[* 1]

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

PRESENT: EILEEN BRANSTEN PART 6
Justice

SUSAN MIDLER,
Plaintiff,

- v -

RICHARD CRANE, M.D.,
Defendant

INDEX NO. 116891/04

MOTION DATE 5/15/07

MOTION SEQ. NO. 02

The following papers, numbered 1 to 3 were read on this motion to SET ASIDE THE VERDICT

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 12 2007
COUNTY CLERK'S OFFICE

Dated: 12-3-07

EILEEN BRANSTEN, J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

SUSAN MIDLER,

Plaintiff,

-against-

RICHARD CRANE, M.D.,

Defendant.

----------X

Index No.: 116891/04
Motion Date: 5-15-07
Motion Sequence No. 2

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 4404, defendant Richard Crane, M.D. ("Dr. Crane") moves for an Order alternatively setting aside the jury's verdict in favor of plaintiff Susan Midler ("Ms. Midler") and directing judgment in his favor, setting aside the verdict and directing a new trial, or granting a "substantial remittitur" of the $2.5 million pain and suffering award. Ms. Midler vehemently opposes the motion.

Background

In October 2000, Dr. Crane, a rheumatologist, began caring for Ms. Midler who had been referred to him by her gynecologist. Plaintiff's Memorandum of Law in Opposition to Defendant's Post-Trial Motion to Set Aside the Jury Verdict ("Midler Mem."), at 6. Ms. Midler provided Dr. Crane with lab results obtained a few months earlier, which showed that she had a high titer ANA (a high level of antinuclear antibodies sometimes indicative of autoimmune disease) . *Id.* The results also indicated that Ms. Midler had a false positive test

for syphilis. Dr. Crane performed his own lab testing and found that Ms. Midler had a high titer ANA of 1:1,1280. Midler Mem., at 6.

In a letter dated November 6, 2000, Dr. Crane wrote Ms. Midler's gynecologist that laboratory "tests indicate a positive ANA although the patient lacks the necessary specific criteria for the diagnosis of lupus or connective tissue disease. Continued monitoring will be required in order to make a more definitive diagnosis should there be any change in her symptom complex." Midler Mem., at 6-7.

In February 2001, Dr. Crane diagnosed Ms. Midler with inflammatory arthritis. Midler Mem., at 7. At this point, Ms. Midler possessed three of four criteria necessary before a diagnosis of lupus (a condition characterized by chronic inflammation of body tissues caused by autoimmune disease) can be made.

In October 2002, Ms. Midler saw Dr. Curtis, an endocrinologist, because she was experiencing hair loss. Midler Mem., at 8. Dr. Curtis ordered tests, including a urinalysis on October 3, 2002. The urinalysis results revealed protein and trace blood, which are significant because they are indicative of kidney disease. *Id.* The findings established, moreover, that Ms. Midler did not have permanent kidney damage. Dr. Curtis told Ms. Midler that there was no endocrinological reason for her hair loss but that she should follow up on the abnormal test results with her rheumatologist. Dr. Curtis directed that the results

be faxed to Dr. Crane. Dr. Crane, however, only received two of six of the test results pages consisting solely of the endocrine tests. Midler Mem., at 9.

On October 30, 2002, Ms. Midler sent Dr. Crane a fax, asking him to call her after reviewing the results sent by Dr. Curtis. Midler Mem., at 9.

On November 26, 2002, Ms. Midler sent Dr. Crane a fax, which stated that she stopped all of her arthritis medication earlier that month and since then was not experiencing joint pain or stiffness. She informed him that her hair was growing back and it was "a miracle." Affidavit in Support ("Supp."), Ex. B.

Ms. Midler did not hear from Dr. Crane or see him again until January 2003, when she was experiencing swollen feet. Midler Mem., at 9. Dr. Crane ordered lab tests "that revealed that Ms. Midler had elevated BUN and creatinine indicative of renal disorder." Midler Mem., at 9. Dr. Crane also performed a urinalysis that showed blood and protein.

On January 30, 2003, Dr. Crane directed Ms. Midler to see a nephrologist because he suspected that she was suffering from lupus nephritis. Midler Mem., at 9.

Ms. Midler went on a scheduled vacation to Hawaii. On February 20, 2003 she saw Dr. Weiss, a nephrologist affiliated with Beth Israel Hospital. Midler Mem., at 10. Dr. Weiss performed additional tests and ordered a renal biopsy, which was unsuccessful due to abnormal bleeding. A March 2003 biopsy revealed heavy scarring and other renal abnormalities.

In late March 2003, Ms. Midler saw Dr. Crane, who informed her that "intravenous Cytoxan was the * * * best treatment for her particular form of kidney disease." Memorandum of Law in Support of Defendant's Post-Trial Motion to Set Aside the Jury Verdict ("Mem. Supp."), at 8 (citing Trial Transcript ["Tr."], at 692). Ms. Midler was unwilling to take Cytoxan because she was concerned about toxicities, hair loss and nausea. *Id.* (citing Tr., at 692-693). Accordingly, Dr. Crane prescribed Immuran, which was not "the most optimal treatment" but was "a better treatment than no treatment at all." *Id.* (citing Tr., at 693).

Dr. Crane had also prescribed 60 milligrams of Prednisone. Ms. Midler lowered her dose to 50 milligrams because she was upset with how the steroids made her look (her face was puffy). Mem. Supp., at 9 (Tr., at 698). Dr. Crane consequently lowered her dosage to 50 milligrams, hoping that Ms. Midler would stay on the medication. *Id.* Ms. Midler, however, once again self tapered her Prednisone, lowering her intake to 30 milligrams per day. *Id.*, (Tr., at 699).

In May 2003, Ms. Midler stopped treating with Dr. Crane and became a patient at the transplant unit of Columbia Presbyterian Hospital. Midler Mem., at 11.Her treatment failed, kidney disease progressed and she began dialysis a few months later in July 2003. In December 2003, she underwent a kidney transplant. *Id.*

In December 2004, Ms. Midler commenced this medical malpractice action. She alleged, among other things, that Dr. Crane failed to diagnose her with lupus "despite the clear signs and symptoms" and that he failed "to perform close clinical monitoring" of her condition "including the failure to perform the appropriate and necessary lab studies which would have more clearly revealed [her] condition." Midler Mem., at 12.

At trial, Ms. Midler adduced expert testimony indicating that "it was a departure from accepted standards of medicine not to have diagnosed * * * lupus during the course of her treatment between June 2001 and August 2002." Midler Mem., at 13. Her expert testified that "it was a departure not to have performed a urinalysis sometime after October 2000" and that based on Ms. Midler's clinical picture, "he should have performed a urinalysis at least every four months." Midler Mem., at 13 (Tr. 411). He stated:

> "I do not think monitoring of a patient like this should constitute just waiting for some new clinical picture to change. We discussed earlier the patient may not be aware of the manifestation of lupus and therefore Dr. Crane should have actively monitored the patient for the development of nephritis and other complications of lupus."

Midler Mem., at 14 (Tr. 406-407) (emphasis added). Ms. Midler's expert explained that one has "to go out and actively look for those symptoms and laboratory findings and monitor them in a patient [one suspects] might have lupus." *Id.*, (Tr. 386). The expert further

indicated that Dr. Crane's constant checking of the creatinine level was "certainly not the way to detect early kidney disease. * * * The way to do it is to do repeated urinalysis." *Id.*

On November 15, 2006, the jury reached its verdict. In response to the question did "defendant, Richard Crane, M.D., depart from good and accepted medical practice in not diagnosing and treating lupus at any time prior to January 31, 2003," the jury unanimously responded "no." Affidavit in Support ("Supp."), Ex. F. The jury also found that Dr. Crane did not depart from good and accepted medical practice "in not diagnosing and treating [Ms. Midler] for lupus nephritis at any time between October, 2002 and January 29, 2003." Supp., Ex. F.

In response to the question did "the defendant, Richard Crane, M.D., depart from good and accepted medical practice in the manner in which he monitored the plaintiff, Susan Midler, including not performing urinalysis tests between October 20, 2000 and January 29, 2003," however, the jury responded "yes." Supp., Ex. F. The jury found that the departure was a "substantial factor in causing injury" to Ms. Midler.

The jury also determined that Dr. Curtis departed from good and accepted medical practice "by not insuring that defendant, Richard Crane, M.D. actually received the abnormal urinalysis results of October 2002," and by "not including the abnormal urinalysis results of October 3, 2002" in his consult letter that was forwarded to Ms. Midler's gynecologist in

November. Neither departure was deemed a substantial factor in causing Ms. Midler injury. Supp., Ex. F.

Finally, the jury found that Ms. Midler was negligent in not returning to Dr. Crane's office before January 23, 2003 "after being directed to do so by Joel Curtis, M.D. in or around October/November, 2002, "and in "not consult[ing] with a nephrologist until February 24, 2003." Supp., Ex. F. The jury found that Ms. Midler's negligence in those respects was a "substantial factor in causing her injury." *Id.* Although the jury found that Ms. Midler was negligent in not taking "Cytoxan when the drug was recommended to her in March, 2003" and in self-tapering her "Prednisone medication in April and May 2003," it concluded that neither of these acts was a "substantial factor in causing her injury." Supp., Ex. F.

The jury found Dr. Crane 60% at fault and attributed 40% of the fault to Ms. Midler. Supp., Ex. F. It awarded Ms. Midler $500,000 for past pain and suffering and loss of enjoyment of life, and $2,000,000 for future pain and suffering and enjoyment of life over 21 years based on her life expectancy. *Id.*

Dr. Crane now moves to set aside the jury's verdict and requests entry of judgment in his favor. Alternatively he seeks a new trial on liability and damages or a "substantial remittitur" of the $2.5 million pain and suffering award. Ms. Midler opposes the motion.

Analysis

Entitlement to Judgment or New Trial

CPLR 4404 provides:

> "After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the 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 or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, [or] in the interest of justice."

Because there is no basis for setting aside or modifying the jury's verdict--defendant is not entitled to judgment as a matter of law, the verdict is not against the weight of the evidence and the compensation awarded does not deviate materially from reasonable compensation--Dr. Crane's motion is denied.

Inconsistent Verdict

Dr. Crane contends that the jury's finding that he did not depart from accepted medical practice in failing to diagnose lupus nephritis between October 2002 and January 29, 2003, "necessarily subsumes a finding that Dr. Crane's diagnostic efforts (including his examination and investigation of the plaintiff's condition, which did not include the performance of urinalysis), was performed with due care and was not negligent." Mem. Supp., at 14. He maintains that the jury's conclusion that he did not fail to diagnose lupus conditions "necessarily embodies a predicate finding that he performed careful clinical

evaluations and adequate diagnostic testing." Mem. Supp., at 16. He further urges that the jury interrogatory inquiring about whether he was negligent in failing to monitor Ms. Midler was redundant of the failure to diagnose interrogatory and that the different jury responses to these questions presents a "fatal verdict inconsistency" that mandates a new trial. Mem. Supp., at 16.

Dr. Crane is wrong.

Ms. Midler's failure-to-monitor theory was different from liability based on failure to diagnose. She did not argue that Dr. Crane performed testing and failed to appreciate the significance of the results. Instead, Ms. Midler maintained and established through expert testimony that, based on her condition, Dr. Crane should have required urinalysis testing every four months, *see*, Tr., at 411, and that had he done so he would have been able to diagnose her condition (which he ultimately did diagnose) sooner. Indeed, if Dr. Crane had ensured that urinalysis testing was performed every four months, he would have learned in October 2002 that Ms. Midler was showing more signs of kidney disease. *See*, *Larkin v. State of New York*, 84 A.D.2d 438, 444 (4th Dept. 1982) (negligence was not based on "improper diagnosis" but rather on failure to recognize the possibility of medical condition from what expert witness described as "classic symptoms"); *see also*, *Laub v. Montefiore Hosp. and Med. Ctr.*, 115 A.D.2d 430, 431 (1st Dept. 1985) (liability based on failure to monitor); *Schneider v. Memorial Hosp. for Cancer and Allied Diseases*, 100 A.D.2d 583 (2d

Dept. 1984) (liability for failure to take more rigorous measures to ascertain cause of complaints).

In fact, Dr. Crane himself acknowledged in his November 6, 2000 letter to Ms. Midler's gynecologist that "continued monitoring will be required in order to make a more definitive diagnosis should there be any change in her symptom complex." Midler Mem., at 6-7. Based on the evidence, the jury imposed liability for Dr. Crane's failure to continuously monitor Ms. Midler's condition.

Dr. Crane's reliance on *McPhillips v. Herzig*, 172 A.D.2d 427 (1st Dept. 1991), is misplaced. There, the Appellate Division held that jury findings that "defendant was negligent in failing to do a pelvic examination" but was not negligent in failing to make a correct diagnosis and institute appropriate treatment on April 22, 1980 were inconsistent. In *McPhillips,* there is every indication that on the date defendant failed to perform the pelvic examination, plaintiff was already suffering from diverticulitis. There was no argument that the physician had any obligation to continuously monitor plaintiff. The crux of the case was that had defendant performed a pelvic exam when plaintiff presented, her condition would have been diagnosed that very day instead of six days later.

Here, in contrast, expert testimony demonstrated that based on Ms. Midler's symptoms, Dr. Crane had a continuing obligation to monitor and to perform urinalysis.

The jury's conclusion that Dr. Crane should not be liable for failing to diagnose Ms. Midler's condition does not necessarily negate liability based on failure to monitor and test. *See, Barry v. Manglass*, 55 N.Y.2d 803, 805 (1981), *rearg. denied* 55 N.Y.2d 1039 (1982). Thus, liability based on failure to monitor, under these circumstances, is not inconsistent with the jury finding that there was no departure in connection with Ms. Midler's diagnosis and the verdict will be upheld.

Verdict Against the Weight of the Evidence

Dr. Crane also argues that the jury's findings that Dr. Curtis' departures in not ensuring that Dr. Crane actually received the abnormal urinalysis results of October 3, 2002 and not including the abnormal results in a November 6, 2002 consult letter to Ms. Midler's gynecologist were not substantial factors in causing Ms. Midler injury are against the weight of the evidence and inconsistent with findings as to causation with respect to Ms. Midler and Dr. Crane. Specifically, Dr. Crane urges that it "is illogical and irrational to hold that [Dr. Curtis' failure to ensure that the abnormal results were communicated to him] was not a substantial factor in causing the injury when Dr. Curtis' failure clearly contributed to a four-month delay in the diagnosis of plaintiff's condition at a time when the damage was clearly reversible." Mem. Supp., at 21.

Dr. Crane points out that the abnormal urinalysis results were significant (which only reaffirms that if he himself had properly monitored Ms. Midler, he would have diagnosed her sooner); thus, the "negligence of Dr. Curtis in not ensuring Dr. Crane actually received the test results is inextricably interwoven with the cause of plaintiff's delayed diagnosis and treatment." Mem. Supp., at 22. Dr. Crane submits that there can be no doubt that Dr. Curtis failed to pass along important results at a critical time.

A court's "discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution * * * ." *Nicastro v. Park*, 113 A.D.2d 129, 133 (2d Dept. 1985); *see also*, *Cholewinski v. Wisnicki*, 21 A.D.3d 791, 791 (1st Dept. 2005). A "verdict should not be set aside unless the jury could not have reached its verdict on any fair interpretation of the evidence." *O'Mara v. City of New York*, 31 A.D.3d 340, 341 (1st Dept. 2006) (citations omitted), *lv. denied* 7 N.Y.3d 717 (2006); *see also, Won Sok Kim v. New York City Tr. Auth.*, 29 A.D.3d 984, 985 (2d Dept. 2006); *Yau v. New York City Tr. Auth.*, 10 A.D.3d 654 (2d Dept 2004), *lv. denied* 4 N.Y.3d 701 (2004).

The jury's findings are based on a fair interpretation of the evidence. The jury could have concluded that Dr. Curtis told Ms. Midler to follow up with her rheumatologist, and that her failure to do so caused her injury not Dr. Curtis' failure to ensure Dr. Crane's actual receipt of the urinalysis findings. The jury, moreover, may have concluded that the test results were sent to Crane but that he did not see or pay attention to them. The jury could

have further concluded that Dr. Crane should have requested more information from Dr. Curtis after receiving incomplete test results. Because there is no fatal inconsistency in the verdict, which is supported by a fair interpretation of the evidence, it must be upheld.

Exercise of Medical Judgment

Dr. Crane also argues that Ms. Midler failed to establish a *prima facie* case of medical malpractice since the decision to monitor her using blood tests and other mechanisms rather than urinalysis was an exercise of medical judgment. Mem. Supp., at 23. He points out that Ms. Midler's expert opined that urinalysis testing was required to provide information about the effects of lupus on her kidneys as opposed to the blood testing that Dr. Crane conducted to detect inflammation in her body. Mem. Supp., at 25. Dr. Crane asserts that the expert reached this conclusion in hindsight . At trial, he adduced expert testimony demonstrating that urinalysis is not the only way to test for renal disorder. Mem. Supp., at 29. He argues that he made "a judgment call on how to follow the plaintiff for development of *any* additional lupus criteria." *Id.*, at 30. His determination not to conduct urinalysis testing, he contends, was based on his clinical examination of Ms. Midler and her symptoms and "was an exercise of his medical judgment." *Id.*, at 30. Thus, he urges that no showing of medical malpractice had been made. At the very least, Dr. Crane argues, this Court should have given

an "error in professional judgment" instruction and its failure to do so requires a new trial. Mem. Supp., at 32.

The basic rule is that a doctor faced with the choice between medically acceptable alternatives does not incur liability solely for a mere error in judgment. *Nestorowich v. Ricotta*, 97 N.Y.2d 393 (2002). When alternative procedures are available to a physician, any one of which is medically acceptable and proper under the circumstances, there is no negligence in choosing one option over another. *See, e.g., Henry v. Bronx Lebanon Med. Ctr.*, 53 A.D.2d 476 (1st Dept. 1976). The "error in judgment" charge implies the exercise of some professional judgment in electing among medically acceptable alternatives. *Spadaccini v. Dolan*, 63 A.D.2d 110, 116 (1st Dept. 1978); *see, also, Martin v. Lattimore Road Surgicenter*, 281 A.D.2d 866 (4th Dept. 2001).

Ms. Midler's theory of liability, which the jury accepted, was based on Dr. Crane's failure to properly monitor her condition. Midler Mem., at 26 (the verdict sheet specified, by way of example, the failure to perform urinalysis between October 20, 2000 and January 29, 2003). Ms. Midler presented evidence that urinalysis should have been performed every four months and that a failure to do so constitutes a departure from accepted medical practice. She argued that in the two years following February 2001, despite exhibiting three of four requisite criteria for lupus, "Dr. Crane did not take one single test, such as a urinalysis or immunologic test specifically to monitor for the presence of lupus." Midler Mem., at 7.

Though certain lab tests had been ordered at that time, Ms. Midler maintained that the tests were not sufficient to monitor for the development of additional lupus criteria.

Dr. Crane has not demonstrated that the tests he performed were accepted alternatives for purposes of ascertaining whether Ms. Midler suffered from lupus. It appears that Dr. Crane "failed to exercise any professional judgment whatsoever" in terms of continued monitoring for lupus. *See, See, Larkin v. State of New York*, 84 A.D.2d 438, 444 (4th Dept. 1982) (treatment, in the face of increasing symptoms, that did not include performance of the "ultimate test" did not constitute an exercise of professional judgment).

Because this case does not present an issue of liability for an incorrect choice between two viable options, an error-in-judgment charge was properly denied and the verdict will be sustained.

Judgment in Dr. Crane's Favor

Dr. Crane also asserts that there is no basis for the jury verdict against him since he had no reason to see Ms. Midler between October 2002 and January 2003. Specifically, Dr. Crane asserts, among other things, that the most recent blood screening in August 2002 had demonstrated the absence of any inflammation or kidney disease, and that plaintiff had indicated to him in November 2002 that she was doing well. Mem. Supp., at 33. Dr. Crane also argues that Ms. Midler failed to comply with the advice of her physicians and take recommended medications as directed. He maintains that even if she had been diagnosed

earlier she would have refused to take Cytoxan and tapered her Prednisone, and therefore, his alleged negligence did not proximately cause her injury. Mem. Supp., at 34.

Dr. Crane also asserts that in finding Ms. Midler negligent for failing to follow up with a nephrologist in January 2003, the jury "impliedly determined that her kidneys were still salvageable as of February 2003." Supp. Mem, at 21. Therefore, he urges that the verdict against him cannot stand.

None of these arguments, however, negates Dr. Crane's negligence. The jury found that Dr. Crane should have monitored Ms. Midler for lupus. The jury disagreed with Dr. Crane's assessment that there was no reason to see, follow up or otherwise monitor Ms. Midler, and credited the expert testimony plaintiff adduced. That Ms. Midler's kidneys may have been salvageable and that she ultimately refused the best treatment option does not altogether negate Dr. Crane's failure to monitor, which was deemed a substantial factor in causing her injury.

Monetary Award

"Although possessing the power to set aside an excessive jury verdict, a trial court should nonetheless be wary of substituting its judgment for that of a panel of fact finders whose peculiar function is the fixation of damages. Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of

injuries in different cases is virtually impossible." *So v. Wing Tat Realty, Inc.*, 259 A.D.2d 373, 374 (1st Dept. 1999); *see also, Levine v. East Ramapo Central School District*, 192 A.D.2d 1025 (3d Dept. 1993) ("The amount of damages to be awarded is primarily a question of fact and considerable deference should be accorded to the interpretation of the evidence by the jury"). Because the jury award does not vary materially from reasonable compensation and because a valid line of reasoning supports the jury's damages findings, this Court will not substitute its judgment for the jury's, and Dr. Crane's motion is denied.

Dr. Crane argues that Ms. Midler's only compensable injury is "essentially the five months of dialysis commencing in June 2003 and the abdominal surgery she required in December 2003 for her kidney transplant." Mem. Supp., at 35. Because Ms. Midler would have had to take immunosuppressant drugs for the rest of her life anyway, Dr. Crane urges that she is not entitled to recover for having to take those drugs. *Id.*, at 36-37; Reply Memorandum of Law in Support of Defendant's Post-Trial Motion to Set Aside the Jury Verdict, at 10. Dr. Crane further maintains that plaintiff's expert who testified about kidney rejection did not speak to her specific case or the fact that she received a donor from a living relative. *Id.*, at 37-38. The expert further did not take into account Ms. Midler's excellent post transplant course or that a person can live a normal life with a single kidney. *Id.*, at 38. Dr. Crane maintains that on "this record, any claim for pain and suffering damages arising

from a speculative future need for a second kidney replacement surgery and dialysis is against the weight of the evidence and should not be permitted." *Id.*, at 39.

Dr. Crane next cites a slew of factually distinguishable cases involving entirely different injuries, arguing that in those cases the consequences were more serious than those suffered by Ms. Midler and nonetheless less money was awarded. Mem. Supp., at 40-43.

The jury, however, rejected Dr. Crane's conclusions and credited expert testimony establishing, among other things, that the immunosuppressants Ms. Midler now requires would not necessarily have been needed for the remainder of her life had she been monitored and properly diagnosed earlier and not warranted a kidney transplant. Tr., at 529, 531, 616. More significantly, in awarding Ms. Midler $2,000,000 the jury concluded, based on expert medical testimony, that kidney transplants do not last a person's whole life (Tr., at 527) and that either a new transplant, additional prolonged dialysis and/or future kidney biopsies would be required. Tr., at 527. This future treatment would involve a great deal of pain and discomfort as evidenced by Ms. Midler's past treatment.

Indeed, the record established that Ms. Midler suffered serious past pain and suffering. The jury concluded that her lupus could have been diagnosed earlier had there been proper monitoring. Because of the delay, however, she had to undergo dialysis treatment three times a week for five months and ultimately a kidney transplant. During dialysis, she was in

tremendous pain, experienced discomfort and was nauseous. She testified that the consequences were so severe that she "just wanted to end [her] life." *See*, Tr. 276.

In the end, it is not for this Court to reject or discount the jury's findings with respect to the probability of future treatment or the severity of the pain Ms. Midler suffered and will continue to suffer for the rest of her life. The jury was extremely careful and deliberate in rendering its verdict. It did not simply impose liability on Dr. Crane, but rather, paid close attention to the evidence and in a discriminate manner concluded that Ms. Midler herself was 40% at fault for her own injuries. After seven days of trial and hearing all of the evidence, the jury made very particular findings regarding Dr. Crane, Ms. Midler and Dr. Curtis. They closely considered which departures substantially caused Ms. Midler injury and which did not. It is not for this Court to substitute its judgment for that of the six jurors vested with the responsibility for making factual findings, particularly where, as here, the findings are supported by the record and are eminently reasonable.

Accordingly, it is

ORDERED that Dr. Crane's motion seeking, among other things, to set aside or modify the jury verdict is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
December 3, 2007

ENTER

Hon. Eileen Bransten