

Helm v Gwenn Lentine, M.D., P.C.

2011 NY Slip Op 31197(U)

May 4, 2011

Sup Ct, Richmond County

Docket Number: 100008/05

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 100008/05
Motion No.: 23 & 24**

ELIZABETH HELM,

Plaintiff

against

GWENN LENTINE, M.D., P.C.

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to vacate order/judgment and to set aside the verdict

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	
Order to Show Cause	2
Answering Affidavits	1
Replying Affidavits	1
Exhibits	Attached to Papers

The defendant's counsel has moved by two Orders to Show Cause after a jury verdict for an Order:

In Motion No. 23 directing the County Clerk of Richmond County to vacate the Judgment and Bill of Costs entered against defendant, Gwenn Lentine, M.D., P.C. on February 16, 2011, and staying enforcement of such judgment entered by the plaintiff pending a hearing and resolution of the Order to Show Cause; and

In Motion No. 24 for an Order:

A. Pursuant to CPLR §4404, setting aside the jury verdict of February 4, 2011 and directing judgment as a matter of law in favor of the defendant, Gwenn Lentine, M.D, P.C., or alternatively;

B. Pursuant to CPLR §4404 and/or CPLR §5501(c), directing a new trial on the issues of departure, proximate cause and damages in the interests of justice as plaintiff failed to present a prima facie case of malpractice; that the verdict was contrary to the weight of the evidence; based upon the conduct of plaintiff's counsel; and based upon defense counsel's motion for a mistrial;

C. For such other and further relief as this Court may deem just and proper.

This court having presided over the trial fo this matter and having heard all of the testimony and reviewed all of the evidence, and having heard the arguments of counsel for both sides, makes the following findings:

As to the application to stay enforcement of the filed judgment (Motion No. 23), the plaintiff's counsel stipulated not to enforce said judgment until it was adjudicated herein. As to the second Order to Show Cause (Motion No. 24), this court finds:

That five out of six jurors answered the following two questions in the affirmative:

Question 1. Did Gwenn Lentine, M.D. depart from accepted standards of care by causing a delay in the diagnosis of the plaintiff, Elizabeth Helm's ovarian cancer?

Answer: Yes

Question 2. If you find that Gwenn Lentine, M.D. caused a delay in the diagnosis of Elizabeth Helm's ovarian cancer, was that a substantial factor in causing additional injuries from that which she would have sustained had it been diagnosed sooner?

Answer: Yes

That after finding the defendant liable, five out of six jurors answered the third question as follows:

Question 3. What amount of money, if any, do you, the jury award the plaintiff, Elizabeth Helm, for the additional injuries she sustained as a result of the delay in diagnosing her ovarian cancer?

Amount of award for additional past pain and suffering:	\$ 1 million
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Amount of award for additional past lost wages:	\$ 250,000
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If you decide not to make an award write the word “NONE.”

This court finds that the jury verdict finding liability and proximate cause is not contrary to the weight of the evidence, nor is it against the interests of justice.¹ A verdict is not against the weight of the evidence unless it is palpably wrong and there is no fair interpretation of the evidence to support the jury’s conclusion.² In determining whether a jury verdict is against the weight of the evidence, the relevant standard is whether the evidence so preponderated in favor of the losing party that the verdict could not have been reached on any fair interpretation of the evidence.³

This court does not find any reason to set aside the verdict of the jury based upon the conduct of the plaintiff’s counsel or for any other reason. Moreover, this court does not find that the jury verdict as to damages of \$1,000,000 to be excessive as to additional past pain and suffering.

This court finds that the amount of past lost wages of \$250,000 is consistent with the testimony and exhibits of plaintiff’s average yearly wages of \$50,000 per year gross before the operation, and her subsequent disability. Projecting that \$50,000 for five years of her projected work life expectancy is consistent with the evidence presented. However, the parties have agreed to deduct from any award for damages 30%, representing deductions for Federal, New York State and New York City income taxes, Social Security, disability and workers’ compensation contributions.

¹ CPLR §4404(a).

² *Sperdudi v. Mezger*, 283 AD2d 1018 (4th Dept. 2001).

³ *Suhr v. Long Beach Medical Center*, 35 AD3d 440 (2nd Dept. 2006).

In addition, any income earned from wages, pensions, disability or social security would further reduce the award for past lost wages from 2002-2006.

Consequently, the following calculations to reduce that award for past lost wages are as follows, based upon the stipulation of counsel and the plaintiff's tax returns for 2002-2006, plus her statement from the Social Security Administration:

Past Lost Wages	\$250,000
30% Income Tax Deduction, Disability, Social Security, Workers' Compensation	<u>- 75,000</u>
Net	\$175,000

Offsets

2002

Wages	\$29,940	
Pension	7,682	
NYS Disability	<u>4,165</u>	
Total		\$41,787

2003

Wages	\$ 750	
Pension	<u>15,364</u>	
Total		\$16,114

2004

Wages	\$ 0	
Pension	15,364	
Social Security	<u>11,736</u>	
Total		\$27,100

2005

Wages	\$ 3,650	
Pension	15,364	
Social Security	<u>12,048</u>	
Total		\$31,062

2006

Wages	\$ 3,801	
Pension	15,364	
Social Security	<u>12,551</u>	
Total		<u>\$31,716</u>
Total Offsets		<u>-\$147,779</u>
Balance Due Plaintiff for Past Lost Wages		\$ 39,721

Accordingly, it is hereby:

ORDERED, that the judgment filed by the plaintiff shall be modified in accordance with this decision; and it is further

ORDERED, that the defendant's motion to set aside the jury verdict of February 4, 2011 and to order a new trial or to reduce that judgment is denied in its entirety, except as to the recalculation for the lost wages award; and it is further

ORDERED, that a money judgment in the sum of \$1,000,000 for additional pain and suffering shall be entered in favor of the plaintiff and against the defendant; and it is further

ORDERED, that an additional money judgment in the sum of \$39,721 be entered in favor of the plaintiff and against the defendant for past lost wages.

Settle judgment on notice.

ENTER,

DATED: May 4, 2011

Joseph J. Maltese
Justice of the Supreme Court