Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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SUKHRAM BADLEY,

Plaintiff,

Index No: 8436/05
Motion Date: 11/26/08
Motion Cal. No: 3
Motion Seq. No: 6

-against-

NORTH SHORE UNIVERSITY HOSPITAL, MICHAEL H. HALL, M.D., TRUMP PAVILION FOR NURSING and REHABILITATION-JAMAICA HOSPITAL NURSING HOME CO., INC., NILESH R. PATEL, M.D., JAMAICA HOSPITAL MEDICAL CENTER, HOLLISWOOD CARE CENTER, INC., SURINDER MOHAN AHUJA, M.D., FREDERICK P. BEAVERS, M.D. and RUBEN TAPIA YATCO, M.D.,

Defendants.

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The following papers numbered 1 to 15 read on this motion by defendant Jamaica Hospital Medical Center for an order, pursuant to CPLR § 4404, setting aside the jury verdict and directing judgment in its favor; or setting aside the jury verdict and directing a new trial on the issue of liability and damages; or setting aside the jury verdict and directing a new trial on the issue of damages, unless plaintiff stipulates to a substantial reduction as set forth below; and vacating the Judgment entered against it by the Queens County Clerk on October 23, 2008, in the amount of $293,799.73, pursuant to CPLR § 5015; and upon this further motion by plaintiff, determining the amount of the Medicaid Lien upon the recovery in this action; and upon this cross-motion by plaintiff for an order, pursuant to CPLR § 4404, setting aside the jury verdict on the issue of damages for past pain and suffering in the amount of $400,000.00 and future pain and suffering in the amount of $400,000.00 and directing a new trial on the issue of damages for past and future pain and suffering.

	PAPERS NUMBERED
Notices of Motions-Affidavits-Exhibits.....	1 - 8
Notice of Cross-Motion-Affidavits-Exhibits.....	9 - 12
Affirmation in Opposition and Reply.....	13 - 14
Letter-Stipulation of Discontinuance.....	15

Upon the foregoing papers, it is hereby ordered that the motions and cross-motion are disposed of as follows:

This is a medical malpractice action commenced against defendants arising from their care of plaintiff Sukhram Badley ("plaintiff"), who was caused to sustained personal injuries resulting in the amputation of his right leg due to the purported negligence of defendants. Plaintiff was seen at defendant Jamaica Hospital Medical Center (defendant "Jamaica") as an ambulatory patient on December 16, 19 and 23, 2002, whereby he was evaluated by Dr. Frederick Beavers, the attending physician of the Vascular Surgery Clinic at defendant Jamaica. Upon clinical testing on December 16 and 19, 2002, plaintiff was given an appointment at his presentment to the clinic on December 23, 2002, to undergo additional testing on January 9, 2003, and have a Magnetic Resonance Angiogram conducted. Plaintiff alleged, inter alia, that defendant Jamaica's failure to restore the blood supply to his right leg through a revascularization during his three December 2002 visits, substantial reduced the chance to salvage the limb, and resulted in the subsequent amputation in January 2003, and therefore was a departure from good and acceptable medical practice.

Plaintiff subsequently settled or discontinued this action prior to the September 2008 trial of this action against all defendants except defendant Jamaica.[1] After the trial of this action for damages, on September 18, 2008, the jury awarded plaintiff $400,000.00 for past pain and suffering,$400,000.00 for future pain and suffering, $40,000.00 for medical expenses. It is upon the foregoing that defendant Jamaica seeks an order setting aside the jury verdict on damages, pursuant to CPLR § 4404, and vacating the Judgment entered against it by the Queens County Clerk on October 23, 2008, in the amount of $293,799.73, pursuant to CPLR § 5015. Plaintiff moves for an

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[1]Plaintiff settled with defendants North Shore, Trump, Holliswood and Nilesh Patel prior to the commencement of the trial for a total amount of $550,000.00, and defendant Jamaica's motion for a set-off of those settlements was granted. The matter was discontinued as to defendant Frederick Beavers, the attending physician of the Vascular Surgery Clinic at defendant Jamaica, on December 14, 2007. Further by letter dated December 2, 2008, defendant Patel proffered the September 12, 2008 Stipulation of Discontinuance, indicating that defendant Jamaica declined to sign such stipulation in light of the instant motion submitted to this Court, and requested that this Court so-order the stipulation. This Court declined to so-order said stipulation, but to the extent that the parties have been precluded from filing the Stipulation of Discontinuance, this Court hereby deems this action discontinued as against all defendant set forth therein, and the parties shall file the stipulation forthwith, together with all appropriate fees, with the Queens County Clerk's Office, if not already filed.

order determining the amount of the Medicaid Lien upon the recovery in this action, and cross-moves, pursuant to CPLR § 4404, to set aside the jury verdict on the issue of damages for both past and future pain and suffering and directing a new trial on the issue of damages.[2]

The power to set aside a jury verdict and order a new trial is an inherent power [Nicastro v. Park, 113 A.D.2d 129 (2nd Dept.1985)], which is codified in section 4404(a) of the CPLR, which provides, in pertinent part: "After a trial of a cause of action... upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and... may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence." Notwithstanding this inherent power, this Court respects a jury's verdict and recognizes, as was stated in Nicastro v. Park, supra, 113 A.D.2d at pp. 133-134, that:

> Fact-finding is the province of the jury, not the trial court, and a court must act warily lest overzealous enforcement of its duty to oversee the proper administration of justice leads it to overstep its bounds and 'unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty' (citations omitted).

As a general matter, "in reviewing the record to ascertain whether the verdict was a fair reflection of the evidence, great deference is accorded to the fact-finding function of the jury, as it is in the

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[2] CPLR § 4404(a), the relevant section upon which both defendant Jamaica and plaintiff seek to set aside the verdict, states the following:

> (a) Motion after trial where jury required. 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, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

Under this section, the Court may set aside a verdict as against the weight of the evidence, in the interest of justice or where the jury has reached an impasse. As this Court has already ruled on the issues of whether the action should be dismissed as to defendant Jamaica based upon Dr. Beaver's discontinuance, as well as the prejudicial effect of allowing testimony regarding plaintiff's subsequent amputation of the left leg three years later, and as the motion does not seek reargument of those issues, those branches seeking to set aside the verdict on those grounds will not be considered.

foremost position to assess witness credibility." Teneriello v. Travelers Companies , 264 A.D.2d 772, 772-3 (2nd Dept. 1999); see, Kaplan v. Miranda, 37 A.D.3d 762 (2nd Dept. 2007); Kihl v. Pfeffer, 47 A.D.3d 154 (2nd Dept. 2007); Taino v. City of Yonkers, 43 A.D.3d 401 (2nd Dept. 2007); Evers v. Carroll, 17 A.D.3d 629 (2nd Dept. 2005). "Indeed, the court must cautiously balance the great deference to be accorded to the jury's conclusion... against the court's own obligation to assure that the verdict is fair (citations omitted), and the court may not employ its discretion simply because it disagrees with a verdict, as this would unnecessarily interfere with the fact-finding function of the jury to a degree that amounts to an usurpation of the jury's duty (citations omitted)." McDermott v. Coffee Beanery, Ltd., 9 A.D.3d 195, 206 (1st Dept. 2004); see, Mitchell v. Yueh S. Wu, 38 A.D.3d 507 (2nd Dept.2007); Bennett v. Wolf, 40 A.D.3d 274 (1st Dept. 2007). "'[T]he discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict'[Nicastro v. Park, 113 A.D.2d 129,133, 495 N.Y.S.2d 184(2 nd Dept.1985)].

In exercising its discretionary authority, a court is guided by the principle that a verdict should not be set aside unless 'the jury could not have reached the verdict on any fair interpretation of the evidence' (citation omitted)." Gallagher v. Sosa, 293 A.D.2d 710 (2nd Dept. 2002); see, also, Kaplan v. Miranda, 37 A.D.3d 762 (2nd Dept. 2007); Miftari v. Klobucista, 285 A.D.2d 634 (2nd Dept. 2001); Salvieterra v. Havekotte, 273 A.D.2d 218 (2nd Dept. 2000); Ruscito v. Early, 253 A.D.2d 461 (2nd Dept. 1998). "For a court to conclude that a jury verdict is unsupported 'by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' (citation omitted)." Kaplan v. Miranda, 37 A.D.3d 762 (2nd Dept. 2007); see, Bradley v. Earl B. Feiden, Inc., 8 N.Y.3d 265(2007); Soto v. New York City Transit Authority , 6 N.Y.3d 487 (2006); Abenante v. Star Gas Corp., 13 A.D.3d 405 (2nd Dept. 2004). "If there is a question of fact and 'it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence.'" Soto v. New York City Transit Authority, 6 N.Y.3d 487, 492 (2006). Nonetheless, the power of a trial court to exercise its discretion in setting aside a jury verdict is broad, and is exercisable to ensure that justice is done. See, Aunchman v. Palen, 186 A.D.2d 104 (2nd Dept.1992).

And, where, as here, the jury's determination of damages is at issue,it is well settled that the amount of damages for personal injuries is principally a question of fact to be resolved by the jury. See, Coker v. Bakkal Foods, Inc., 52 A.D.3d 765 (2 Dept. 2008); Crockett v. Long Beach Medical Center, 15 A.D.3d 606 (2nd Dept. 2005); Day v. Hospital for Joint Diseases Orthopaedic, 11 A.D.3d 505 (2nd Dept. 2004); Stylianou v. Calabrese, 297 A.D.2d 798 (2nd Dept. 2002). The jury's determination of damages, nevertheless, may be set aside where the record indicates that an award deviates so materially from what would be reasonable compensation, that the verdict could not have been reached on any fair interpretation of the evidence. See, Giugliano v. Giammarino, 37 A.D.3d 533 (2nd Dept. 2007); Fryer v. Maimonides Medical Center, 31 A.D.3d 604 (2nd Dept. 2006); Zukowski v. Gokhberg, 31 A.D.3d 633 (2nd Dept. 2006); Stylianou v. Calabrese, 297 A.D.2d 798 (2nd Dept.2002); Britvan v. Plaza At Latham LLC, 266 A.D.2d 799 (3rd Dept. 1999). Consequently,

unless the evidence militates against upholding the amount of damages awarded, "considerable deference should be accorded to the interpretation of the evidence by the jury." Duncan v. Hillebrandt, 239 A.D.2d 811, 814 (3rd Dept.1997); see, Nash v. Sue Har Equities, LLC, 45 A.D.3d 545, 545 (2nd Dept. 2007); Marshall v. Lomedico, 292 A.D.2d 669 (3rd Dept. 2002).

Here, defendant Jamaica seeks to set aside the verdict on the following grounds: (1) plaintiff never established a prima facie case demonstrating that Dr. Beavers departed from accepted standards of care, or that any departure was a substantial factor in necessitating the amputation; (2) the jury finding of malpractice was not supported by the credible evidence; (3) the Court erred in not dismissing this matter against it as the action was discontinued against Dr. Beavers and defendant Jamaica cannot be held vicariously liable; (4) the jury verdict was based upon sympathy and/or was a compromise; (5) the Court erred in precluding the testimony regarding plaintiff's subsequent amputation of the left leg; and (6) upon consideration of the proof, the award for future pain and suffering is excessive.

With respect to the first ground, despite defendant Jamaica's contentions to the contrary, the jury's interpretation of the evidence in finding a deviation from good and acceptable standards of care, does not preponderate against the weight of the credible evidence. The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted practice and evidence that such departure was a proximate cause of injury or damage. See, Elias v. Bash, 54 A.D.3d 354 (2nd Dept. 2008); Wicksman v. Nassau County Health Care Corp., 27 A.D.3d 644 (2nd Dept. 2006); Perez v. St. John's Episcopal Hosp. South Shore, 19 A.D.3d 389 (2nd Dept. 2005). Here, the jury upon consideration of conflicting expert testimony concluded that there was a departure or deviation, and that such departure was a substantial factor in requiring the subsequent amputation of plaintiff's right leg. It thus can neither be rationally argued that the jury could not have reached the verdict on any fair interpretation of the evidence, nor that the verdict is unsupported by sufficient evidence as a matter of law. Rather, there was a plausibly valid line of reasoning and permissible inferences to be drawn that Dr. Beavers did depart from good and acceptable standards of care in his treatment of plaintiff. See, generally, Bradley v. Earl B. Feiden, Inc., 8 N.Y.3d 265 (2007); Soto v. New York City Transit Authority, 6 N.Y.3d 487 (2006) Kaplan v. Miranda, 37 A.D.3d 762 (2nd Dept. 2007); Gallagher v. Sosa, 293 A.D.2d 710 (2nd Dept. 2002); Miftari v. Klobucista, 285 A.D.2d 634 (2nd Dept. 2001). As was stated by the Court of Appeals in Soto v. New York City Transit Authority, 6 N.Y.3d 487, 492 (2006):

> A jury verdict rests on legally insufficient evidence where there is "simply no valid line of reasoning and permissible inferences which could possibly lead rational [individuals] to the conclusion reached by the jury on the basis of the evidence presented at trial" (Cohen v Hallmark Cards, 45 NY2d 493, 499 [1978]). We have held that this inquiry is similar to that of a trial judge determining whether to direct a verdict (see Cohen, 45 NY2d at 499). If there is a question of fact and "it would not be utterly irrational for a jury to reach the result it has determined upon . . . the court may not conclude that the verdict is as a matter of law not supported by the evidence" (Cohen, 45 NY2d

at 499; Campbell v City of Elmira, 84 NY2d 505, 510 [1994]).

As set forth above, there was a plausibly valid line of reasoning and permissible inferences to be drawn by the jury that Dr. Beavers did depart from good and acceptable standards of care in his treatment of plaintiff.

Nor is there merit to defendant's claim that the jury's finding of malpractice was not supported by the credible evidence. It is well-recognized that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor. See, Tornello v. Gemini Enterprises, Inc., 299 A.D.2d 477 (2nd Dept. 2002)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had an opportunity to see and hear the witnesses]; Cirami v. Taromina, 243 A.D.2d 437 (2nd Dept. 1997)[stating that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor]; Darmetta v. Ginsburg, 256 A.D.2d 498 (2nd Dept. 1998)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses]; Vega v. City of New York, 194 A.D.2d 537 (2nd Dept. 1993)[stating that issues of credibility are properly determined by the hearing court]. Here, the jury, well within its province, credited the testimony of plaintiff and his medical expert, Dr. Ralph DeNatale, and discredited the testimony of defendant Jamaica's expert, Dr. William Suggs. Moreover, there is no indication that the conclusions reached by the jury were in any way permeated by sympathy or represented a compromise verdict.

With respect to the remaining ground to set aside the verdict, defendant Jamaica contends that upon consideration of the proof, the award for future pain and suffering is excessive. Plaintiff, by way of his cross-motion, likewise challenges the jury's award, seeking to set aside both awards for past and future pain and suffering upon the ground that the awards are insufficient. The cases relied upon by the parties in support of each of their respective positions are inapposite, as those cases arise either from amputations resulting from severe traumas. See, e.g., Firmes v. Chase Manhattan Automotive Finance Corp., 50 A.D.3d 18 (2nd Dept. 2008)[damage award of $2.2 million for two years of past pain and suffering deviated materially from what would be reasonable compensation for amputation of motorcyclist's leg below knee, debridements to remove dead tissue, skin grafts, inability to use prosthesis, and phantom pain; award of $1.5 million would represent reasonable compensation for past pain and suffering]; Chung v. New York City Transit Authority, 213 A.D.2d 619 (2nd Dept. 1995)[damage award of $1,500,000 for past pain and suffering, for plaintiff who lost both legs after he fell from station platform and was struck by subway car, was excessive, and award of $600,000 would constitute reasonable compensation.]. The more analogous cases are those involving medical malpractice actions arising from amputations where diabetes is at issue. See, DiGiacomo v. Cabrini Medical Center, 21 A.D.3d 1052 (2nd Dept. 2005), leave to appeal denied6 N.Y.3d 703 (2006)[in medical malpractice action based upon below-the-knee amputation of the right leg of plaintiff who suffered from diabeties, appellate court reduced the jury award for past pain and suffering from the sum of $350,000 to the sum of $250,000, and for future pain and suffering from the sum of $470,000 to the sum of $350,000]; Free v. Nassau Queens Medical Group, P.C., 242 A.D.2d 668 (2nd Dept. 1997)[holding that award, inter alia, of $300,000 for past pain and suffering would constitute reasonable compensation for a plaintiff who underwent surgical amputation of her left leg below the

knee, due to the defendant internist's malpractice in treating a diabetic foot ulcer]. Compare, Walker v. Zdanowitz, 265 A.D.2d 404 (2nd Dept. 1999)[award, inter alia, of $2,500,000 for past pain and suffering to patient whose legs had to be amputated as result of physicians' failure to make timely diagnosis of peripheral vascular disease reasonable compensation]. An evaluation of the jury award in the instant case, consideration of the nature and extent of the injuries sustained by plaintiff, and the fact specific query that the jury is charged to make leads this Court to conclude that the jury's award was based upon a fair interpretation of the evidence. Neither the award for past, nor futurem, pain and suffering totaling $800,000.00, materially deviate from what would be considered reasonable compensation, and, therefore, should not be disturbed. See, Fryer v. Maimonides Medical Center, 31 A.D.3d 604 (2nd Dept. 2006); Crockett v. Long Beach Medical Center, 15 A.D.3d 606 (2nd Dept.2005); Day v. Hospital for Joint Diseases Orthopaedic Institute, 11 A.D.3d 505 (2nd Dept. 2004); Free v. Nassau Queens Medical Group, P.C., 242 A.D.2d 668 (2nd Dept. 1997); Chung v. New York City Transit Authority, 213 A.D.2d 619 (2nd Dept. 1995). Accordingly, as the awards were not against the weight of the evidence, that branch of the motion to set aside the verdict as to future pain and suffering on the ground that it was excessive is denied.[3] Likewise denied is the cross-motion seeking to set aside the awards for past and present pain and suffering as inadequate.

Plaintiff also moves for an order setting the amount of the Medicaid Lien, which Notice of Lien from the Human Resources Administration dated March 11, 2008, indicate an outstanding lien of $178,859.25, and a letter and Notice of Lien dated March 12, 2008, indicate that the outstanding lien is $328,692.00, covering a period from October 14, 2002 through November 30, 2007. Plaintiff seeks to have the Medicaid Lien set at the sum of $40,000.00 in accordance with the amount awarded by the jury.

Social Services Law § 104-b, entitled "Liens for public assistance and care on claims and suits for personal injuries," states, in relevant part, the following:

> 1. If a recipient of public assistance and care shall have a right of action, suit, claim, counterclaim or demand against another on account of any personal injuries suffered by such recipient, then the public welfare official for the public welfare district providing such assistance and care shall have a lien for such amount as may be fixed by the public welfare official not exceeding, however, the total amount of such assistance and care furnished by such public welfare official on and after the date when such injuries were incurred.

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[3] Defendant Jamaica did not seek to set aside the verdict with regard to past pain and suffering, stating in its Affirmation In Opposition to Cross-Motion and Reply, "while this affirmant has no quarrel with the jury's determination as to past damages, [] the jury's award must be set aside entirely as to future damages []." Likewise, although the Affirmation in Support of the motion seeks to set aside the award for medical expenses in the amount of $40,000.00, as defendant Jamaica has not proffered evidence with regard to this award, this Court deems this relief abandoned.

From the outset, it is noted by this Court that plaintiff served this motion upon defendant Jamaica and the Law Department of the Human Resources Department, the agency which sent plaintiff the Notice of Lien. However, since the lien is being asserted by the Department of Social Services, notice should have been given to that entity as well. Consequently, as this Court is not convinced that the appropriate entity has been served, the motion to determine the Medicaid Lien is hereby denied without prejudice to renew upon proper papers, which shall include proof of service of the motion upon the Department of Social Services, presumably the lien holder.

Accordingly, based upon the foregoing, denied in its entirety is the motion by defendant Jamaica Hospital Medical Center for an order, pursuant to CPLR § 4404, setting aside the jury verdict and directing judgment in its favor; or setting aside the jury verdict and directing a new trial on the issue of liability and damages; or setting aside the jury verdict and directing a new trial on the issue of damages, unless plaintiff stipulates to a substantial reduction as set forth below; and vacating the Judgment entered against it by the Queens County Clerk on October 23, 2008, in the amount of $293,799.73, pursuant to CPLR § 5015. Likewise denied is the cross-motion by plaintiff for an order, pursuant to CPLR § 4404, setting aside the jury verdict on the issue of damages for past pain and suffering in the amount of $400,000.00 and future pain and suffering in the amount of $400,000.00 and directing a new trial on the issue of damages for past and future pain and suffering. Lastly, the motion by plaintiff determining the amount of the Medicaid Lien upon the recovery in this action, fixing such lien in the amount of $40,000.00, is denied without prejudice to renew upon the reasons set forth above.

Dated: March 5, 2009

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J.S.C.