

Frith v Bassett Healthcare Network
2016 NY Slip Op 32673(U)
June 3, 2016
Supreme Court, Schenectady County
Docket Number: 2013-0762
Judge: Vincent J. Reilly
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STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

DENISE E. FRITH,

Plaintiff,

-against-

DECISION & ORDER
Index No. 2013-0762
RJI No. 46-1-2013-1593

THE BASSETT HEALTHCARE NETWORK,
THE MARY IMOGENE BASSETT HOSPITAL,
Individually and doing business as the
BASSETT MEDICAL CENTER,
THE BASSETT HOSPITAL PHYSICIANS' GROUP and
STEPHEN B. GRAHAM, D.O.,

Defendants.

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REILLY, JR., J.

The plaintiff sought to recover damages for severe personal injuries sustained as a result of the defendants' departure from good and accepted medical, hospital and nursing practices. This action was tried before a jury in Schenectady County. The jury rendered a verdict in favor of the plaintiff and awarded damages in the amounts of: \$700,000.00 for past pain and suffering; \$20,000.00 for loss of wages and \$800,000.00 for future pain and suffering. With respect to the amount of damages for future pain and suffering, the jury

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determined that the amount awarded was intended to provide compensation to the plaintiff for the next 31.7 years.

The defendants have moved for an order of this Court, pursuant to Civil Practice Law and Rules (CPLR) §4404(a), setting aside the verdict and ordering a new trial in the interests of justice. In the alternative, the defendants request an order of this court, pursuant to CPLR §5501(c), reducing the damages awarded by the jury on the grounds that the damages deviated from reasonable compensation and were not adequately supported by the evidence. The plaintiff has opposed the motion.

The plaintiff has cross-moved for an order of this court granting a judgment against the defendants based upon the jury's findings and in accordance with the provisions of CPLR §4545, providing for certain collateral source reductions and to conform the damages, as so reduced, to be in compliance with CPLR Article 50-A. The defendants have not opposed the plaintiff's cross-motion. The defendants submit that, in the event that their post-trial motion is denied, the defendants do not object to the court applying the provisions of CPLR Article 50-A and granting judgment consistent with the facts and law.

Turning to the defendants' post-trial motion, CPLR §4404(a) provides that the trial court may set aside the jury's verdict upon the motion of any party or on its own initiative and may order a new trial, in the interest of justice. The power is discretionary in nature and is predicated on the assumption that the judge who presides at trial is in the best position to evaluate errors therein. *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]; *Straub v Yalamanchili*, 58 AD3d 1050, 1051 [3d Dept 2009]; *Packard v State Farm Gen. Ins. Co.*, 268 AD2d 821, 822 [3d Dept 2000].

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The trial judge must decide whether substantial justice has been done, whether it is likely that the verdict has been affected by error of law or misconception of fact by the jury, and must look to his own common sense, experience and sense of fairness, rather than to precedents in arriving at a decision. *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d at 381; *Demarco v Frucchione*, 67 AD2d 1055 [3d Dept 1979]. A new trial should be ordered in the interests of justice only if there is evidence that substantial justice has not been done, as would occur, for example where the trial court erred in ruling on the admissibility of evidence, there is newly discovered evidence or there has been misconduct on the part of the attorneys or jurors. *Gomez v Park Donuts*, 249 AD2d 266, 267 [2d Dept 1998].

At the onset of the trial, the plaintiff's medical chart from Bassett Hospital was entered into evidence, on the consent of counsel, without objection. Contained within the chart was an attestation statement that contained the following codes and descriptions under the secondary diagnoses category: Code 9982, accidental puncture or laceration during a procedure, not elsewhere classified and Code E8700, accidental cut/puncture/perforation/hemorrhage during surgical operation.

During summation, plaintiff's counsel referred to the attestation statement and its contents and argued, among other things, that the document was prepared by Dr. Graham's employer, the hospital, who was swearing that this was a cut, a perforation, a puncture or a hemorrhage caused during surgery. At no time during summation did counsel for the defendants object to the plaintiff's use of the attestation statement.

During deliberations, the jury requested that the court provide them with the page number of the attestation statement. After the jury was brought back into the courtroom

to have their question answered, the jury reported that they had already located the document.

Thereafter, counsel for the defendants made an oral application requesting that the court give a curative instruction or supplemental charge to the jury regarding the attestation statement. Counsel for the defendants argued that the attestation statement contained inadmissible hearsay and that defense counsel's use of the statement during summation, particularly his implication that the language on the statement constituted an admission on the part of the defendants, was extremely prejudicial and warranted a curative instruction.

The court denied the defendants' application. In so doing, the court noted that the document was part of the record and was admitted into evidence, on consent, without objection. The court further noted that it would not invade the province of the jury and instruct them as to the weight to give any particular document.

On the instant motion, the defendants argue that the admission into evidence of the attestation statement was a fundamental error involving one of the main issues in the case. The defendants argue that plaintiff's counsel's use of the attestation statement and counsel's arguments during summation were improper as the attestation statement contained inadmissible hearsay. The defendants also argue that their request for a curative instruction was properly made and should have been granted by this court.

It is well established that documents and records that are otherwise admissible at trial are not made inadmissible because they contain hearsay statements. Certainly, at the request of the parties, hearsay statements can be redacted from the document prior to admitting the document into evidence. Defendants assert that while not specifically stated,

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PARTIES TO THE
CASE

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the plaintiff's medical chart from Bassett Hospital was admitted into evidence, subject to redaction.

In this case, the attestation statement was part of the plaintiff's medical chart and was admitted into evidence, on consent, without objection. Even if it were to be assumed that the chart was admitted into evidence subject to redaction, the record reveals that the defendants never sought to have the attestation statement or any portion thereof, redacted. Given these circumstances, it cannot be concluded, as defendants argue, that the admission into evidence of the attestation statement was a fundamental error. Nor can it be concluded that plaintiff's counsel's use of the attestation statement and counsel's arguments during summation were improper. The attestation statement was part of the record and the plaintiff's counsel's summation was merely fair comment on properly, unconditionally admitted evidence.

The defendants were not entitled to a curative instruction or supplemental charge to the jury with respect to the attestation statement. As noted previously, the attestation statement was admitted into evidence, on consent, without objection. No request was made for the statement, or any portion thereof, to be redacted. The court cannot instruct the jury, by way of curative instruction or supplemental charge, as to the weight it should give to any particular, properly admitted piece of evidence.

Based on the forgoing, the court cannot conclude that substantial justice has not been done. Therefore, the court finds no basis upon which to set aside the jury's verdict and order a new trial. The defendants' motion pursuant to CPLR §4404(a), is denied.

The defendants' motion pursuant to CPLR §5501(c), for an order of this court reducing the damages awarded by the jury for future pain and suffering on the grounds that

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the damages deviated from reasonable compensation and were not adequately supported by the evidence, is also denied.

It is well settled that the amount awarded as damages for personal injuries is a factual question for the jury. *Killon v. Parrotta*, 125 AD3d 1220, 1222 [3d Dept 2015]; *Vogel v Cichy*, 53 Ad3d 877, 878 [3d Dept 2008]. A jury's damage award may be set aside only when the award deviates materially from what would be reasonable compensation. *Id.* "In determining if a jury verdict should be set aside, the question is whether there is sufficient evidence to support the verdict and, if so, whether the evidence on the whole so preponderates in favor of the losing party that the verdict could not have been reached on any fair interpretation of the evidence." *Santalucia v County of Broome*, 228 AD2d 895, 896 [3d Dept 1996].

After hearing the testimony and considering the evidence presented, the jury rendered a verdict in favor of the plaintiff and awarded damages in the amount of \$800,000.00 for future pain and suffering. The jury specifically determined that this amount was intended to provide compensation to the plaintiff for the next 31.7 years. It is noted that the award of damages for future pain and suffering amounted to \$25,236.59 per year for a 31.7 year period. Given the facts presented in this case, it cannot be concluded that the jury's award for future pain and suffering was unreasonable. There was sufficient evidence in the record to support the jury's award. The court finds no basis upon which to reduce the amount awarded by the jury in this regard. Now, therefore, it is hereby:

ORDERED, that the defendants' motion pursuant to CPLR §4404(a), is denied; and it is further

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ORDERED, that the defendants' motion pursuant to CPLR §5501(c), is denied; and it is further

ORDERED, that the plaintiff's cross-motion is granted; and it is further

ORDERED, that the plaintiff is hereby directed to submit a proposed judgment to this court, on notice to the defendants, within thirty (30) days of the date of this decision.

THIS DECISION SHALL CONSTITUTE THE ORDER OF THE COURT. THE ATTORNEYS FOR PLAINTIFF SHALL ENTER THIS ORIGINAL DECISION & ORDER WITHIN 20 DAYS OF ITS DATE AND SERVE A COPY, WITH NOTICE OF ENTRY, ON THE OPPOSING ATTORNEYS.

Dated: 6/3/16


HON. VINCENT J. REILLY, JR.
Supreme Court Justice

ENTERED

Schenectady County Clerk's Office

JUN. 15. 2016.

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