

Messina v Staten Is. Univ. Hosp.
2012 NY Slip Op 33636(U)
May 24, 2012
Sup Ct, Richmond County
Docket Number: 104742/07
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:104742/07
Motion No.:005**

**ROBERT MESSINA and
CAROL MESSINA,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

STATEN ISLAND UNIVERSITY HOSPITAL,

Defendant

The following items were considered in the review of the following motion to set aside the jury verdict.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support	2
Answering Affidavits	3
Replying Affidavits	4
Supplemental Affirmation in Opposition	5
Supplemental Affirmation in Reply	6
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves to set aside the jury verdict in this action pursuant to CPLR §§ 4401, 4404 and 5501(c), and upon the setting aside of the jury verdict dismissing the plaintiff's complaint. Alternatively, the defendant seeks to vacate the jury's award for future living expenses and/or granting a new trial on liability and/or damages. The defendant's motion is denied.

This case was a nursing malpractice case based on the care rendered to Robert Messina, the plaintiff by the staff of the defendant, Staten Island University Hospital. After fourteen days of trial the jury rendered a plaintiff's verdict apportioning 75% liability to Staten Island University Hospital and 25% to Golden Gate Nursing Home, which was not a party to this action.

At the close of plaintiff's case the defendant moved to strike the testimony of Dr. Johnson-Arbor, a wound care expert, and Dr. Charles Kincaid, a life care planner. During trial this court denied the defendant's motion to preclude Dr. Kincaid's testimony and dismiss any of plaintiff's claims regarding lost wages, past or future. The court found that the plaintiff had work history that would have continued had the plaintiff not been rendered incapable forever working again. Therefore, the claims for lost wages were credible and that a reasonable jury could rely on the testimony of Dr. Kincaid to award lost wages. On this post-trial motion this court finds no basis to deviate from this original ruling.

During the trial this court reserved granting summary judgment to the defendant, Nurse Karen Farid based on the testimony of plaintiffs' expert, Dr. Johnson-Arbor. However, at the conclusion of the trial, this court dismissed Nurse Karen Farid as an individually named defendant because it was clear that she was an employee of the defendant, Staten Island University Hospital, and not an independent nurse practitioner working at the hospital. Therefore, her employer, Staten Island University Hospital, is liable for her actions or inactions during the course of her employment.

On this post-trial motion the defendant argues that the testimony of Dr. Johnson-Arbor is insufficient to sustain a malpractice verdict against the defendant. The discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, because in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable verdict. A jury verdict should be set aside as against the weight of the evidence only if the jury could not have reached its verdict on any fair interpretation of the evidence.¹ Great deference is accorded to the fact-finding functions of the jury, and determinations regarding credibility witnesses are for the fact finders, who had the opportunity to see and hear the witnesses.² In determining whether a jury verdict is against the

¹ *Won Sok Kim v. New York City Transit Authority*, 29 AD3d 984, [2d Dept 2006].

² *Hedaya Home Fashions, Inc. v. Am. Motorists Ins. Co.*, 12 AD3d 639, [2d Dept 2004].

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

Here, the record indicates that Dr. Johnson-Arbor, the plaintiff's expert, testified as to several departures by the employees of Staten Island University Hospital, which a reasonable jury could have found caused Robert Messina's decubitus ulcerated bedsore injuries. First, Dr. Johnson-Arbor testified that the bed Robert Messina was given had a maximum use weight of 350 pounds when he weighed approximately 375 pounds. Additionally, there were at least two instances where a consultation was ordered with Nurse Farid, the wound care specialist, which were not responded to for several days resulting in harm to the patient. Consequently, given the high threshold to set aside a jury verdict the defendant's motion must be denied.

At the beginning of the trial, it was disclosed that the plaintiffs were subject to a federal ERISA medical lien in the sum of approximately \$1,300,000. After a conference call with counsel for both sides and the ERISA carrier representative, it was represented that the lien would be reduced approximately \$900,000. But the issue of medical expenses could not be ruled upon by either the jury or this court because the lien was a federal ERISA lien and the carrier was not subject to a state court ruling. Consequently, counsel for the plaintiff and the remaining defendants agreed that past medical expenses would not be presented at the trial and that the balance of the reduced ERISA lien would be added to any verdict the jury may render for such past medical expenses.

The jury rendered a verdict in the sum of:

Past pain and suffering	\$1,000,000.00
Future pain and suffering	\$1,992,000.00
(The jury awarded \$120,000.00/yr for 16.6. yrs)	
Lost earnings	\$ 162,000.00
(The jury awarded \$45,000.00/yr for 3.6 yrs)	

³ *Suhr v. Long Beach Medical Center*, 35 AD3d 440, [2d Dept 2006].

Future living expenses (The jury awarded \$132,153.50/yr for 16.6. yrs)	\$2,193,748.10
Carol Messina loss of services	\$ 50,000.00
Equipment expenses (by stipulation)	<u>\$ 5,000.00</u>
For a total of	\$5,402,748.10

Pursuant to the stipulation of counsel the ERISA lien for past medical expenses was approximately \$900,000. Consequently, the plaintiff is entitled to a judgment in the sum of \$5,402,748.10, with costs and disbursements, plus interest from July 1, 2011 and a judgment in the reduced amount of the ERISA lien in the approximate sum of \$900,000.00.

Despite numerous attempts to resolve this matter, post verdict, no alternative resolution has been forthcoming.

Accordingly, it is hereby:

ORDERED, that Staten Island University Hospital's motion to set aside the jury verdict and alternatively, to vacate the jury's award for future living expenses and/or granting a new trial on liability and/or damages is denied; and it is further

ORDERED, that the plaintiff is entitled to a money judgment in the sum of \$5,402,748.10, plus costs, disbursements and interest from July 1, 2011, and a judgment for the ERISA lien in the approximate amount of \$900,000.00.

Settle judgment on notice.

DATED: May 24, 2012

Joseph J. Maltese
Justice of the Supreme Court