

Nocito v Albany Advanced Imaging, PLLC
2015 NY Slip Op 32775(U)
September 24, 2015
Supreme Court, Albany County
Docket Number: A00061/2011
Judge: Kimberly A. O'Connor
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

NANCY NOCITO and JAMES NOCITO,

Plaintiffs,

- against -

DECISION AND ORDER
Index No.: A00061/2011
RJI No.: 01-11-105528

ALBANY ADVANCED IMAGING, PLLC,
KIRSTEN K. CESTARO, M.D., ROBERT W.
LOBEL, M.D., JEANNE ANNE DAHL, RNC, NP,
NORTHEAST UROGYNECOLOGY, PELVIC
MEDICINE AND RECONSTRUCTIVE SURGERY, P.C.,

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Defendants.

(Supreme Court, Albany County, Trial Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES:

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O'CONNOR, J.:

Defendants Robert W. Lobel, M.D., Jeanne Ann Dahl, RNC, NP, Northeast Urogynecology, Pelvic Medicine and Reconstructive Surgery, P.C. (hereinafter "defendants")¹ have filed a motion

¹ The jury returned a verdict of "no cause" against Kirsten Cestaro, M.D. and Albany Advanced Imaging, PLLC.

seeking an Order: (a) setting aside the jury's verdict regarding liability and proximate cause and entering a judgment in their favor; (b) in the alternative, setting aside the jury's verdict as excessive; (c) pursuant to CPLR 4545 reducing the amount of the jury award for past medical expenses by the amounts replaced or to be replaced with collateral sources; and (d) any other and further relief that would be just and proper. Plaintiffs oppose the motion and contend that the verdict is supported by the evidence.

The trial in this matter commenced on November 12, 2014, and ended with a jury verdict on November 20, 2014. The jury found that the defendants departed from the accepted standards of medical care in the way the plaintiff's surgery was performed, and in the post-operative care and treatment of the plaintiff, and that such departures were a substantial factor in causing the injuries and damages suffered by the plaintiffs. The jury awarded plaintiff Nancy Nocito Five Hundred Thousand Dollars (\$500,000.00) for past pain and suffering, One Million Dollars (\$1,000,000.00) for future pain and suffering, and Sixty-Two Thousand Six Hundred Fifty Seven Dollars and Four Cents (\$62,657.04) for past medical expenses. The jury also awarded plaintiff James Nocito Two Hundred Fifty Thousand Dollars (\$250,000.00) for his loss of consortium claim.

The law is well-established that in a case where there is insufficient evidence to support the jury's verdict, the Court must set aside that verdict, and if the party is entitled, direct a judgment for that party (*see Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493 [1978]; *Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241 [1944]). Defendants claim that the verdict against them is not supported by the evidence presented at trial. The defendants' main contention in this regard is that the plaintiffs' experts' testimony does not establish their case against the defendants. The defendants contend that there is a complete lack of proof that Nancy Nocito's nerve injury occurred during the surgery performed by Dr. Lobel, and that the defendants did not provide adequate post-operative care

to Mrs. Nocito. The Court disagrees.

The plaintiffs presented expert testimony, as well as their own testimony and the testimony of other lay witnesses, which taken as a whole, can be considered to support the plaintiffs' case. Each expert testified regarding the basis for his opinion, and also provided a reasonable explanation for the effect the surgery has had on Ms. Nocito's inability to normally void her bowels, as well as any other long-term effects of the surgery and post-operative care. The defendants' arguments in this regard are not compelling, and do not demonstrate a lack of evidence in the plaintiffs' case, but simply present the defendants' theory of the case. However, this theory was rejected by the jury. Instead, the jury accepted the testimony of the plaintiffs and their witnesses. When presented with opposite conclusions regarding the appropriateness of the actions taken by medical professionals, and the resulting injuries and damages from those actions, a jury must decide which version to accept. In this case, the jury found in favor of the plaintiffs and clearly accepted their version of the issues in the case.

Taken together, all of the testimony and proof in the case that was presented by the plaintiffs, if believed, establishes the departures from the standards of care, and the proximate cause, to meet the standards in a medical malpractice action. The Court is unpersuaded that the plaintiffs' experts, in particular, did not present evidence that could appropriately be considered by the jury to be in support of the plaintiffs' claims. As such, the Court finds that the verdict is supported by the weight of the evidence, and that part of defendant's motion is denied.

The defendants also contend that the jury's verdict regarding damages was excessive. "Although a jury verdict award should be set aside where it deviates materially from reasonable compensation for the injuries sustained by plaintiffs (citations omitted), the amount of damages in a personal injury action is generally a question of fact for the jury (citations omitted) (*Osiecki v.*

Olympic Reg. Dev. Auth., 256 A.D.2d 998 [3d Dep't 1998]). "Because pain and suffering awards are not subject to precise quantification, examination of comparable cases is necessary to determine whether the award materially deviated from reasonable compensation (citations omitted)" (*Osiecki v. Olympic Reg. Dev. Auth.*, 256 A.D.2d at 1000).

Both parties presented the Court with an analysis of verdicts in arguably similar cases. While the facts of those cases differed to some extent from the facts of this case, and the damages awards were also different, it cannot be said that the jury's verdict in this case "deviates materially from reasonable compensation." The range of verdicts in comparable cases certainly places this verdict on the higher end of that range. However, based upon the facts of this case, the permanent condition the plaintiff lives with, as well as the number of years for which the jury awarded future pain and suffering, the Court finds that the verdict is not excessive.

Finally, the defendants contend that the jury's award for past medical expenses should be reduced from Sixty-Two Thousand Six Hundred Fifty-Seven Dollars and Four Cents (\$62,657.04) to Two Thousand Two Hundred Ninety-Nine Dollars and Nine Cents (\$2,299.09) based upon proof of collateral source replacement and indemnification in accordance with CPLR §4545. Other than a conclusory statement in the attorney's affidavit that the parties stipulated to the amount awarded, the plaintiff did not address this aspect of the defendants' motion. A review of the information presented by the defendants reveals that the plaintiffs' insurance covered the vast majority of the past medical bills. The Court finds that the defendants' calculation is accurate, and, accordingly, the jury's award for past medical damages shall be reduced to the amount requested.

Accordingly, it is hereby

ORDERED, that the defendants' motion to set aside the verdict regarding liability is denied:
and it is further

ORDERED, that the defendants' motion to set aside the damages verdict as excessive is denied; and it is further

ORDERED, that the defendants' motion to reduce the jury's verdict regarding past medical expenses is granted, and the amount shall be reduced to the amount requested.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being forwarded to the attorneys for the plaintiffs. A copy of the Decision and Order together with all papers on the motion are being forwarded to the Office of the Albany County Clerk for filing. The signing of this Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: September 24, 2015
Albany, New York



HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice



MARLENE J. DION
Deputy County Clerk

Papers Considered:

1. Notice of Motion, dated January 9, 2015; Affidavit of Shawn F. Brousseau, Esq., sworn to January 9, 2015; Memorandum of Law, dated January 9, 2015; Exhibits A - Z;
2. Affirmation of Laura M. Jordan, Esq., dated March 13, 2015; Memorandum of Law, dated March 13, 2015;
3. Memorandum of Law in Reply, dated March 19, 2015; and
4. Letter from Laura M. Jordan, Esq., dated March 19, 2015, with Exhibits 14 -17 annexed.

29/28/15