

**Morillo v Pereyra**

2013 NY Slip Op 31151(U)

May 23, 2013

Supreme Court, New York County

Docket Number: 109084/2007

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER  
*Justice*

PART 15

Index Number : 109084/2007  
MORILLO, NANCY  
vs.  
PEREYRA, FANY D.D.S.  
SEQUENCE NUMBER : 005  
VACATE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 1, 2  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 3, 4  
Replying Affidavits \_\_\_\_\_ | No(s) 5, 6

Upon the foregoing papers, it is ordered that this motion is

**FILED**  
MAY 28 2013  
NEW YORK  
COUNTY CLERKS OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 5/23/13

  
\_\_\_\_\_  
HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED .....  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
NANCY MORILLO, as temporary administrator of  
DIVA MORILLO,

Plaintiff,

Index No.  
109804/07

Mot. Seq. No.: 005

- against -

Decision After  
Trial

FANY PEREYRA, DDS, ST. VINCENT'S MIDTOWN  
HOSPITAL and ST. CLARE'S HOSPITAL and  
HEALTH CENTER,

Defendants. MAY 28 2013

**FILED**  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Diva Morillo ("Plaintiff") commenced the instant malpractice action against defendants Fanny Pereyra, DDS s/h/a Fany Pereyra, DDS ("Dr. Pereyra") and St. Vincent's Midtown Hospital f/k/a St. Clare's Hospital and Health Center ("SVMH") (collectively, "Defendants"). Plaintiff's action concerned the alleged negligent performance of a dental procedure in May 2005, resulting in injuries to Plaintiff.

A trial before a jury was conducted from January 28, 2013 to February 8, 2013. The jury returned a verdict on February 8, 2013.

Defendants now move for an Order (1) pursuant to CPLR §4404(a), vacating the jury's verdict to Plaintiff and directing judgment notwithstanding the verdict ("JNOV") in favor of Defendants on the basis that the jury's findings are not supported by sufficient evidence as a matter of law; (2) in the alternative, pursuant to CPLR §4404(a), vacating the jury's verdict to Plaintiff, and remanding the case for

a trial, on the basis that the jury's findings are against the weight of the evidence; and (3) pursuant to CPLR §5501(c), vacating the damages award, or direct a remittitur, on the basis that the jury's damages verdict of \$3 million for past pain and suffering deviates materially from reasonable compensation and is excessive under the circumstances.

Plaintiff cross moves for an Order pursuant to CPLR §4404(a) and/or CPLR §5501(c) setting aside the jury's verdict with respect to damages herein as insufficient and against the weight of the evidence with respect to the jury's failure to award damages in the category of past and future medical expenses, custodial care and rehabilitation and in the category of future pain and suffering, and for additur with respect to the same. In the alternative, Plaintiff seeks an Order setting aside the jury's verdict with respect to interrogatories 1, 5, 7, and 8 of the verdict sheet as against the weight of the evidence, and directing a new trial on the issue of liability only, in the event that the Court sets aside the jury's finding of a departure by Dr. Pereyra based on the information she provided in consulting with Plaintiff's medical doctor Dr. Chun (jury interrogatories 3 and 4 of the verdict sheet)..

Defendants, in support of their motion, contend that a directed verdict in their favor is warranted on the basis that the evidence contradicts and invalidates the jury's findings on Questions 3 and 4 on the Verdict Sheet.

Plaintiff, in her cross motion, contends the jury's damages award is against the weight of evidence based on its failure to make any award for future pain and suffering or in the category of medical, custodial, or rehabilitated expenses.

Oral argument was held on April 16, 2013.

CPLR §4404(a) states, in relevant part:

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 . . . where the verdict is contrary to the weight of the evidence . . .

Pursuant to CPLR §4404(a), a trial court has discretion to set aside a verdict which is the product of substantial confusion among the jurors and grant a new trial. Confusion is shown when the answers to interrogatories on the verdict's sheet are internally inconsistent. *See Vera v. Bielmotatik Corp.*, 199 A.D. 2d 132, 133 [1<sup>st</sup> Dept 1993] ("The fact that a general verdict may have been rendered for the primary defendants is wholly inconsistent with the jury's detailed findings of liability and damages. Such internal inconsistency can only be remedied upon further consideration by the jury (obviously no longer possible) or by a new trial."). A verdict apportioning liability to a party even though the same jury has found that party's negligence was not a substantial factor in causing the accident is internally inconsistent. *DePasquale v. Morbark Industries, Inc.*, 254 A.D. 2d 450, 450 [2d Dept 1998]).

Furthermore, "Where there is a substantial likelihood that the jury's verdict results from a trade off on a finding of liability, in return for a compromise on damages, the retrial should be on all issues." (*Farmer v. A&T Bus Co., Inc.*, 96 AD2d 783, 783 [1st Dept. 1983]). *See also Mitchell v. Port of Authority of New York and New Jersey*, 65 A.D. 3d 943, 944 [1<sup>st</sup> Dept 2009]).

The jury answered the Verdict Sheet as follows:

Question "1." Was extracting 8 of Diva Morillo's teeth using four carpules of 2% lidocaine with 1:100,000 epinephrine a departure from good and accepted dental practice on May 13, 2005?

Answer: No. (5 out of 6 jurors)

IF YOUR ANSWER TO QUESTION "1" IS "NO," GO TO QUESTION "3."

Question "3." Did the defendant, Fanny Pereyra, DDS depart from good and accepted dental practice with respect to the information she provided to Dr. Chun on May 5, 2005 in seeking a consult?

Answer: Yes. (6 out of 6 jurors)

Question "4." Was this departure a substantial factor in bringing about

inquiry to Diva Morillo?

Answer: Yes. (6 out of 6 jurors)

Question "5." Did the defendant, Fanney Pereyra, DDS depart from good and accepted dental practice in not monitoring Diva Morillo's blood pressure before, during or after the dental procedure she performed on may 13, 2005?

Answer: No. (5 out of 6 jurors)

IF YOUR ANSWER IS "YES," GO TO QUESTION "7."

Question "7." Did the defendants before obtaining Ms. Morillo's consent to the procedure and use of medication provide appropriate information?

Answer: No. (6 out of 6 jurors)

Question "8." Would a reasonable prudent person in plaintiff's position at the time consent was given have given such consent if given appropriate information?

Answer. Yes (5 out of 6 jurors)

IF YOUR ANSWER IS YES, GO TO DIRECTION ON PAGE 10, BEFORE QUESTION "10."

Question "10." State Separately the amount, if any, awarded for the following items of damages from May 13, 2005 up to the date of your verdict:

- (A) Medical expenses                    \$ NONE
- (B) Custodial care                        \$ NONE
- (C) Rehabilitation Services            \$ NONE

(D) Pain and Suffering \$3,000,000.00

IF YOU DECIDE NOT TO MAKE AN AWARD FOR ANY ITEM, YOU WILL INSERT THE WORD "NONE."

(6 out of 6 jurors)

QUESTION "11." State the amount award if any, for:

future pain and suffering: \$ NONE

(a) state the number of years the future pain and suffering will occur \_\_\_\_ years

If you decide not to make an award as [sic] the any above items, you will insert the word "none" as to that item.

(6 out of 6 jurors)

QUESTION "12." For each item of economic damages, if any, you find will be incurred in the future state the following:

(A) Medical expenses

The annual amount in current dollars \$ NONE

The number of years during which such Expenses will be incurred \_\_\_\_\_ years

(B) Custodial care

The annual amount in current dollars \$ NONE

The number of years during which such Expenses will be incurred \_\_\_\_\_ years

(C) Rehabilitation Services

The annual amount in current dollars \$ NONE

The number of years during which such Expenses will be incurred \_\_\_\_\_ years

IF YOU DECIDE NOT TO MAKE AN AWARD FOR ANY ITEM, YOU WILL INSERT THE WORD "NONE."

(6 out of 6 jurors)

There are internal inconsistencies in the jury's findings in the Verdict Sheet with respect to both liability and damages. After having heard all the evidence presented at trial and due deliberation, the jury found no departure with respect to the dental procedure performed on May 13, 2005, that was casually related to the alleged injuries (Question 2). The only departure that the jury found was with respect to the information given by Dr. Pereyra to Dr. Chun as part of the request for medical clearance for the dental extractions (Question 3). Based on this departure, the jury awarded \$3 million for past pain and suffering but did not award any damages for future pain and suffering and for economic damages (including medical expenses, custodial care, and rehabilitation services). Such an award is internally inconsistent and against the weight of the evidence in light of the fact that the jury found that Dr. Pereyra appropriately performed the dental extractions and that Dr. Chun testified that she would still have given clearance even if she knew what amount of epinephrine was being used. Further, there was evidence of extensive economic damages if the jury concluded that Plaintiff's aortic dissection and incapacity was caused by Dr. Pereyra's negligence. Yet, the jury chose not to award economic damages. The inconsistencies in the jury's award with respect to both questions of liability and damages strongly indicate an impermissible compromise among the jury, and warrants setting aside the verdict and a new trial.

Wherefore it is hereby

ORDERED that defendants' motion is granted to the extent provided herein; and it is further

ORDERED that plaintiff's cross motion is granted to the extent provided herein; and it is further

ORDERED that the verdict rendered on February 8, 2013 is set aside and a new trial is ordered; and it is further

ORDERED that a copy of this order with notice of entry shall be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to set this matter on the trial calendar for a new trial.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 5/23/13



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EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER

**FILED**  
MAY 28 2013  
NEW YORK  
COUNTY CLERK'S OFFICE