

Patterson v Montefiore Med. Ctr.

2014 NY Slip Op 32716(U)

March 31, 2014

Sup Ct, Bronx County

Docket Number: 303916/2010

Judge: Sharon A.M. Aarons

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX** Part 24

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DAMON PATTERSON

Plaintiff,

Index No. 303916/2010

-against-

Present: Hon. Sharon A. M. Aarons

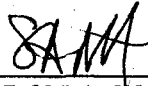
MONTEFIORE MEDICAL CENTER,
Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Reply	3

Upon the foregoing papers, the defendant's post-trial motion pursuant to CPLR 4404 and 5501 (c) seeking to set aside the jury verdict on damages and for an order granting a new trial on the issue of damages, or alternatively, granting a remittitur, is decided in accordance with the accompanying Decision and Order of the same date hereof.

Dated: March 31, 2014



SHARON A. M. AARONS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

DAMON PATTERSON

Plaintiff,

-against-

Index No. 303916/2010

DECISION AND ORDERMONTEFIORE MEDICAL CENTER,
Defendant.

Hon. Sharon A. M. Aarons:

Defendant Montefiore Medical Center ("Montefiore") moves post trial pursuant to CPLR 4404 and 5501 (c) to set aside the jury verdict on damages and for an order granting a new trial on the issue of damages, or alternatively, granting a remittitur. The motion is granted, to the extent indicated below.

This medical malpractice action was tried before this Court and a jury, resulting in a verdict in favor of the plaintiff in the amount of \$700,000 for past pain and suffering, and \$5 million for future pain and suffering for a 55 year period. Defendant now moves to set aside the jury's verdict with respect to the award of damages as excessive.

Plaintiff Damon Patterson, 17 years old, sought treatment from defendant Montefiore for malignant fibrohistosarcoma, an aggressive cancer of the jaw. The treatment required a team of reconstructive surgeons and oncologists to excise the cancer, and rebuild the plaintiff's jaw with bone and tissue removed from plaintiff's right calf.

The final stage of the treatment plan was to remove skin from plaintiff's thigh to create a skin graft for the area of the incision on the right lower leg. Subsequently, plaintiff's leg was required to be immobilized in a splint for one-week period after the skin graft was placed on plaintiff's lower leg and he would undergo extensive chemotherapy.

The surgery to remove the cancer was performed on September 17, 2009. Although the facial

plastic surgery and the removal of the cancer was successful, plaintiff developed two decubitus ulcers (“pressure sores”) on his right foot while his foot was immobilized in the splint – one on the top of his right foot, and one on his heel. While in the ICU, plaintiff complained about excruciating pain in his right leg that emanated through his whole leg. There was also a foul odor, “like road kill,” emanating from the leg. During that time, Patterson’s mother also noticed puss on the sheets and stated that plaintiff would scream in pain when she made light contact with his big toe. Plaintiff’s foot was never elevated except for when his mother placed a pillow under his leg.

The ulcers were first observed when the splint was removed on September 23, 2009, delaying plaintiff’s hospital discharge. The plaintiff described a stinging sensation once air hit the wounds for the first time. He testified that his heel appeared “black, like jelly type” and “basically soft... It wasn’t like a regular heel and it was completely swollen.” Subsequently, the nurse practitioner noticed a yellow discharge from the dressings on top of plaintiff’s foot, as well as a foul odor. As a result of the wound-healing issues associated with the pressure ulcers, plaintiff’s discharge from the hospital was delayed for eleven days, and his chemotherapy treatments were delayed.

After his discharge, plaintiff was prescribed a “boot,” which he was required to wear while ambulating, and while undergoing physical therapy at home. According to plaintiff’s expert, Dr. Kelly Johnson-Arbor, the use of the boot exacerbated the ulcers. The physical therapy (ordered as part of the plaintiff’s recovery from the surgery and skin graft) was extremely painful, due to the presence of the boot and the worsening condition of the ulcerations. During the time that plaintiff was undergoing physical therapy at home on November 3, 2009, the ulcer on top of plaintiff’s right foot reached stage III (affecting fatty tissue) or IV (affecting muscle), including tendon damage from the wounds.

The wounds reached their worst state in mid-November, 2009. Plaintiff’s oncologist

observed that plaintiff's leg had changed in character, that plaintiff had a large ulceration and open wound on his right heel, and a large (7 cm) wound on the top of his right foot. When the doctor moved plaintiff's big toe, because the wound was so large and deep, plaintiff could observe his tendons moving. On November 30, 2009, the wounds in the area of the ulcers were treated by debridement – the removal of necrotic tissue. The wounds were not fully healed on March 22, 2010, when chemotherapy was completed.

As a result of these wounds, plaintiff had limited range of motion in his right ankle and foot. He lost a large piece of his right heel. An MRI also revealed damage to the tissues beneath the pressure ulcers. Nurse Curry, one of the plaintiff's treating nurses at the defendant hospital, noted limited range of motion, which she attributed to the pressure sores. The wounds were not fully resolved until June, 2010.

Despite the eventual healing of the pressure sores, plaintiff has been left with permanent injuries, including scarring, loss of mobility and sensation, and the loss of a large piece of his heel. Plaintiff testified that his problems with his big toe and with flexion in his ankle have persisted. In the period after his surgery, plaintiff complained that the motion in his right toe had decreased over time. During physical therapy, he had been unable to pick up a marble with his right toe, and this issue never resolved. The plaintiff also testified that he has been left with a loss of sensation at the top of his foot, and scar tissue that feels sore and tight. Additionally, as a result of a loss of a piece of his right heel, and the persistent soreness in that area, it hurts if plaintiff tries to stand for extended periods of time. The plaintiff, once an avid basketball player, is now unable to play basketball because of the pain and lack of flexibility. He can no longer run, jump or turn quickly. The plaintiff testified that he had trouble walking, or climbing steps, due to pain in his right foot and heel. He asserted that he was unable to flex his big toe. The pressure ulcer scar tissue at the top of his foot

causes pain when he bends his foot. Although initially he had undergone some physical therapy, plaintiff was not receiving treatment at the time of trial.

Plaintiff's expert, Dr. Kelly Johnson-Arbor, attributed the formation of the ulcers to lack of padding in the splint, excess pressure, or failure to elevate the foot. She stated that in her expert opinion, the failure to remove the splint and inspect, evaluate and treat the pressure ulcers was a departure from accepted medical and nursing treatment. She testified that the ulcers were at Stage III, left scars, and resulted in a loss of sensation, and a loss of flexion of plaintiff's big toe. Dr. Johnson-Arbor concluded that tendon damage caused by the ulcers resulted in a loss in flexion of the plaintiff's big toe.

According to the defendant's expert examining physician, Dr. Ascherman, who examined the plaintiff approximately 18 months after the conclusion of chemotherapy in September, 2011, the plaintiff's pressure sores healed well with minimal limitations. They required debridement in the office, but no other procedures. The scar on plaintiff's right heel was 3 ½ by 1 ½ centimeters, and the scar on the top of the plaintiff's right foot was 7 by 3 ½ centimeters. There was no keloid formation, and Dr. Ascherman found no limitation of movement in plaintiff's ankle or otherwise, and no limp when plaintiff ambulated. The expert found decreased sensation in the ankle, and limitation in the flexion of plaintiff's right toe (i.e., a decrease in plantar flexion). He attributed the reduction in flexation not to the ulcers, but to the fibula flap resection undertaken in connection with the treatment plan. He maintained that plaintiff's expert had never performed a fibula flap procedure, was unaware of the effect of the removal of bone, muscle, and blood vessels on the functioning of the foot, and was incorrect in her testimony in that Dr. Johnson-Arbor's explanation for her conclusion that the ulcers caused the loss in flexion was anatomically incorrect.

Defendant does not now challenge the jury's finding of liability, but maintains only that the amount of damages awarded by the jury was excessive.

The CPLR 4404 standard for setting aside a verdict as against the weight of the evidence is whether there exists a "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." (*Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499, 382 N.E.2d 1145, 410 N.Y.S.2d 282 [1978]). "[I]n the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict." (*Cholewinski v. Wisnicki*, 21 A.D.3d 791, 801 N.Y.S.2d 576 [1st Dept. 2005].) Moreover, in deciding this motion the evidence supporting the verdict is entitled to every favorable inference. (*Broadie v. St. Francis Hosp.*, 25 A.D.3d 745, 807 N.Y.S.2d 656 [2d Dept. 2006].)

The facts in the present case were sharply contested, with the plaintiff contending that he was permanently disabled by virtue of the loss of flexation, and the defendant conceding at best that there were minor residual effects from the ulcers. While defendant does not challenge the finding of liability, defendant does contest the plaintiff's expert finding that the loss of flexion was attributable to the ulcers, as opposed to an unavoidable result of the removal of bone, muscle and tissue. Although the facts were sharply contested, giving the plaintiff the benefit of the permissible inferences from the evidence, the jury could rationally find that the plaintiff sustained a permanent loss of flexion as a result of the ulcers. The credibility of the witnesses and the resolution of conflicting proofs are matters properly for determination by a jury (*Louis v. Kimmelman*, 8 A.D.3d 206, 779 N.Y.S.2d 478 [1st Dept. 2004]). The jury's verdict, which indicated that plaintiff's testimony and that of his expert medical witness were credited, was based on a fair interpretation of the evidence (*see Ruiz v. City of New York*, 289 A.D.2d 42, 734 N.Y.S.2d 35 [1st Dept. 2001]) and thus cannot be set aside as contrary to the weight of evidence.

As to the quantum of damages awarded, generally, the method of review is to evaluate whether the appealed award deviates materially from comparable awards. (*Donlon v. City of New York*, 28 A.D.2d 13, 14, 727 N.Y.S.2d 94 [1st Dept. 2001] ["Such a method cannot, due to the inherently

subjective nature of non-economic awards, be expected to produce mathematically precise results, much less a per diem pain and suffering rate.”) The CPLR 5501(c) “material deviation” standard is properly applied by a trial court (and not just an appellate court) in determining a post-trial motion in the first instance under CPLR 4404. (*Ashton v. Bobruitsky*, 214 A.D.2d 630,631, 625 N.Y.S.2d 585 [2d Dept. 1995]).

Both plaintiff and defendant agree that there are relatively few cases involving damages for pressure sores alone. Defendant relies principally on *Alvarez v. Beth Abraham Health Servs.* (101 A.D.3d 647, 955 N.Y.S.2d 872 [1st Dept. 2012]), in which the Appellate Division affirmed an award of \$500,000 for past pain and suffering, and \$250,000 for future pain and suffering over a 42 year period, where plaintiff sustained ulcerations while undergoing rehabilitation in a nursing home following a diving accident that rendered him quadriplegic. The award was sustained in view of plaintiff’s “relatively young age, and in light of the evidence that his ulcer may reopen in the future.” While the Appellate Division decision is short on facts, the underlying motion by defendant to set aside the verdict, and the trial court’s decision on the post-trial motion (Order of Justice Hunter, dated August 11, 2011, Index No. 7124/2005) indicate that contrary to the facts in this case, the plaintiff’s ulcers were relatively small, and healed relatively quickly. While one ulceration on plaintiff’s buttocks required debridement, it was only one centimeter deep, and healed within two months after plaintiff’s discharge from the facility. In addition, although the ulcers re-opened on occasion, they rapidly closed with treatment. In addition, unlike the present case, there was no testimony of ongoing physical limitation attributed to permanent physical damages resulting from the ulcerations. The case is therefore of limited application to the present case.

Defendant maintains that more serious injuries in other cases have resulted in significantly lower awards. For example, in *DeCastro v. Andrews Plaza Hous. Assoc., L.P.* (85 A.D.3d 553, 924 N.Y.S.2d 792 [1st Dept. 2011]), plaintiff suffered a chondral fracture defect in the articular surface of

the right knee joint and a partial tear of the anterior cruciate ligament, requiring corrective arthroscopic surgery. She also sustained lower spinal injuries in the form of a bulging and a herniated disc. Plaintiff underwent several months of physical therapy, her treating physicians testified that her injuries are permanent and progressive, and plaintiff would require corrective back surgery and additional surgeries on her right knee. The Appellate Division sustained the jury's award of \$350,000 for past pain and suffering and \$250,000 for future pain and suffering over 37 years.

Plaintiff cites cases sustaining much larger awards for injuries to the lower extremities. (*See Boulukos v. 213 P.A.S., L.L.P.*, 7 A.D.3d 346, 776 N.Y.S.2d 567 [1st Dept. 2004] [\$1.5 million was appropriate amount for 35 years of future damages for serious ankle injury].)

The damages here are more severe than those sustained by the plaintiff in *Alvarez*, in which an aggregate award of \$750,000 was sustained, in view of plaintiff's complaints of ongoing pain, physical limitations, and soreness.

Reviewing the damages awarded based upon the injuries claimed by the plaintiff, including the prolongation of his stay in the hospital following the cancer surgery, the loss of flexation of plaintiff's toe, the need for physical therapy, the length of time that passed from the discovery of the ulcerations to the time they resolved, the loss of part of his heel, the continuing pain that plaintiff suffers, and the limitations on his mobility, this Court finds that the award for past pain and suffering did not deviate materially from reasonable compensation. Comparing the injuries for past pain and suffering in this case with those sustained in *Alvarez*, in which the Appellate Division affirmed an award of \$500,000 for past pain and suffering, and in view of the more serious, deeper ulcerations sustained in this case, the award of \$700,000 for past pain and suffering was appropriate.

With respect to that award for future pain and suffering, the Court finds that the award was excessive. Awards for future pain and suffering in comparable cases have ranged between \$2 million to \$2.5 million, for periods of time much lower than the 55 years for which plaintiff is entitled to

compensation. (*See Hill v. Muchow*, 178 A.D.2d 954, 579 N.Y.S.2d 254 [4th Dept. 1991] [reducing past pain and suffering from \$2.5 to \$2 million, and affirming \$2.5 million for 27 years of future pain and suffering where, among other injuries, plaintiff's foot and ankle pain and disabilities were extreme, permanent, and progressively worsening; in addition, plaintiff sustained severe, painful and debilitating or deforming injuries to his nose, face, mouth, jaw, neck and back]; *Tonaj v. ABC Carpet Co., Inc.*, 43 A.D.3d 337, 841 N.Y.S.2d 482 [1st Dept. 2007] [reducing future pain and suffering for a 20 year period from \$5 to \$2 million where plaintiff broke six teeth, fractured his left elbow and right wrist, underwent two operations on his elbow, one on his shoulder, and one on his back, still feels pain in his elbow, wrist and back, continues to take pain medication, has difficulty sleeping, and cannot stand or sit for extended periods of time]).

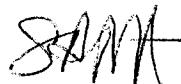
In *Williams v. City of New York* (105 A.D.3d 667, 964 N.Y.S.2d 134 [1st Dept. 2013]), the Appellate Division reduced an award for future pain and suffering for a 15 year period from \$2 million to \$1.2 million, where plaintiff injured his back, aggravated a preexisting back and left leg condition, was incapable of working after the accident, and would need future care for the remainder of his life due to the compromised nature of his spine. Plaintiff testified that although he still experienced significant pain, he improved significantly after fusion surgery performed in 2007, and had "good days" about four days per week, during which he could perform household chores, walk a mile, and run errands. In view of the fact that the damages in that case were for a 15 year period, whereas the period of time for future pain and suffering in this case is 55 years, given plaintiff's young age, an award of \$2.5 million herein constitutes reasonable compensation for the component of future pain and suffering.

The motion is granted to the extent of directing a new trial unless plaintiff stipulates to reduced damages in the amount of \$2.5 million for future pain and suffering. The amount of past pain and suffering remains unchanged. Accordingly, it is hereby

FILED Apr 10 2014 Bronx County Clerk

ORDERED that defendant's motion is granted to the extent of ordering a new trial on damages for future pain and suffering unless plaintiff stipulates to a reduced award of \$2.5 million for future pain and suffering, within 30 days after service of a copy of this order with notice of entry.

Dated: March 31, 2014



SHARON A. M. AARONS, J.S.C.