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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

CADEN KENNEY-MCGOWAN, an infant, by his mother and natural guardian, PATRICIA MCGOWAN and PATRICIA MCGOWAN, Individually,

Plaintiffs,

-against-

SALVATORE J. CORSO, M.D., ORTHOPAEDIC & SPORTS ASSOCIATES OF LONG ISLAND, and PLAINVIEW HOSPITAL,

Defendants.

Motion Sequence #4
Submitted May 15, 2009
XXX

INDEX NO: 5373/07

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Affirmation in Reply.....3

Requested Relief

Plaintiffs CADEN KENNEY-MCGOWAN, an infant, by his mother and natural guardian, PATRICIA MCGOWAN (hereinafter referred to as "CADEN") move for an order, pursuant to CPLR §4404(a), setting aside the jury verdict in favor of CADEN and against SALVATORE J. CORSO, M.D. (hereinafter referred to as "DR. CORSO"), on the grounds that the jury verdict for past pain and suffering is insufficient as against the

weight of the evidence, and granting an increase in the award for past pain and suffering or, in the alternative, granting a new trial on damages on this claim. Counsel for DR. CORSO opposes the motion, which is determined as follows:

Background

On February 5, 2009, the jury returned a verdict in the sum of $50,000.00 for CADEN's past pain and suffering against DR. CORSO, finding that DR. CORSO failed to diagnose and identify a bone mal-alignment and failed to obtain measurements and assessments of the infant, CADEN's, bone alignment, which were departures from good and acceptable medical and surgical practices and substantial factors in causing CADEN's injuries. In addition the jury awarded CADEN $11,738.56 for past medical expenses. Counsel for plaintiff argues that CADEN had significant pain and suffering during the nearly three (3) years that he had an arm that was not functional and that the jury award of $50,000.00 for past pain and suffering was wholly insufficient in light of the facts and circumstances of this case.

The testimony at trial established that, on May 5, 2003, when CADEN was approximately two (2) years old, he suffered a humerus fracture of his right arm for which DR. CORSO rendered medical treatment. Testimony established that, because of the child's tender age, Dr. CORSO chose to put the arm in a cast, rather than pin the broken bones, which resulted in a deformity diagnosed as a right cubitus varus elbow (a frozen elbow). The jury credited expert testimony that, if the elbow had been pinned, the elbow deformity would not have occurred and the jury found that Dr. CORSO's committed malpractice in failing to diagnose and identify the bone mal-alignment and

failing to measure and assess the bone mal-alignment. The jury credited testimony that the elbow deformity inhibited CADEN's functioning and range of motion.

Testimony at trial established that, on October 24, 2003, approximately six (6) months after CADEN's initial injury, he fell again causing another fracture to his right arm very close to the original injury. The injury was described by the treating physician as a lateral condylar fracture which required a percutaneous pin fixation to allow for healing, which operation was performed on October 31, 2003 and resulted in CADEN's right arm being in a cast/splint for approximately five (5) to six (6) weeks. In his report, CADEN's treating physician opined that the size of the deformity in his right elbow caused CADEN to suffer the second injury, and the physician concluded that the right elbow deformity had to be corrected. Thereafter, on November 28, 2005, CADEN's doctor performed two (2) osteotomies to correct the cubitus varus condition and, with the aid of wires and pins, placed the elbow in a position resulting in a normal range of motion. After said surgery, CADEN's arm was immobilized in a cast that went from his shoulder to his wrist, in a slight valgus position (twisted clockwise), for approximately six (6) to eight (8) weeks, and was unable to perform any of his daily personal functions such as dressing, bathing or going to the bathroom, and he was confined to his home and missed several months of school. The child has a keyloid scar on his right arm.

Before the corrective surgery, CADEN was receiving occupational therapy two (2) times per week, in thirty (30) minute sessions, to address his fine motor skills and muscle tone. Evidence at trial from CADEN's occupational therapist established that the child's elbow deformity negatively impacted his ability to perform age appropriate

actions; that the instability of the joint impacted the refined distal movement in his hands and fingers; his ability to hold a weighted object, to crawl, to support his weight, his bilateral coordination, his ability to feed himself and to use his right arm in a smooth and effective manner. This matter will be dealt with in greater depth below.

The Law

CPLR §4404(a) 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, 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.

It is axiomatic that a jury verdict is entitled to the benefit of every fair and reasonable inference which can be drawn from the evidence and that it is the function of the jury, not the Court, to make credibility determinations. It has often been observed that "whether a jury verdict is against the weight of evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence". *Nicastro v Park*, 113 AD2d 129, 495 NYS2d 184 (2nd Dept. 1985). In addition, "[a]lthough these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results". *Cohen v Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d 1145 (C.A. 1978).

To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be "no valid line of reasoning and permissible

inference which could possibly lead reasonable men to the conclusion reached by the jury on the basis of the evidence presented at trial". *Cohen v Hallmark Cards*, *supra; Nicastro v Park, supra*. Moreover, as stated in *Nicastro*, "[t]he criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent . . . [and] whether a jury verdict should be set aside as against the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors (citations omitted)". The rule has been stated as requiring that a jury verdict be set aside where "the jury could not have reached a verdict on any fair interpretation of the evidence". *Nicastro v Park, supra; see also, Burney v Raba,* 266 AD2d 174, 697 NYS2d 329 (2nd Dept. 1999); *Licker v Brangan,* 177 AD2d 547, 576 NYS2d 288 (2nd Dept. 1991).

The Court, having heard the testimony and seen the demeanor of the witnesses, has the power to set the verdict aside in the supervision of the jury's work before it. The Court has "the duty of maintaining reasonable consistency between the weight of the evidence and the verdicts reached". *Mann v Hunt*, 283 AD 140, 126 NYS2d 823 (3rd Dept. 1953). It must employ the sum total of its legal experience to determine whether a new trial is required, in a decision that would not be regarded in the profession as unreasonable. *Mann v Hunt, supra.*

CPLR §5501 (c) sets forth the standard for determining whether a jury verdict should be set aside as excessive or inadequate. This statute directs that

> [i]n reviewing a money judgment in an action which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have

> been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

Although phrased as a direction to the Appellate Courts, it is well settled that the standard applies to the Trial Courts as well. *See, Weigl v Quincy Specialties Company*, 190 Misc 2d 1, 735 NYS2d 729 (Supreme New York Co. 2001); *Morisseau v State of New York*, 265 AD2d 647, 696 NYS2d 545 (3rd Dept. 1999); *cf., Cochetti v Gralow*, 192 AD2d 974, 597 NYS2d 234 (3rd Dept 1993); *Shurgan v Tedesco* 179 AD2d 805, 578 NYS2d 658 (2nd Dept. 1992).

The evaluation mandated by CPLR §5501 (c) as to whether an award deviated materially from reasonable compensation is inherently subjective and cannot produce results with mathematical procession. The task is to identify the factual similarities and apply reasoned judgment. *Donlon v City of New York*, 284 AD2d 13, 727 NYS2d 94 (1st Dept. 2001).

> The amount of damages to be awarded for personal injuries is primarily a question of fact for the jury . . . Only when an award "deviates materially from what would be reasonable compensation" is a new trial on damages granted (CPLR 5501[c]) . . . (citations omitted).

Kihl v Pfeffer, 47 AD3d 154, 848 NYS2d 200 (2nd Dept. 2007).

> While the amount of damages to be awarded for personal injuries is primarily a question for the jury, an award may be set aside when it deviates materially form what would be reasonable compensation (*see*, CPLR 5501[c]; *Walsh v Kings Plaza Replacement Serv.*, 239 AD2d 408; *Senko v Fonda*, 53 AD2d 638).

Iovine v City of New York, 286 AD2d 372, 729 NYS2d 182 (2nd Dept. 2001). Great deference should be accorded to the determination made by the jury, and the Court's discretionary power to overturn a jury's money verdict should be exercised sparingly. *Adams v Georgian Motel Corporation*, 291 AD2d 760, 738 NYS2d 712 (3rd Dept. 2002).

Discussion

After a careful review of the medical records in evidence and the testimony at trial, the Court concludes the following: 1) CADEN, at twenty-one (21) months of age, on May 5, 2003, fell and fractured his super condylar elbow of the right arm. He was treated with a splint; 2) CADEN fell on October 25, 2003 and sustained a condylar fracture of the right arm in the area of the May 5, 2003 fracture. On October 31, 2003 he underwent a closed pinning for the second fracture. His right arm was placed in a long arm splint. On November 26, 2003 the splint and the pins were removed, and a splint was applied to be used during the day. On December 10, 2003 the splint was removed and he was free to return to all activities; 3) on October 21, 2004, CADEN, was examined with view towards correcting the right elbow mal-alignment by osteotomy. It was decided that the corrective action would be done when the child was four (4) years of age in approximately eight (8) months; 4) on October 27, 2005 approximately 2 ½ years following the injury on May 5, 2003, it was decided by his treating doctor that CADEN was age appropriate for the closing wedge osteotomy. The surgery would require fixation pins and four (4) weeks in a splint. Thereafter, it was anticipated that the child would engage in two (2) to three (3) weeks of protected activity; 5) on November 28, 2005, an operation described as right elbow lateral closing

wedge osteotomy with purcutaneous pins was performed. The pre-operative radiographs confirmed an approximate thirty (30) degree deformity in the right elbow in comparison to the left side. The surgeon performed two (2) osteotomies and pins and wires were inserted to hold the bones in place; 6) a physical examination of CADEN was conducted on December 8, 2005 when it was decided that the bones were well aligned and it was expected that the splint would be removed in four (4) weeks; the child was doing well; 7) on December 15, 2005, a physical examination found no change and CADEN was doing very well; 8) on January 5, 2006, the splint and pins were removed and radiographs revealed that the osteotomies were healing well. CADEN was to engage in protected activities for two (2) weeks; 9) on January 19, 2006, CADEN was doing well and his treating physician indicated that he could return to his regular activities. CADEN had full range of motion; 10) on May 25, 2006, it was determined that the osteotomies' site had healed excellently.

It appears that CADEN spent approximately fourteen (14) weeks in casts on his right arm, including the original injury on May 5, 2003, the second injury on October 25, 2003 and the operation which addressed the deformity in his right elbow on November 28, 2005.

The doctors reports prior to the two (2) osteotomies contained language that the child suffered no pain. However, the report from Rothman Therapeutic Services, the child's occupational therapists, presents a picture of the difficulties that CADEN experienced as a result of the deformity in his right elbow. The report, dated November 22, 2004, was a quarterly progress report indicating the occupational therapy CADEN

was receiving. The report reflects the negative impact of the elbow condition, and notes that CADEN: 1) is unable to perform age appropriate activities such as shoveling sand in the pail; 2) is unable to hold minimally weighted objects such as a container of Playdough due to lack of stability in the arm; 3) has difficulty in crawling; 4) has difficulty in opening containers and cutting paper; 5) struggles using feeding utensils and has difficulty in moving the food from the table to his mouth, producing food spillage and frustration; 6) has a lack of stability in the elbow causing the child to compensate by having to inefficiently use larger muscles to enhance stability.

The report reflects that CADEN experienced frustration due to the elbow deformity and in performing routine tasks of daily living, and gives a comprehensive view of the negative effects of the malpractice. Moreover, the Court notes that none of the recoveries for injuries sustained by litigants in other cases were helpful to the Court because they did not involve young children and were not comparable to the case at bar.

Conclusion

Based upon a fair reading of the evidence, it is the judgment of the Court that the jury verdict is insufficient as against the weight of the evidence and materially deviated from what would be reasonable compensation when it awarded CADEN $50,000.00 for past pain and suffering. Contrary to the defendant's assertion that CADEN's injury was merely cosmetic, the Court finds that the jury did not reasonably compensate CADEN for the pain and suffering that he endured as a result of Dr.

CORSO's malpractice and that $100,000.00 for past pain and suffering represents reasonable compensation for CADEN's injury. It is therefore

ORDERED that plaintiffs' motion to set aside the jury verdict on damages is granted only to the extent of setting aside the verdict for past pain and suffering and ordering a new trial on damages for past pain and suffering unless the parties agree to accept the new amount of $100,000.00 as damages. If said sum is agreed to by the parties within thirty (30) days after service of a copy of this order with notice of entry thereon, the parties shall submit a written stipulation consenting to the increase of the jury verdict and the parties shall enter judgment accordingly.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: August 28, 2009

WILLIAM R. LaMARCA, J.S.C.

ENTERED

SEP 03 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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