[* 1]

SHORT FORM ORDER

INDEX NO. 9573/2002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY



**PRESENT:**

**HON. JOSEPH FARNETI**
**Acting Justice Supreme Court**

LAURIE BRADY, as Mother and Natural Guardian of ASHLEIGH BRADY, an Infant,

Plaintiff,

-against-

GOOD SAMARITAN HOSPITAL, PATRICIA FORD, M.D., STUART BOHRER, M.D., RICHARD SCRIVEN, M.D. and CHILDREN'S SURGICAL GROUP, P.C.,

Defendants.

**ORIG. RETURN DATE: FEBRUARY 25, 2010**
**FINAL SUBMISSION DATE: MARCH 4, 2010**
**MTN. SEQ. #:** 007
**MOTION: MOT D**

**PLTF'S/PET'S ATTORNEYS:**
LAW OFFICE OF ROBERT F. DANZI
900 MERCHANTS CONCOURSE
SUITE 314
WESTBURY, NEW YORK 11590
516-228-4226

**ATTORNEYS FOR DEFENDANTS GOOD SAMARITAN HOSPITAL AND PATRICIA FORD, M.D.:**
LEWIS, JOHS, AVALLONE
AVILES & KAUFMAN, LLP
425 BROAD HOLLOW ROAD
MELVILLE, NEW YORK 11747
631-755-0101

**ATTORNEYS FOR DEFENDANTS STUART BOHRER, M.D., RICHARD SCRIVEN, M.D. AND CHILDREN'S SURGICAL GROUP, P.C.:**
THE LAW OFFICES OF SANTANGELO & SLATTERY
1800 NORTHERN BOULEVARD
ROSLYN, NEW YORK 11576
516-775-2236

Upon the following papers numbered 1 to 6 read on this motion TO INCREASE JURY VERDICT AND DISMISS AFFIRMATIVE DEFENSE. Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation 6; it is,

**ORDERED** that this motion by plaintiff, LAURIE BRADY, as Mother and Natural Guardian of ASHLEIGH BRADY, an Infant ("plaintiff" or "infant plaintiff"), for an Order, pursuant to CPLR 4404, 4401 and 3211 (b):

a) awarding plaintiff damages for her injuries going forward from the date of verdict and increasing the damages awarded to plaintiff for her injuries sustained up to and including the date of verdict; and

b) striking or dismissing the affirmative defense of set off,

is hereby **GRANTED** solely to the extent set forth hereinafter. The Court has received opposition hereto from defendant STUART BOHRER, M.D.

The matter was tried in this Court before a jury. On November 18, 2009, the jury returned a verdict of no liability against defendants GOOD SAMARITAN HOSPITAL, PATRICIA FORD, M.D., and RICHARD SCRIVEN, M.D., and one hundred (100%) percent liability against defendant STUART BOHRER, M.D. ("defendant"). In response to interrogatory number eight on the special verdict sheet, "[d]id defendant STUART BOHRER, M.D. depart from accepted medical practice by failing to refer ASHLEIGH BRADY to an orthopedic specialist for immediate evaluation following the visit on December 21, 1999?", the jury answered "YES." In response to interrogatory number eight-a on the special verdict sheet, "[w]as this departure a substantial factor in causing injury to ASHLEIGH BRADY?", the jury similarly answered "YES." With respect to damages, the jury awarded plaintiff $250,000 for pain and suffering up to the date of the verdict, and awarded no damages for pain and suffering from the time of the verdict through time that plaintiff was expected to live.

The Court is now called upon to determine a motion by plaintiff seeking an award of damages for her injuries going forward from the date of verdict, and increasing the damages awarded to plaintiff for her injuries sustained up to and including the date of verdict. Plaintiff also seeks to strike or dismiss defendant's affirmative defense of set off, alleging that such defense is based upon a recovery of $75,000 received by plaintiff in a collateral action arising from a motor vehicle accident, and defendant failed to satisfy his burden of proving that any of plaintiff's recovery against him was duplicative of her prior recovery. Plaintiff contends that the results of this defendant's negligence are separable from the injuries sustained in the motor vehicle accident.

This action is for medical malpractice in which plaintiff claims that defendants departed from accepted practice in connection with treatment rendered to the infant plaintiff, who was then seven years old, following an automobile accident on November 21, 1999. As a result of the accident, the infant plaintiff, among other injuries, suffered an injury to the "joint capsule" of C-1 and C-2 of her cervical spine, which allegedly led to a condition known as an atlanto-axial rotatory subluxation. Plaintiff's expert, Dr. Patrick Connolly, testified that if a joint is out of position, but not dislocated, it is considered "subluxed." A subluxation at C1-C2 is known as an atlanto-axial rotary subluxation because C-2 has a peg which is the axis, and C-1 rotates around C-2. Plaintiff claims that because of the negligence of defendants in failing to refer the infant plaintiff to an orthopedic surgeon in a timely manner, the condition could not be treated conservatively and required spinal fusion surgery, which left the infant plaintiff with a permanent loss of fifty (50%) percent of the range of motion in her cervical spine. In addition, the infant plaintiff's cervical spine will allegedly be subjected to accelerated degeneration.

Plaintiff contends that although the jury unanimously found defendant liable to plaintiff, and found a causal relationship between his departure from accepted medical practice on December 21, 1999 and plaintiff's injury, and awarded plaintiff damages for pain and suffering from the date of the occurrence to the date of the verdict, the jury nevertheless failed to award any damages for future pain and suffering. Plaintiff argues that this was inconsistent with the fact that it was undisputed at trial that the infant plaintiff's injury was permanent, and contrary to the weight of the evidence. As such, plaintiff alleges that an award of $630,000 ($10,000 per year for an additional 63 years) in future damages is "reasonable, well supported by the record, unassailable, and conservative." Moreover, plaintiff alleges that the award of $250,000 for past pain and suffering "deviated materially" from what was reasonable compensation given the nature and extent of plaintiff's injuries, and should be increased by the Court to $450,000, at defendant's peril of retrial on the damage claim.

As discussed, plaintiff also seeks to strike or dismiss defendant's affirmative defense of set off, which was asserted after the Court granted a motion by defendant during trial for leave to amend his answer. The defense is based upon a prior settlement which plaintiff received from the tortfeasor in the underlying motor vehicle accident. Plaintiff notes that the infant plaintiff ultimately received only $50,000 of the proceeds, and that plaintiff expressly acknowledged that the recovery was inadequate for the injuries sustained. Plaintiff contends

that defendant wholly failed to satisfy his burden of proving that he was entitled to some set off, or that any of plaintiff's recovery against him was duplicative of her prior recovery. Plaintiff indicates that the prior recovery was based upon the injury to the joint capsule of C1-C2, among other injuries, while the recovery herein was based upon the events that occurred on and after December 21, 1999, i.e., the need for and subsequent adverse results of the spinal fusion surgery. As such, plaintiff claims there is no overlap, and thus, no set off.

In opposition, defendant alleges that the spinal fusion surgery eliminated the pain caused by the atlanto-axial rotatory subluxation; that Dr. Connolly was "extremely vague" as to what the actual effects of the surgery in the future might be; and that the infant plaintiff has had a very good result and recovery. Hence, defendant argues that the award of $250,000 represents reasonable compensation in view of the evidence of plaintiff's recovery and the minimal effects that the spinal fusion surgery has had on her daily activities and enjoyment of life. Defendant indicates that plaintiff has excelled in school and as a musician; is a member in many school clubs and societies; works approximately fifteen hours per week; and volunteers at her church. Defendant alleges that plaintiff testified she only needs Tylenol on an occasional basis for pain or stiffness in her neck. Regarding plaintiff's fifty (50%) percent loss of range of motion, defendant alleges that there was no testimony as to the impact upon plaintiff, and defendant's expert, Dr. Raggio, testified that the rest of the spine would compensate for the loss of range of motion.

Further, defendant argues that plaintiff's motion to strike his affirmative defense of set off must be denied, as the prior settlement encompassed "neck and back injuries," and was entered into subsequent to plaintiff undergoing spinal fusion surgery. In the alternative, defendant seeks a hearing, pursuant to CPLR 4533-b, to determine what amount of the settlement was for the rotatory subluxation and spinal fusion, and the pain and suffering attributable thereto.

The Court of Appeals has held that in the context of a motion to set aside a verdict, "[it] is necessary to first conclude that there is simply 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" (*Ziecker v Orchard Park*, 75 NY2d 761 [1989], *quoting Cohen v Hallmark Cards*, 45 NY2d 493 [1978]; *see also Lolik v Big V Supermarkets*, 86 NY2d 744 [1995]; *Dellamonica v Carvel Corp.*, 1 AD3d 311 [2003]; *Brown v City*

*of New York*, 275 AD2d 726 [2000]). In contrast, if the evidence is such "that 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 v Hallmark Cards*, 45 NY2d 493, *supra*). In considering such a motion, the court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the non-moving party (*see Figueroa v Sliwowski*, 43 AD3d 858 [2007]).

Furthermore, the amount of damages to be awarded for personal injuries, including pain and suffering, is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Firmes v Chase Manhattan Automotive Fin. Corp.*, 50 AD3d 18 [2008]; *Taylor v Martorella*, 35 AD3d 722 [2006]; *Wallace v Stonehenge Group, Ltd.*, 33 AD3d 789 [2006]).

In view of the testimony and evidence adduced at the trial of this action, the Court finds that the verdict of the jury is amply supported by the weight of the evidence and was reached based upon a fair interpretation of the evidence. The Court finds that based upon, among other things, the testimony of the infant plaintiff, Dr. Connolly, and Dr. Raggio, the jury reached a rational conclusion with respect to the amount of damages awarded for past and future pain and suffering. While it is undisputed that the infant plaintiff has suffered a permanent loss of fifty (50%) percent of the range of motion in her cervical spine, the jury, based upon its verdict, found that this loss would have a *de minimis* impact on the infant plaintiff's daily activities and enjoyment of life in the future. As noted, the testimony revealed that the infant plaintiff has made an excellent recovery, is able to participate in numerous activities, and only occasionally has pain. Therefore, it cannot be said that the verdict was not supported by the evidence as a matter of law. Although Dr. Connolly testified as to the permanency and possible effects of the spinal fusion on the infant plaintiff going forward, he also testified that the infant plaintiff has had a good result. Defendant argues that Dr. Connolly was unable to precisely articulate what the actual effects of the surgery might be in the future. Although there may have been differing expert opinions at trial as to the impact of the infant plaintiff's injuries in the future, where conflicting evidence is presented, great deference is accorded to the credibility determinations made by the jury (*see Biello v Albany Mem. Hosp.*, 49 AD3d 1036 [2008]; *Perry v Wine & Roses, Inc.*, 40 AD3d 1299 [2007]; *Morgan v New York City Tr. Auth.*, 24 AD3d 639 [2005]).

Further, under the circumstances presented here, and considering the nature and extent of the injury sustained by the infant plaintiff, the Court finds that the jury's award for pain and suffering did not materially deviate from what would be considered reasonable compensation (*see* CPLR 5501 [c]; *see e.g. Kalmeta v Poelker*, 56 AD3d 429 [2008]; *Stylianou v Calabrese*, 297 AD2d 798 [2002]). Because pain and suffering awards are not subject to precise quantification, examination of comparable cases is necessary to determine whether the award materially deviated from reasonable compensation, bearing in mind that any given award depends on a unique set of facts and circumstances (*see Miller v Weisel*, 15 AD3d 458 [2005]; *Osiecki v Olympic Reg'l Dev. Auth.*, 256 AD2d 998 [1998]; *Karney v Arnot-Ogden Mem. Hosp.*, 251 AD2d 780 [1998], *lv denied* 92 NY2d 942 [1998]). An examination of similar cases has revealed a broad range of verdicts for injuries of this nature (*see Leonard v Unisys Corp.*, 238 AD2d 747 [1997]; *Sluzar v Nationwide Mut. Ins. Co.*, 223 AD2d 785 [1996]; *Lemberger v City of New York*, 211 AD2d 622 [1995]; *Diorio v Scala*, 183 AD2d 1065 [1992]; *Robinson v Ross*, 180 AD2d 859 [1992]; *Menga v Raquet*, 150 AD2d 434 [1989]), with the instant verdict falling in that range, albeit on the lower end. Thus, the Court finds that the jury's total award of $250,000 does not deviate materially from what would be reasonable compensation when examining comparable cases (*see e.g. Pinkowski v Fuller*, 5 AD3d 907 [2004]; *Adams v Georgian Motel Corp.*, 291 AD2d 760 [2002]; *Robinson v Ross*, 180 AD2d 859, *supra*). Of course, the Court is aware that none of the cases cited herein are factually identical to the case at bar. In view of the foregoing, that branch of plaintiff's motion to award damages for injuries going forward from the date of verdict and to increase the damages awarded to plaintiff for her injuries sustained up to and including the date of verdict, is **DENIED**.

Finally, with respect to defendant's affirmative defense of set off, the Court finds that defendant failed to prove that he was entitled to some set off, or that any of plaintiff's recovery against him was duplicative of her prior recovery. As discussed, plaintiff's prior recovery was based upon the injury to the joint capsule of C1-C2, among other injuries, while the recovery herein was based upon the medical malpractice that occurred on December 21, 1999, and the results thereof. Generally, a subsequent, or successive, tortfeasor does not have a right to contribution from a prior tortfeasor (*see Innvar v Liviu Schapira, M.D., P.C.*, 166 AD2d 632 [1990]). While the initial tortfeasor may well be liable for the entire damage to the plaintiff, including any aggravation of injuries caused by a successive tortfeasor, the successive tortfeasor is liable only for the separate injury or aggravation caused by his or her conduct (*see Ravo v Rogatnick*, 70

NY2d 305 [1987]; *Zillman v Meadowbrook Hosp.*, 45 AD2d 267 [1974]). As such, where the injuries caused by the original and successive tortfeasor are capable of being separated from or divided between one another, the successive tortfeasor, being liable only for the injuries that tortfeasor caused, has no right of contribution from the original tortfeasor (*see Cohen v N.Y. City Health & Hosps. Corp.*, 293 AD2d 702 [2002]; *Eick v Staten Is. Orthopaedic Assoc.*, 282 AD2d 496 [2001]; *Kalikas v Artale*, 124 AD2d 645 [1986]). In this case, defendant and the tortfeasor in the underlying motor vehicle accident were independent and successive tortfeasors, rather than joint or concurrent; therefore, defendant's malpractice that exacerbated the initial injury can be, and was, separately evaluated by a jury herein (*Zillman v Meadowbrook Hospital Co.*, 45 AD2d 267, *supra*). Therefore, the Court finds that defendant is not entitled to a set off.

Accordingly, that branch of the instant motion seeking to dismiss defendant's affirmative defense of set off is **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

**Dated: October 15, 2010**

**HON. JOSEPH FARNETI**
**Acting Justice Supreme Court**

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**