?
>
> 10a. Did Dr. LYNN depart from good and accepted standards of dental care and practice in the treatment plan for the upper bridge work and/or lower left bridge work of plaintiff DENIS KRASNOV?
>
> 11a. Did TOOTHSAVERS, through its other dentists, depart from good and accepted standards of dental care and practice in the treatment plan for the lower left bridge work of plaintiff DENIS KRASNOV?

Interrogatory 16 asked:

> What was the last date of the continuous course of treatment by DR. JERRY LYNN for the condition that plaintiff DENIS KRASNOV claims was negligently treated? [2]

The jury responded: March 28, 2000, the date of KRASNOV's initial visit.[3]

LYNN and TOOTHSAVERS move to set the verdict aside on the ground that the jury's rejection of KRASNOV's claim of "continuous treatment" renders the claims against LYNN time-barred.[4]

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[2] KRASNOV testified that LYNN treated him on subsequent visits. LYNN denied this.

[3] At the request of the parties, the Court included the "continuous treatment"charge. PJI 3d 2:149 [2006]

[4] The statute of limitations on dental malpractice is two and a half years. CPLR § 214a.

LYNN and TOOTHSAVERS additionally move to set the verdict aside due to inconsistency in the jury's responses to interrogatories 10 and 11 and no clear finding as to whether interrogatory 11 related to TOOTHSAVERS before or after the sale.

Finally, LYNN and TOOTHSAVERS seek a declaratory judgment that LYNN's acts cannot be attributed to TOOTHSAVERS.[5]

STOLZENBERG argues that the jury's responses to interrogatories 10 and 11 are not ambiguous. The jury's affirmative response to interrogatory 10 could reflect the finding that LYNN was negligent with respect to the upper bridge work, while the other dentists were negligent with respect to the lower left bridgework. In the alternative, the affirmative responses could reflect a finding that the treatment plan was formulated by more than one dentist.

STOLZENBERG argues there is no ambiguity as to which TOOTHSAVERS is referenced in interrogatory 11, since the lower left bridgework was completed prior to the sale.

XENAKIS requests lawful adjustments to the verdict, based upon the settlement by CARNIERO during trial and in the event that the verdict against LYNN is overturned.

KRASOV argues that, notwithstanding the jury's response to interrogatory 16, the statute of limitations should be tolled because LYNN's preparation of KRASNOV's teeth and formulation of the treatment plan constitutes continuous treatment. In the alternative he argues that LYNN's liability should be imputed to TOOTHSAVERS under a theory of vicarious liability.

LYNN and TOOTHSAVERS oppose the attribution of liability for the other dentists to

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[5]Defendants LYNN and TOOTHSAVERS move to set aside the verdicts against them for failure to make out a *prime facie* case and as being against the weight of the evidence. The Court finds these claims to be without merit.

LYNN, on the ground that the dentists were independent sub-contractors, not employees. They oppose the attribution of LYNN's liability to TOOTHSAVERS on the grounds that (1) LYNN was not an employee of TOOTHSAVERS; (2) a corporation cannot be liable for acts which are time-barred; and, (3) there is a line on the verdict sheet apportioning fault specifically to TOOTHSAVERS.

Discussion

A motion to set aside a jury verdict shall not be granted unless the preponderance of the evidence in favor of the moving party is so great that the verdict could not have been reached upon any fair interpretation of the evidence (*Baker v Turner*, 200 AD2d 525 [1st Dept 1994]. The test is not whether the jury erred in weighing the evidence, but whether any viable evidence existed to support the verdict *(Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]). The question whether a verdict is against the weight of the evidence involves what is in large part a discretionary balancing of many factors. For a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence, however, requires a harsher and more basic assessment of the jury verdict. It is necessary to first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). Where an apparently inconsistent or illogical verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that jury adopted that view (*Goldstein v Snyder,* 3 AD3d 332 [1st Dept 2004]; *Skowronski v Mordino*, 4 AD3d 782 [4th Dept 2004]; *Gaston v Viclo Realty Company,* 215 AD2d 174 [1st Dept 1995]) [a jury's verdict should not be set aside as inconsistent as long as there is at least one fair

interpretation of the evidence to support it]). A contention that a verdict is inconsistent and irreconcilable must be reviewed in the context of the court's charge (*Lundgren v McColgin*, 96 AD2d 706 [4th Dept 1983]).

The jury assessed liability against 2 of 6 doctors sued, notwithstanding evidence of negligence by the other dentists. The jury assessed ½ of the liability against LYNN, but found that his treatment of KRASNOV was time-barred. The issues to be determined are (1) whether the verdict can be reconciled with a reasonable view of the evidence adduced at trial; (2) whether the verdict is internally consistent; and (3) whether the claims against LYNN are time-barred.

(1) The Court finds that the verdict can be reconciled with a reasonable view of the evidence.

<u>LYNN</u>

At the time that KRASNOV initiated his treatment, LYNN was the sole shareholder of TOOTHSAVERS and owner of the laboratory which manufactured crowns and bridges for TOOTHSAVERS. LYNN'S treatment of KRASNOV during the first visit mandated extensive further treatment and there was testimony from several dentists that it was negligently performed. From this evidence, the jury could have logically concluded that LYNN was 50% responsible for KRASNOV's damages.

<u>XENAKIS</u>

The evidence showed that XENAKIS treated KRASNOV more often than any other doctor at TOOTHSAVERS and that his treatment was negligent and flawed. XENAKIS willfully ignored the ill-fit of the bridges he re-cemented; willfully ignored fracture and decay in a tooth on which he re-cemented a crown; failed to follow accepted dental practices in

performing root canal procedures; and failed to recognize or remedy serious and obvious problems with KRASVOV's treatment. From this evidence, the jury could have logically concluded that XENAKIS was 40% responsible for KRASNOV's damages.

TOOTHSAVERS

The evidence showed that patients at TOOTHSAVERS were not the patients of a single dentist. KRASNOV was treated by at least 9 different dentists, many of them only once. The defendant dentists incompletely represented KRASNOV's treatment at TOOTHSAVERS. The TOOTHSAVERS practice of randomly assigning dentists, coupled with its faulty record-keeping, apparently made it impossible to identify all of the dentists who worked on KRASNOV. It also permitted, and even encouraged, individual dentists to evade personal responsibility. Each dentist testified that he was assigned a small and specific function which was completed in the belief that other dentists had formulated a treatment plan to which the patient had agreed. Each dentist testified that he assumed that KRASNOV's problems would be addressed by other dentists. From this evidence, the jury could logically conclude that it was TOOTHSAVERS itself, and not CARNIERO, WINEGARTEN and PATEL, that should be held liable for the balance of KRASNOV's damages.

Thus, viable evidence existed to support each prong of the verdict (*Lolik v Big V Supermarkets, supra.*)

(2) The Court finds that the verdict is internally consistent.

INTERROGATORY 10

The Court finds no ambiguity in the jury's response to interrogatory 10. The affirmative response can be interpreted as a finding that LYNN was negligent with respect to the treatment

plan for KRASNOV's upper bridgework, the treatment plan for his lower left bridgework, or both. Under any of these interpretations, it is consistent with the jury's affirmative response to interrogatory 11. The jury could have determined that LYNN was negligent with respect to the treatment plan for the KRASNOV's upper bridgework and the other dentists at TOOTHSAVERS were negligent with respect to the treatment plan for KRASNOV's lower left bridgework. Alternatively, they could have found, consistent with the evidence, that a treatment plan is formulated by more than one dentist. Therefor, the jury could have found that both LYNN and the other dentists were negligent with respect to the treatment plan of the lower left bridgework.

INTERROGATORY 11

The Court finds no ambiguity in the jury's response to interrogatory 11 as to whether it related to TOOTHSAVERS before or after the sale to STOLZENBERG. KRASNOV's lower left bridgework was treated on only one visit subsequent to the sale at which time it was re-cemented by XENAKIS. Since the lower left bridgework was completed prior to the sale, the jury reasonably assessed liability against TOOTHSAVERS prior to the sale.

(3) The Court finds that the claims against LYNN are barred by the statute of limitations and must be dismissed.

The statute of limitations is a defense upon which the defendant bears the burden of proof (*Martin v Edwards Laboratories,* 60 NY2d 417 [1983]). The plaintiff, however, bears the burden of proving those facts which will support the application of one of the rules tolling or barring the statute of limitations (*Kasten v Blaustein*, 214 AD2d 539 [2d Dept 1995]). Where the exact nature of a plaintiff's continuing visits to a doctor presents a question of fact upon which there is conflicting evidence, the issue of whether or not the continuous treatment doctrine may

be applied is a question of fact for the jury's resolution (*Bartolo v Monaco*, 202 AD2d 535 [2d Dept 1994]) .

The jury was given the following charge:

> A medical malpractice action must be filed within two years and six months of the defendant's alleged negligent acts or from the last treatment where there was a continuous treatment for the same condition that gave rise to the defendant's act.
> Defendant Dr. LYNN contends that he only treated the plaintiff once on his first visit and therefore that the last date of continuous treatment was March 28, 2000.
> The plaintiff contends however that Dr. LYNN was involved in his treatment and care during several later visits and that the last dates of continuous treatment was March 11, 2003.
> Continuous treatment mean a course of care or treatment for the condition from which the patient was suffering. Therefore you must decide when defendant Dr. LYNN last treated plaintiff DENIS KRASNOV for his dental condition.
> In so doing you may consider the following: visits must have been for more than an examination or routine checkup and must not have been for consultation about or treatment for another condition related to the condition at issue.
> The return visits must be for after care, complaints, symptoms or corrective treatment related to the original condition. ...
> Treatment by other physicians for the same condition may be some evidence of a break in continuity, but does not in and of itself mean that there was no continuing treatment. ... In deciding where continuous treatment existed and when the treatment ended you will consider where a continuous course of treatment has been established, who initiated the final contact and where the final contact was for the purpose of further or corrective care and treatment of the condition, the treatment of which gave rise to the claim of malpractice. PJI 3d 2:149 [2006]

LYNN asserted that any claims against him were time-barred because he never treated KRASNOV after the initial visit on March 28, 2000. KRASNOV argued that the statute of limitations was tolled by LYNN's treatment of him on subsequent visits. This conflicting testimony created a question of fact which the jury resolved in LYNN's favor. The jury's response to Interrogatory 16 explicitly rejected KRASNOV's testimony and, thereby, rejected the basis of his claim of "continuous treatment."

KRASNOV argues on this motion that, notwithstanding the jury's response to

interrogatory 16, the statute of limitations should be tolled. He argues that preparation and formulation of the treatment plan constitute "continuing treatment," relying on the decision rendered by Justice Sklar, denying summary judgment, as "law of the case."

> [T]he papers raise the issue of the applicability of the continuous treatment doctrine as to these movants [LYNN and TOOTHSAVERS] and the doctrine of imputed continuous treatment sufficient to toll the Statute of Limitations as to Dr. LYNN with respect to any treatment he rendered more than 2 ½ years before the action was commenced. (*Krasnov v Winegarten*, Sup Ct, NY County, July 7, 2005, Sklar, J, p12)

KRASNOV's reliance upon Justice Sklar's decision is misplaced. A denial of a motion for summary judgment is generally *res judicata* of nothing except that summary judgment was not warranted. (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212, C3212:21, p 440), *Puro v Puro*, 79 AD2d 925 [1st Dept 1981]). The issue of the applicability of the "continuous treatment" doctrine was a question of fact unsusceptible of resolution on a motion for summary judgement. It was resolved by the jury. Moreover, the charge as given did not include either preparation or treatment plan as constituting "continuous treatment" nor was such an expanded charge requested.

In the alternative, KRASNOV argues that TOOTHSAVERS should be held vicariously liable for the acts of LYNN and/or the other dentists under the doctrine of apparent authority. He is once again mistaken. Vicarious liability provides a theoretical means for transferring the liability of an employee to his employer and imposing upon the latter financial responsibility for the legally cognizable culpable conduct of the former [6] (Prosser, Torts [4th ed], § 69, pp 458-459). Given this principle, it is manifest that there can be no vicarious liability on the part of

[6] Defendants' assertion that neither Lynn nor the other dentists were "employees" is unavailing, since, under the theory of apparent agency, a principal may be held liable for the acts of someone who is not an employee (*Hill v St Clare's Hospital*, 67 NY2d 72 [1986]).

the principal where the individual himself is not liable (*Karaduman v Newsday*, 51 NY2d 531 [1980], *reargument denied* 52 NY2d 899 [1981]). LYNN's negligence is time-barred and defense verdicts were returned against the other dentists. There is no legally cognizable culpable conduct to transfer to TOOTHSAVERS.

Finally, a jury charge regarding vicarious liability and/or apparent authority was neither requested nor given, precluding a verdict based upon these theories. (*Searle v Cayuga Medical Center at Ithaca*, 38 AD3d 834 [3d Dept 2006]).[7]

This Court has considered the other issues raised by the parties and finds them without merit.

Conclusion

This Court finds no reason to second-guess the jury because the verdict is rational and consistent with the evidence and the charge (*Reynolds v Burghezi*, 227 AD2d 941 [1995]). Since there has been no demonstration that the jury could not have reached its verdict on any fair interpretation of the evidence (*Nicastro v Park*, 113 AD2d 129 [2d Dept 1985]), the verdict will not be disturbed (*Giraldo v Rossberg*, 297 AD2d 534 [1st Dept 2002]).

Accordingly, it is hereby

ORDERED that the motion to renew and reargue the post-trial motions of defendants JERRY LYNN, D.D.S. and TOOTHSAVERS, based in part upon the filing with this Court of the full and complete Trial Transcript, is granted, and, upon consideration thereof, it is

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[7] KRASNOV additionally asserts that it was the lawyers' "understanding" that "if the jury found against LYNN [the Court] would hold TOOTHSAVERS vicariously responsible" (*Affirmation in Opposition*, p 10). He fails to provide any citation to the record to substantiate this contention, which is denied by defendants. However, as set forth above, even if such an agreement existed, there is no liability for which TOOTHSAVERS may be held responsible.

ORDERED that (1) the motions of defendants JERRY LYNN, D.D.S. and TOOTHSAVERS, pursuant to Rule 4404(a) to set aside the verdict and enter judgment in their favor as a matter of law and/or ordering a new trial are denied; and it is further

ORDERED that the motion to set aside the verdict as against defendant JERRY LYNN, D.D.S. and to dismiss the complaint against him is granted; and it is further

ORDERED that the motion for a declaratory judgment that TOOTHSAVERS DENTAL SERVICES, P.C. should not be substituted for JERRY LYNN, D.D.S. in the verdict is denied as moot; and it is further

ORDERED that the motion to set aside the defense verdict for defendant DR. CARLOS CARNIERO pursuant to Rule 4404(a) is denied; and it is further

ORDERED that the motion to reduce the finding of $150,000 for past pain and suffering is denied; and it is further

ORDERED that the motion pursuant to G.O.L. § 15-108 to reduce the verdict by $18,000 is granted; and it is further

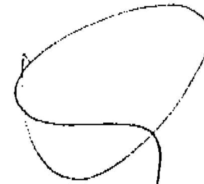
ORDERED that the motion to renew and reargue the post trial cross motion of DR. MARK XENAKIS, pursuant to CPLR § 1601(1), to reduce the verdict by $75,000, representing the share of the non-economic loss attributed to JERRY LYNN, D.D.S, is granted and, upon consideration, it is

ORDERED that the verdict be reduced by $75,000; and it is further

ORDERED that plaintiff's post trial application to increase the jury verdict as to past and future pain and suffering is denied.

This reflects the decision and order of this Court.

Dated: 3/27/07



HON. MARILYN SHAFER, JSC
J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

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