

**Freilicher v Parry**

2014 NY Slip Op 31935(U)

July 22, 2014

Supreme Court, Suffolk County

Docket Number: 22468-2003

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

***P R E S E N T :***

Hon. PETER H. MAYER  
Justice of the Supreme Court

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	:	
Defendant(s).	:	
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Upon the reading and filing of the following papers in this matter: (1) Plaintiff's on-the-record application on October 19, 2011, as well as Memorandum of Law, dated November 11, 2011, and supporting papers; (2) Defendant Parry's on-the-record application on October 19, 2011, as well as Memorandum of Law, dated December 6, 2011, and supporting papers; (3) Defendant McKenna's on-the-record application on October 19, 2011, as well as Memorandum of Law, dated December 9, 2011, and supporting papers; (4) all other supporting documents; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by the defendants Steven Parry, M.D. and Brian McKenna, M.D. to set aside the verdict as reported by the jury on October 19, 2011 pursuant to CPLR § 4404(a) is decided as follows; and it is further

**ORDERED** that the motion by the plaintiffs for additur on the grounds that the amounts awarded for past pain and suffering, future pain and suffering, medications, medical care, lab work and loss of earnings constitute unreasonable compensation is decided as follows.

The defendants, Steven Parry MD and Brian Mckenna MD have moved to set aside the verdict in the above mentioned case pursuant to CPLR 4404(a). The claim against the defendants in the case concern allegations that they failed to diagnose and treat an HSV-2 infection during the course of the plaintiff Virginia Freilicher's pregnancy with the infant plaintiff, Nina Freilicher. This, according to plaintiffs, caused the infant Nina, born March 13, 2001, to develop herpes encephalitis some two weeks after her birth, resulting in brain damage.

The plaintiffs claimed that Mrs. Freilicher was not infected with the herpes virus (sero-negative), until at least the last trimester of pregnancy which left her without anti-bodies to HSV-2, which would have provided a measure of protection against transmission to the infant during delivery. The plaintiff further claimed that the virus was transmitted to the infant during the course of vaginal delivery. The jury returned a verdict in favor of the plaintiff's and against both defendants on the question of their failure to counsel the parents regarding the transmission of herpes during the pregnancy. The jury apportioned the liability on this failure to counsel theory at 55% for Dr. Parry and 45% for Dr. Mckenna. The jury returned a defendant's verdict in favor of Dr. Gloria Escamilla, M.D., who is an obstetrician-gynecologist who is a partner of Dr. Mckenna and who delivered Nina. The jury returned defendant's verdicts on a number of other alleged departures submitted to them.

Mrs. Freilicher first came to Dr. Mckenna in October of 1998 when she was pregnant with her daughter Virginia. At the time, she was 34 years old and had 3 children. She gave what was termed a questionable history of a single lesion and a positive culture for Herpes Simplex Type 1 (HSV-1) in 1997. According to Dr. Mckenna, Mrs. Freilicher was entered into the "herpes surveillance program" in the practice. She was also told, according to Dr. Mckenna, that she would be monitored very carefully and if she had no lesions, chances were very low that there would be any problem. She proceeded with a rather uneventful pregnancy, exhibited no signs or symptoms of a herpes infection and gave birth to Virginia on May 12, 1999.

Dr. Steven Parry was a family practitioner who treated both Mr. And Mrs. Freilicher. The trial evidence revealed that Robert Freilicher had a consultation with Dr. Parry on July 23, 1998 regarding sores and cuts on his penis. Dr. Parry diagnosed the condition as contact dermatitis, but advised him that the condition might be herpes. In December of 1999, during an appointment Dr. Parry told Robert that he now thought he had contracted genital herpes (HSV-II). Immediately subsequent to this finding, Mrs. Freilicher requested and received an appointment with her gynecologist, Dr. Mckenna, an appointment attended by both Mr. And Mrs. Freilicher. According to the office chart and Dr. McKenna's testimony, an "extensive consultation" took place concerning the subject of genital herpes and human papilloma virus(HPV), since Virginia had recently had a positive culture for HPV. Dr. McKenna testified that he gave the couple the "herpes story" explaining the nature of the herpes virus and the various means by which it can be transmitted. He also advised the couple of what to expect in the event of a subsequent pregnancy and that there was to be no intercourse upon Virginia becoming pregnant. Further, he testified that the only way to prevent transmission from a husband with a herpes infection to a sero-negative spouse would be to have

no exposure to the virus-meaning no intercourse.

Robert Freilicher testified that at the time of the diagnosis of genital herpes in December of 1999, Dr. Parry told him that Virginia probably had herpes already, but in case she did not, advised him to refrain from intercourse during an outbreak. He also stated that Dr. McKenna told him that he could be treated if he had an outbreak and that he said the same thing to Virginia and that he understood that sex during an outbreak could result in transmission of the virus.

Dr. McKenna also testified that during the pregnancy with Nina, Mrs. Freilicher was again placed in the "herpes surveillance" group and that she continued to be managed as a patient who was at risk for herpes throughout the pregnancy. There was no evidence during the pregnancy that she was infected with herpes and never manifested any outbreak. On March 12, 2001, Mrs. Freilicher was examined by Dr. McKenna and found to have no evidence of any outbreak or "podrome" of herpes and thus scheduled her for an induction on the following day as she was experiencing discomfort from the pregnancy and complaining of back pain. On March 13, 2001, labor was induced, there was no evidence of herpetic lesions, and Nina was delivered without complications. She was admitted approximately two weeks after her birth to Stony Brook Hospital with a fever of unknown origin and ultimately diagnosed with herpes encephalitis.

A herpes culture taken from Mrs. Freilicher on May 17, 2001 was negative, and she was not diagnosed with HSV-2 until 2003.

Mr. Freilicher was seen by Dr. Parry for a herpes outbreak on Feb. 24, 2001. Dr. McKenna was unaware that he had an outbreak of herpes during the third trimester. He testified that had he known that Robert had an outbreak and had unprotected sex, it might have changed his treatment plan of Virginia. Specifically, he would have considered delivering Nina by C-section.

Mr. Freilicher insisted that there was never any discussion of abstention or the use of condoms during the December 1999 consultation or any of the prenatal visits, and that the only thing they were told was to avoid sex during an outbreak and while admitting that he had an outbreak in February of 2001, only became aware of it shortly after having sex with his wife.

As stated, both Mr. And Mrs. Freilicher maintained that their understanding of the disease was that transmission of the herpes virus could only occur if they had unprotected intercourse while he had a visible lesion. Further both testified that there were two, and only two discussions regarding herpes with Dr. McKenna, the first in December of 1999 and the second at some point during the pregnancy with Nina. Robert and Virginia also testified that Dr. McKenna gave Robert an antiviral called Famvir used to suppress but not cure the herpes virus so that the potential for outbreaks is curtailed by its use. Both Robert and Virginia testified that the advice they received from Dr. McKenna was to avoid intercourse during an active lesion and that there was never any conversation regarding condoms, abstention, or viral shedding in the absence of lesions. (There was expert testimony that transmission of the virus can occur in the absence of lesions by the process of "viral shedding"). Virginia testified that she never had any conversation with Dr. Parry regarding herpes even though she was his patient as was Nina once she became pregnant.

She knew that Robert had an outbreak in the third trimester, and believes he saw Dr. Parry for it and was given medication. She admits they had unprotected sex during the pregnancy. She testified that at the end of the last trimester, when she was eager for the pregnancy to be over, Dr. McKenna told Virginia to go home, have sex with her husband, and bring on contractions the “old fashioned way.” There was testimony from Dr. McKenna that prostaglandin in semen does help bring on contractions, and sexual intercourse is sometimes recommended for this purpose, but he would not have told Virginia and Robert to do this.

It is undisputed that the words “extensive consultation” appear in Dr. McKenna’s chart regarding the December 9, 1999 visit by the Freilicher’s. It is also without dispute that the Contemporary Women’s Care chart (Dr. McKenna) does not contain any further reference to herpes or Dr. McKenna’s recitation of the “herpes story” or the “herpes surveillance program.” Both Robert and Virginia denied receiving the “herpes story” as testified to by Dr. McKenna. The ACOG (American College of Obstetrics and Gynecology) sheet for the Nina pregnancy has no mention that Robert was diagnosed with HSV-2 notwithstanding the fact that Robert was diagnosed on December 3, 1999, well before the Nina pregnancy. The December 9, 1999 visit does contain the statement “husband has s/s (signs and systems) of herpes”. Notably, the chart does not contain any reference to “abstention” from sexual relations except for an entry on November 19, 1999 stating the Virginia should abstain from sex for two weeks for reasons unrelated to herpes.

Both defendants and their experts acknowledged that counseling regarding abstinence was a necessary part of medical care for this disease, and critical to the prevention of transmission to the uninfected partner and the unborn baby.

#### THE LAW

The power to set aside a verdict and order a new trial is an inherent one, which is codified in CPLR 4404(a) (see *McCarty v. Port of N.Y. Authority*, 21 AD2d 125, 127, 248 NYS2d 713; *Siegel NY Practice*, Sec. 406). The statute provides that a Court may order a new trial “when the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree.”

Whether a jury verdict is against the weight of the evidence is essentially a discretionary and factual determination (*Nicastro v. Park*, 113 AD2d 129, 495 NYS2d 184 [1985]). This question is distinguished from the assessment of whether a jury verdict, as a matter of law, is supported by sufficient evidence (*Cohen v. Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282). 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 inferences which could lead rational people to the conclusion reached by the jury, on the basis of the evidence presented at trial (*Cohen v. Hallmark Cards*, *supra*). The result of such a determination leads to a directed verdict terminating the action.

Setting aside a verdict as against the weight of the evidence requires a discretionary balancing of many factors. The power to set aside a jury verdict and order a new trial must be exercised with considerable caution as a successful litigant is entitled to the benefits of a favorable verdict. Fact finding is, in general, the province of the jury, not the trial court (*Nicastro v. Park*, *supra*; *Ellis v. Hoelzel*, 57 AD2d

968, 394 NYS2d 91). Thus, it has been stated that a jury verdict should not be set aside unless “the jury could not have reached the verdict on any fair interpretation of the evidence.” (*Cubeta v. York International*, 30 AD3d 557, 818 NYS2d 136 [2006]). Essentially, the “fair interpretation” standard mandates that the verdict be given great deference unless it appears that, upon review of the trial record, the verdict was not a fair reflection of the evidence presented. (*Nicastro v. Park* 113 AD2d 129, 495 NYS2d 184[1985]).

The defendants argue that they are entitled to judgment as a matter of law pursuant to CPLR 4404 or, in the alternative, a set aside of the verdict with a directive that the case be retried solely on the failure to counsel theory. The standard to determine whether the verdict should be set aside with entry of judgment for the defendants is for the Court to determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury. Here, the Court finds that there was sufficient evidence such that a rational person could conclude that the defendants failed to counsel the plaintiff as to the transmission of the virus and the proper methods of preventing same during the pregnancy( a standard that *all* experts for both sides agreed was required) and that such failure led to Nina contracting the virus during vaginal delivery.

The more difficult question is whether the Court should set aside the verdict and set the matter for a new trial based on the argument that the jury could not have reached this verdict on any fair interpretation of the evidence.

#### DR. PARRY

Robert Freilicher testified that he had previously been a patient of Dr. Parry’s father and when his son, Dr. Steven Parry, came on he began seeing him. In July 1998, Robert came to Dr. Parry for cuts on his penis. Dr. Parry told Robert he believed it was contact dermatitis but it could be herpes and he treated it as if it were contact dermatitis. Dr. Parry also told Robert that since his wife had a yeast infection, the cream or medication she was using for that could be causing the problem. Robert testified that there was no conversation with Dr. Parry regarding transmission of herpes, condoms or abstinence. Further, he stated there was no conversation as to what to do if Virginia got pregnant. He stated that he didn’t know much about transmission and that all he knew was to avoid intercourse during an outbreak. He met again with Dr. Parry in December 1999 and this time he was told by Dr. Parry that he thought it was herpes. When asked if his wife can get it, Dr. Parry told him that she probably already had it. Robert said there was no discussion of condoms or abstention and no conversation about what to do if Virginia got pregnant.

After this visit ,Robert told Virginia everything and upon doing so, Virginia immediately called for an appointment with Dr. McKenna, which occurred on December 9, 1999. Robert and Virginia attended this appointment at which time there was a discussion regarding HPV as this virus put a woman at greater risk of developing cervical cancer. A decision was made to monitor her every 6 months. The discussion also included the question of whether Robert could get HPV and, upon inquiry, was told not to worry. Regarding herpes, Dr. McKenna told them it would recur and that he must refrain from sex during an outbreak. He said there was no conversation regarding condoms or abstinence or risks to the fetus if Virginia should get pregnant. He testified that he went with Virginia on most of her visits with Dr. McKenna after she got pregnant. In the last month of pregnancy, there was a reference to Robert’s “friction burns” to which, according to Robert, Dr. McKenna made a joke stating “friction burns, how fast were you going?” It was

at this time that Dr. McKenna gave some antiviral drugs as samples in case he had another outbreak. Robert testified that there was no conversation with Dr. McKenna regarding transmission to Virginia or about abstinence or condoms.

Robert stated that he called Dr. Parry in February 2001 regarding marks on his penis and Dr. Parry prescribed medication. He then saw Dr. Parry in his office and at no time did Dr. Parry speak to him about the pregnancy or Virginia, nor had he spoken to Robert about any of these subjects on any prior meetings. At this appointment, Dr. Parry did not conduct any physical examination. Robert testified that the diagnosis given him in July 1998 regarding the cuts on his penis was contact dermatitis and there was never any mention of herpes. He was given medication and the irritation cleared up. When Dr. Parry diagnosed him in December of 1999 with genital herpes, he never said it couldn't be cured or that was with him for life or risks of transmission when having intercourse without a condom. Once again, he stated that he was not told anything about what to do in case of pregnancy and, at this meeting, did not ask permission to speak to Virginia. Dr. Parry testified that he did ask for such permission which was refused. It is, however, undisputed, that Robert told his wife of his diagnosis as Virginia immediately sought an appointment with Dr. McKenna to discuss a number of issues, including this most recent diagnosis. Dr. Parry also testified that if a pregnant woman were to get a herpes 2 infection in the third trimester of pregnancy, the risk of transmission to the infant would be high. There was testimony from Dr. Parry that Robert was a very nice man, a very good patient, very compliant and very inquisitive. Although Dr. Parry agreed that he had an obligation to know whether Virginia was or was not infected with the herpes virus during the pregnancy with Nina, he didn't do so but relied instead on the couple remaining abstinent. Although Dr. Parry stated that he counseled Robert numerous times on abstinence, there is no note in the chart with respect to this and Robert denied ever receiving such counseling.

#### DR. McKENNA

Dr. McKenna stated that he's been giving the "herpes story" to patients since 1998 and it has never changed. He said he instructed Virginia about transmission and that there's no perfect solution absent no contact, that condoms are not perfect, and that he would watch and do a C-section at time of delivery if she had a lesion. Robert and Virginia denied such counseling. Dr. McKenna acknowledged that he gave Robert famvir and told him to get a regular prescription from his Dr. He stated that he told them in December that the only way to make sure that Virginia doesn't get infected is to abstain. Robert and Virginia both denied this conversation and there is no documentation in the chart. He acknowledged that having unprotected sex in the last trimester where the husband is infected is "very risky." (to the fetus) All experts agreed that if a woman gets infected far enough in advance of pregnancy, then antibodies are produced which will provide protection to the fetus upon vaginal delivery. The danger of acquiring the infection in the last trimester, which was the plaintiff's claim in this case, means that the mother will not have sufficient time to develop protective antibodies, and thus the risk of transmission to the fetus upon vaginal delivery is "very high." All experts also agreed that a significantly high percentage of all infants who contracted herpes encephalitis acquired it during vaginal delivery from a mother who was infected but without antibodies to protect the fetus. It was also agreed by experts that the infection can pass from mother to infant without any evidence at time of delivery of an outbreak or "podrome" as the mother may have acquired the virus by "viral shedding" of cells from the infected partner. Even Dr. McKenna stated that there is an 85 % chance of contracting HSV-2 from the birth canal, and less than a 15% chance of it occurring due to touch. He stated

there was no standard of care to prevent asymptomatic transmission of HSV-2 in 2000-2001. He testified that he had no way of knowing Virginia's status as to whether she was infected or not and speculated that it could have occurred at any time during Robert and Virginia's relationship.

Defense expert Dr. Raucher disagreed with Dr. McKenna in that it was his opinion that most babies with neonatal herpes got it from their mother's birth canal in at least 90 to 95 % of the cases.

The defense position that Robert Freilicher was a person who was not a compliant patient or showed an unwillingness to heed medical advice was argued in support of the proposition that even if the jury found the failure to counsel claim viable, it would be sheer speculation to conclude that such a departure would proximately cause this injury if the patient receiving the advice was not a person who routinely obeyed his physician's advice. The trial record, however, contains ample testimony, from the defendants themselves, that Robert Freilicher was a compliant, responsive, and inquisitive patient. This evidence was corroborated by the sequence of events that occurred after Robert learned, for sure, of the fact that he indeed had the herpes virus. He clearly told his wife as soon as possible after this diagnosis as an appointment with Dr. McKenna was arranged by Virginia Freilicher immediately which Robert Freilicher attended and in which the HPV as well as the herpes virus was discussed. This evidence tends to suggest care, concern, and a desire to learn about health matters that may affect them jointly. The evidence that condoms are only partially effective, that the studies on abstinence show that in most cases it doesn't work is equally unavailing as even defense experts agreed that babies who contract herpes encephalitis, in overwhelming numbers, get it through the mother's birth canal during vaginal delivery. It is highly important, therefore, that couples get counseled particularly about abstinence, throughout the pregnancy. The evidence also showed that baby Nina contracted the disease within the margin of error of the incubation period, that the Freilicher's had unprotected sex during the third trimester, that Robert had what appeared to be an outbreak(although Robert denies knowing of the outbreak until after the sexual encounter), during the relevant time period in which the risk of transmission is highest. Virginia also testified that Dr. McKenna told her to bring about contractions the old fashioned way, by going home and having sex, a method which seems to have some scientific validity according to Dr. McKenna.

#### CONCLUSION

There were sharp questions of fact presented on the claim made under the failure to counsel theory. It is undisputed that Virginia was never counseled on the subject of herpes, transmission, viral shedding, abstinence or use of condoms by Dr. Parry as he felt he was not empowered to do so without the permission of his other patient, Robert who, according to Dr. Parry, refused to give it. Plaintiff's expert testified that counseling during the pregnancy with Nina from Dr. Parry to Virginia as well as Robert was the standard of care as Dr. Parry now had the fetus as another patient. Under these circumstances, knowledge about how to prevent transmission was of extreme importance as this requirement trumps any rights of medical privacy Robert may have had. Robert denied counseling by Dr. Parry except to the extent of learning not to have intercourse during an outbreak. Dr. Parry testified that he counseled Robert many times on herpes, transmission, use of condoms, and abstinence.

Both Robert and Virginia testified that they were never counseled regarding transmission of the herpes, prevention, viral shedding, condoms or abstinence by Dr. McKenna during the pregnancy whereas Dr. McKenna testified that they were counseled extensively on all these subjects at the December 1999

consultation as well as during the pregnancy.

Although it is true that failure to note something required by the standard of care in a medical chart is not necessarily indicative of a departure, *Topel v Long Island Jewish Medical Center* 55 NY2d 682 [1981] *Krapivka v. Maimonides Medical Center*, 119 AD2d 801[2nd Dept. 1986], the jury was within its rights to consider the lack of corroborative documentation in both Dr. Parry's and Dr. McKenna's charts regarding the counseling of the patients during Virginia's pregnancy with Nina in determining the credibility of the various witnesses on this issue. The Court also notes that the testimony of both Dr. Parry and Dr. McKenna on the failure to counsel claim was on the basis of what their custom and practice was in giving this type of advice and not independent recollection. The proof from both sides regarding the failure to counsel claim consists of testimony, uncorroborated by any other record evidence. A jury, under these circumstances, has the right to assign more importance to the lack of documentation from the physicians rather than the plaintiffs, as the plaintiffs have no duty to keep a chart.

According to Dr. McKenna and Dr. Raucher the danger of an asymptomatic woman shedding the herpes virus made the obligation of the physician to counsel throughout the pregnancy of paramount importance particularly when considered with the defense evidence that between 85 and 95 % of babies that develop herpes encephalitis acquire it from the mother's birth canal during delivery.

It is clear that a jury's verdict in the face of conflicting testimony is afforded great weight, because it is the jury that heard the evidence. *Goldberg v. Sottile & Megna, M.D. P. C.*, 54 AD3d 359 [2<sup>nd</sup> Dept. 2008].

After full review and analysis of the trial record in this case, this Court cannot say that the evidence so preponderated in favor of the defendants that the jury could not have reached its conclusion based on any fair interpretation of it. *Arpino v. Lombardo* 215 AD2d 614 [1995]. The Court finds that the fact finders had sufficient and proper trial evidence before them, the fair interpretation of which could lead to the verdict which is the subject of this application. Accordingly, the defendants Dr. Parry and Dr. McKenna's respective motions to set aside the verdict pursuant to CPLR 4404(a) are denied.

#### ADDITUR

Nina Freilicher was born on March 13, 2001 and was well developed, anatomically sound, and thriving in all respects. She responded appropriately to stimuli. Nina began to regurgitate food and act uncomfortable on March 24, 2001 and after turning feverish on March 25 was taken to Stony Brook Hospital on instructions from the pediatrician. She was subsequently diagnosed with herpes encephalitis upon admission to the neonatal intensive care unit of the hospital. While at Stony Brook there was evidence that Nina had seizures and various invasive procedures including spinal taps, placement of IV lines, the insertion of a vascular access device, and the placement of a Broviac catheter under general anesthesia. The Broviac was used to administer antiviral medications directly into Nina's heart. She was discharged home on April 7, 2001 with the Broviac catheter in place. On April 11, the Broviac was replaced, on April 17 it was flushed with Heparin and on April 24 it was removed.

Testimony from plaintiff's expert interpreting MRI studies on Nina demonstrated that

approximately one half to two thirds of Nina's brain had shrunk on or about and between March 30, 2001 and September 28, 2001. Although Nina did not testify, plaintiff's expert pointed out that because of the atrophy and destruction of brain tissue on the right side, the skull on that side did not grow so as to have a symmetry of appearance with the left side which was the area of the brain not affected by the infection. The records of Dr. Marsha Bergtraum, the pediatric neurologist who had been treating Nina since 2004 revealed Nina's history of seizures, choking episodes, drooling, wetting herself and herpes outbreaks. The records revealed that at least two of the choking episodes required the Heimlich maneuver. This occurs because her ability to chew has been compromised.

Her left foot and left hand are smaller than the right with the left arm approximately one inch shorter than the right and narrower. She has partial left hemiparesis, motor dysfunction, and auditory processing difficulties. Her gross motor, fine motor, oral motor and visual motor skills are compromised. Dr. Berergtraum's diagnostic impression was Cerebral Palsy-left hemiparesis, seizure disorder, motor dysfunction central auditory processing disorder and articulation disorder-dysarthria. There was also noted to be signs of Obsessive Compulsive Disorder in 2009 consistent with other testimony that behavioral abnormalities could be anticipated because of anterior damage to the frontal lobe. Other records in evidence revealed that Nina suffers from spasticity, scoliosis, hearing impairment and frequent appearance of lesions and sores. Other testimony revealed that Nina's left shoulder slopes, her left arm is always "crooked" and her left hand and fingers are small and "rubbery."

It is without dispute that Nina is permanently infected with HSV-2 virus. She has, and will continue to have herpetic outbreaks or lesions, mostly below the left breast which are visible and contagious. The infection is life long and cannot be cured. Her permanent injuries, therefore, include spastic left hemiparesis, drooling, wetting herself, choking disorder, cognitive delay, deformities of the left arm, hand, leg and foot with a slight deformity of the skull. She has missing teeth, as well as chewing, swallowing and speech disorders. She also suffers from a seizure disorder, which can be controlled by medication. At 10 years of age Nina was in an "inclusion classroom" which is a system in which children who require special assistance are included in a regular classroom but receives help in what is known as "push-ins" or "push-outs". This occurs when a specialist enters the classroom to help Nina with a particular need or pulls Nina out of the classroom to give the service. Notably, there is evidence to support the fact that Nina is fully cognizant of her deficits.

There is wide ranging disparity in sustainable verdicts reflecting brain injury damage as there are many variations in the clinical outcomes that are the subject of the reported cases. There is no doubt that all cases where there has been a finding of responsibility in causing brain damage have the permanency and irreversibility of the condition in common. It is the level of limitation on the life of the individual that becomes instrumental in determining what is appropriate compensation for the injury.

In this regard, the plaintiff seeks additur to the amounts of compensation for past pain and suffering; future pain and suffering; economic damages for future medical care; medications and lab work; future economic damages for future loss of earnings; and loss of fringe benefits.

The defendants oppose this application on several grounds. Their first contention is that the verdict as reported could only have been as a result of an inappropriate compromise and therefore the verdict itself

must be overturned. This argument was raised in the opposition papers to the plaintiff's motion for additur and not in the motion to set aside the verdict and, therefore, plaintiff argues that the defendants waived this argument by failing to include it in the motion to set aside. The defendants also proffer various arguments as to why the request for additur concerning future medications, medical care, and lab work should be left undisturbed along with the verdicts for past and future pain and suffering. Dr. McKenna also seeks an order correcting the verdict requiring compensation for therapies to 11 years (until such time as Nina turns 21) as opposed to the 60 years reported by the jury, her statistical life expectancy.

Irrespective of whether there was a waiver of the compromise verdict argument by the defense, the Court finds that there is insufficient evidence of impermissible compromise by the jury. A sad fact developed through the evidence in this case is that the relevant medicine here revealed that there was no standard of care to protect the babies of discordant couples where the mother contracts asymptomatic HSV infection late in the pregnancy in 2000 and 2001. It was without dispute, therefore, that the only medical standard of care was to counsel these discordant couples, *during pregnancy*, that the only way to prevent infection during pregnancy is to abstain from intercourse. The only additional evidence on this issue was that a C-section would be done if the physician observed a visible lesion at the time of delivery. Thus, a classic credibility challenge was raised, with the defendants proclaiming they provided continued counseling and the plaintiffs stating that no counseling was tendered during Virginia's pregnancy with Nina regarding abstention as the only way to prevent acquiring the infection and thus exposing the baby. Moreover, the jury was unanimous on both deviation questions as to both defendants. One cannot conclude, therefore, that there was an impermissible compromise verdict based on this trial record.

The Court has researched various verdicts concerning brain damaged infants as well as the cases submitted by all counsel and finds as follows:

The Court sets aside that portion of the jury verdict which awarded the infant plaintiff \$70,000 for past pain and suffering as well as compensation for future pain and suffering in the amount of \$70,000 as insufficient compensation and grants a new trial on the issue of damages in these categories unless the defendants stipulate to increase the awards to the sums \$350,000 for past pain and suffering and the sum of \$2,500,000 for future pain and suffering.

The court declines to disturb the jury's findings, as requested by the plaintiff herein, as to the \$311.35 for future medications, \$99.00 for future medical care and \$57.42 for laboratory work (annualized for 60 years). There is no question that much of plaintiff's life care planner's conclusions are based on medical records that are several years old and not necessarily reflecting her current condition. For example, the cost of the brand name drug that she takes for seizures will decrease once it becomes generic and, more importantly it becomes somewhat speculative as to how much of this medication she will need in the future.

Dr. Carfi didn't know much if anything about Nina's present visits to physicians, who they were, what specialties, etc. He didn't know who her primary care physician was but agreed it would be the primary care person to determine what specialists she may or may not need in the future, and to what extent, if any, she will need seizure medication.

He saw the child twice, once in June of 2009 and once in August 2011, spending approximately one

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opinions and recommendations are not supported by the record.

The Court makes the same conclusion concerning the request by the plaintiff for additur under the category of lost wages and finds that there was ample room in the evidence for the jury to conclude that the losses projected by Dr. Leiken were not supported by the record and, therefore, not sufficiently reliable to sustain his projections as to lost income and lost fringe benefits. The trial record contains insufficient evidence upon which to conclude that Nina would have obtained a two year or four year degree, central facts which Dr. Leiken assumed in forecasting his loss projections.

Finally, it is without dispute that Dr. Carfi's testimony as to damages coming under the heading of "therapies" concerned amounts only continuing for Nina until the age of 21. Therefore, the Court will correct that portion of the verdict sheet awarding damages for therapies in the amount of \$2,987.40 annually for 60 years and directs that it reads that such damages are awarded for a period of 11 years.

This constitutes the decision and order of the Court

Dated: July 22, 2014

FINAL DISPOSITION

  
PETER H. MAYER, J.S.C.

NON FINAL DISPOSITION