SHORT FORM ORDER

INDEX NO. 24454/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JACK FLANAGAN, an Infant by his Mother and Natural Guardian, JENNIFER FLANAGAN, and JENNIFER FLANAGAN, Individually,

Plaintiffs,

-against-

LAURENCE F. MACK, M.D., INFERTILITY ASSOCIATES OF LONG ISLAND, P.C., DAVID I. BERGMAN, M.D., PREFERRED WOMENS HEALTH, LONG ISLAND MEDICAL LASER, P.C., PREMIERE OB/GYN PLLC, DANIEL FAUSTIN, M.D., MADONNA PHYSICIAN SERVICES, P.C., MADONNA SERVICES, LTD., IRA J. SPECTOR, M.D. & STEVEN A. KLEIN, M.D., P.C., MANA DEJHALLA, M.D., CHINWA C. OFFER, M.D., RAMI JAMIL NAJJAR, M.D., RAMI NAJJAR MD P.C., and MERCY MEDICAL CENTER,

Defendants.

ORDER

PLAINTIFFS' ATTORNEY:
DUFFY & DUFFY
1370 RXR PLAZA
WEST TOWER - 13TH FLOOR
UNIONDALE, NEW YORK 11556
516-394-4200

Upon the following papers numbered 1 to 3 read on this motion FOR AN AWARD OF ATTORNEYS' FEES; *Ex Parte* Order and supporting papers 1-3.

This is an *ex parte* application by plaintiffs' counsel pursuant to Judiciary Law § 474-a seeking an increase in counsel fees due to "extraordinary circumstances" related to the prosecution of this complex medical malpractice action. Counsel contends that the legal, medical and factual issues in this case require additional substantial fees be awarded to counsel.

The Court has received the affirmation of attorney James R. Duffy, Esq. which details the firm's retention, investigative, research, discovery, trial preparation and trial services related to this action involving the *in utero* demise of a twin and live birth of the surviving twin who suffered injuries *in utero* as a result of defendants' alleged negligence. This matter settled during trial on April 20, 2018, for the gross sum of $4,300,000.

The Judiciary Law at Section 474-a sets forth a schedule of attorney's fees pertaining to medical malpractice actions:

> § 474-a. Contingent fees for attorneys in claims or actions for medical, dental or podiatric malpractice
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> 1. For the purpose of this section, the term "contingent fee" shall mean any attorney's fee in any claim or action for medical, dental or podiatric malpractice, whether determined by judgment or settlement, which is dependent in whole or in part upon the success of the prosecution by the attorney of such claim or action, or which is to consist of a percentage of any recovery, or a sum equal to a percentage of any recovery, in such claim or action.
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> 2. Notwithstanding any inconsistent judicial rule, a contingent fee in a medical, dental or podiatric malpractice action shall not exceed the amount of compensation provided for in the following schedule:
> 30 percent of the first $250,000 of the sum recovered;
> 25 percent of the next $250,000 of the sum recovered;
> 20 percent of the next $500,000 of the sum recovered;
> 15 percent of the next $250,000 of the sum recovered;
> 10 percent of any amount over $1,250,000 of the sum recovered.
>
> 3. Such percentages shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed, including interest upon a judgment, shall be deemed

part of the amount recovered. For the following or similar items there shall be no deduction in computing such percentages: liens, assignments or claims in favor of hospitals, for medical care, dental care, podiatric care and treatment by doctors and nurses, or of self-insurers or insurance carriers.

4. In the event that claimant's or plaintiff's attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery. Such application shall be made to the justice of the trial part to which the action had been sent for trial; or, if it had not been sent to a part for trial, then to the justice presiding at the trial term calendar part of the court in which the action had been instituted; or, if no action had been instituted, then to the justice presiding at the trial term calendar part of the Supreme Court for the county in the judicial department in which the attorney has an office. Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the claimant's or plaintiff's consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two of this section, provided, however, that such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney. If the application is granted, the justice shall make a written order accordingly, briefly stating the reasons for granting the greater compensation; and a copy of such order shall be served on all persons entitled to receive notice of the application.

5. Any contingent fee in a claim or action for medical, dental or podiatric malpractice brought on behalf of an

> infant shall continue to be subject to the provisions of section four hundred seventy-four of this chapter

(Judiciary Law § 474-a).

NOTICE REQUIREMENT

Judiciary Law § 474-a (4) authorizes and empowers the court to fix additional fees "upon affidavit with written notice and an opportunity to be heard to the claimant or plaintiff and other persons holding liens or assignments on the recovery." The Court has received a Waiver and Consent on behalf of the Commissioner of the Suffolk County Department of Social Services (the only lien holder herein) dated June 22, 2018, wherein the Commissioner by counsel acknowledges receipt of this application and waives the opportunity for a hearing on this application for an enhanced attorney fee and consents to this proceeding. The Medicaid lien will be satisfied out of the proceeds of the settlement herein. The plaintiffs submit an affidavit sworn to on April 23, 2018, authorizing the plaintiffs' attorney to receive a fee equal to one-third (1/3) of the net settlement proceeds.[1] The Court finds that plaintiffs' counsel has satisfied the written notice and an opportunity to be heard requirements to the plaintiffs and other persons holding liens or assignments on the recovery.

PLAINTIFFS' COUNSEL'S BURDEN TO REBUT THE ADEQUACY OF THE FEE SCHEDULE

The Court of Appeals, in the matter of *Yalango by Goldberg v Popp*, 84 NY2d 601 (1994), has provided the analytical framework for the determination of whether counsel in a medical malpractice action has met the criteria for departing from the mandatory medical malpractice attorney's fees schedule set forth in Judiciary Law § 474-a (2):

> Inadequacy of the statutory fee schedule is the touchstone of the section 474-a (4) inquiry. The analysis must begin with the recognition that the section 474-a

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[1] The Court is aware that the consent of the client is not a factor to be considered in the analysis required pursuant to Judiciary Law § 474-a (*see Devadas v Niksarli*, 2010 NY Slip Op 31982[U] [Sup Ct, New York County]).

> (2) scheduled fees are presumptively reasonable in all malpractice cases (*see*, *Gair v Peck*, 6 NY2d 97, 113, 114, *supra*). To succeed on a request for excess compensation, then, the applicant bears the burden of rebutting that presumption by establishing that the fee schedule was inadequate to compensate counsel for the representation provided in the particular case (*id.*; *Matter of Clinton*, 157 Misc 2d 506, 510, *supra*). Thus, before departing from the statutory fee schedule, the court must make a threshold finding that a departure from the fee schedule is justified because the authorized fee did not equitably compensate counsel. That a threshold showing of inadequacy must be made before relief based on extraordinary circumstances may be granted is self-evident from the plain and unequivocal language of the statute which expressly calls for that predicate

(*Yalango*, 84 NY2d at 607-608).

If calculated upon the fee schedule as set forth in Judiciary Law § 474-a (2), the total counsel fee for plaintiffs' attorneys would be a fee of $572,784 ($4,300,000 - $72,158 [disbursements] = $4,227,842) (30% of first $250,000 = $75,000; 25% of next $250,000 = $62,500; 20% of next $500,000 = $100,000; 15% of next $250,000 = $37,500; 10% of the amount over $1,250,000 [$4,227,842 - $1,250,000 = $2,977,842] $297,784).

While certainly not an insubstantial attorney fee amount, the hours expended by counsel, the nature and complexity of the medical issues, the existence of multiple defendants in multiple practice areas and specialties, the timeline and period of monitoring and treatment during the course of pregnancy, the compounding of medical errors based upon prior and subsequent interrelated issues of medical negligence are without question factors impacting upon the adequacy of the statutory fee schedule in this particular case. It is without question that multiple health professionals individually and collectively contributed to the serious negative outcomes for Twin A in this case.

Perhaps an appropriate starting point for the purpose of the required analysis is the fact that this matter settled during trial. This was not a case resolved during the discovery phase, but rather after the completion of all discovery as well as complete preparation and during the prosecution of a trial.

The questions of adequacy and reasonableness are the guiding principles herein. A fee above the statutory schedule is not in the nature of a financial reward but must be justified in the context of this case relative to other general or standard medical malpractice prosecutions. By definition, most if not all medical malpractice actions contain complex medical issues and multiple defendants, both individual and institutional.

> The considerations which are relevant to an assessment of the adequacy of the section 474-a (2) fees are those related to the economics of the litigation and any concomitant financial hardship suffered by plaintiff's counsel. In other words, in determining whether extraordinary circumstances caused the fee to be inadequate, governing emphasis should be placed on whether the award – viewed as a whole or broken down to its hourly equivalent – equitably compensates counsel for "the amount of time reasonably and necessarily spent" in litigating the claim (*People v Perry*, 27 AD2d 154, 161). Under this formulation, the statutory fee may be inadequate, for example, where the case involves an extremely complicated procedural history or where plaintiff's counsel is required to expend an inordinate amount of time in pursuing the medical malpractice claim, thereby rendering the hourly rate of compensation exceptionally low or causing a loss of other income or some other financial detriment. Once that threshold showing is made, counsel must then justify a departure from the fee schedule by demonstrating that extraordinary circumstances caused the statutory fees to be unreasonable in the particular case

(*Yalango*, 84 NY2d at 608).

JAMES R. DUFFY'S TIME EXPENDED

The facts and circumstances surrounding this case are complex. The actions and inaction of multiple defendants at various points over a period of months based upon a compounding of errors in the reading of test results, not realizing prior results were incorrect and without sufficient basis, the delay in diagnosis, treatment and/or referral by the ob/gyn, the delay in triage and

treatment by the hospital nursing staff, sonography, fetal monitoring and labor and delivery resulted in injury to the surviving twin.

Plaintiffs' counsel began work on this matter in December of 2010, and this matter was settled during trial on April 20, 2018. During the seven and one-half years this matter was pursued by plaintiffs' counsel on behalf of the plaintiffs, the theories of liability as dictated by the evidence as contained in the medical records, and developed during the discovery phase were by no means commonplace. In the first instance, the formulation of the theories of liability and the marshaling of the evidence sufficient to support the plaintiffs' burden of proof was neither obvious nor linear. James R. Duffy, the senior member of the firm, as evidenced by his affidavit, was the attorney at the firm most closely involved with the formulation, pursuit and prosecution of this matter. Attorney Duffy has a well-earned reputation for excellence and ability in the pursuit of medical negligence actions on behalf of his clients. This reputation is known to this Court by professional experience with Attorney Duffy in the handling of matters of this nature. Beyond this Court's dealings with Attorney Duffy, his handling of complex matters in this field are well-known in the legal community and his efforts in pursuing these matters is of the highest professional caliber.

Attorney Duffy's shepherding of this case was constant and continual throughout its prosecution as evidenced by his affidavit in support of this application. The creation, visiting and re-visiting of the legal theories, tactics and strategies involved Attorney Duffy and senior members of his firm. Attorney Duffy spent extensive time and "much of that time was on evenings and on weekends over the years the case progressed through the discovery process and in all likelihood it constituted much more time than I have estimated herein." This quote from Attorney Duffy's affidavit further supports the uniqueness and complexity of the legal and medical theories surrounding the treatment rendered by the medical professionals herein.

Attorney Duffy and his colleagues formulated many alternative responses to anticipated defense positions on the facts, the medicine and the law. This multilevel anticipation and preparation for the myriad of possible responses of the multiple defendants was in and of itself more complex than the ordinary matter in which the facts, the medicine and the law are somewhat straightforward and clear. This, in this Court's opinion, is not one of those common cases.

Attorney Duffy sets forth an accounting of his time during various stages of the action totaling 959 hours for himself alone. Hourly rates for pre-

eminent attorneys such as Attorney Duffy may range into the $1200 to $1500 per hour. Even at a range of $800 to $1000 per hour, Attorney Duffy's hourly fee in this case would be in the range of $767,000 to $959,000 without taking into consideration the time expended by other members of the Duffy firm. The statutory fee on $4,227,842 would be $572,784. The $572,784 statutory presumption is inadequate in this case. Attorney Duffy's time alone would result in an hourly rate calculation of $597 per hour without any calculation for the fees of the other attorneys.

TIME REQUIRED TO PROPERLY INVESTIGATE AND PREPARE FOR DISCOVERY AND TRIAL BY MEMBERS OF THE FIRM OTHER THAN JAMES R. DUFFY

Attorney/Partner Mary Ellen Duffy conducted the depositions of Dr. Mack, Dr. Bergman and Dr. Faustin. Ms. Duffy also prepared and defended Kevin Flanagan for deposition. Attorney Damien Smith prepared and defended Jennifer Flanagan for deposition. The deposition preparation, attendance and review accounted for 128 hours of attorney time.

There were motions for summary judgment made by multiple defendants in this case. The defense of these motions were handled by Mary Ellen Duffy and James R. Duffy. The motions were extensive, detailed and medically complex and could have resulted in dismissal on the issue of liability based upon numerous prominent defense medical expert opinions concerning the timing of the anemia and brain damage suffered by the surviving twin. A cadre of defense experts in Obstetrics/Gynecology, Maternal Fetal Medicine, Neonatal Perinatal Medicine, Anatomic and Clinical Pathology, Forensic Pathology, Placental Pathology, and Anesthesiology made complex presentations on the issue of liability which were voluminous. The Duffy firm's opposition to those motions together with plaintiffs' medical experts were successful in defeating those motions which could have been determinative and precluded any recovery by the plaintiffs. An additional 400 hours for the extensive work performed by Attorney Mary Ellen Duffy is reasonable under the circumstances presented herein.

In addition, the coordination and preparation for trial of the plaintiffs' medical experts was detailed, extensive and time consuming. The process as described by Attorney James R. Duffy as constantly refining the detail of the trial preparation in the face of equally experienced and formidable adversaries was well detailed in the written submission to this Court. This case was certainly

complex. The result achieved by the Duffy firm is certainly an excellent outcome on behalf of the plaintiffs. The client was made aware in the retainer agreement of the possibility of this application and the client has consented to the application for and granting of greater compensation. The Court finds that under the particular circumstances of this case, adherence to the fee schedule provided for in Judiciary Law § 474-a (2) would result in inadequate compensation to plaintiffs' counsel as that term is defined in the pertinent case law by the Court of Appeals (*see Yalango*, 84 NY2d 601).

Attorneys James R. Duffy and Mary Ellen Duffy were not the only attorney partners or associates who devoted time to the prosecution of this action. The additional attorneys who contributed for a period of over seven years were conservatively estimated at an additional 1400 hours beyond the 959 hours for James R. Duffy and the 528 hours for Mary Ellen Duffy. Combining the hours expended for James R. Duffy and Mary Ellen Duffy for a combined 1487 hours would result in an effective combined hourly fee for these two seasoned, senior and experienced plaintiffs' medical malpractice attorneys of $385 per hour. The lower end of the spectrum for James R. Duffy's fees would be in the realm of $1000 per hour and Mary Ellen Duffy in the amount of $650 per hour. At those levels, the lower level of reasonable combined fees would be $1,302,200 for these two attorneys alone.

In adding an additional 1400 hours for other attorneys at the associate level an hourly rate of $300 per hour is reasonable. In combining those rates an additional $420,000 in fees would have been generated on an hourly basis. The combined conservatively estimated fee of $1,722,200 for James R. Duffy, Mary Ellen Duffy and the other attorneys in the firm performing professional legal services in this matter would constitute 40.5% of the $4,227,842 recovery on behalf of the plaintiff. The one-third fee which counsel seeks herein is $1,409,280 ($4,227,842 ÷ 3). This one-third fee in and of itself would not reasonably and fully compensate counsel under the circumstances of this particular case.

In applying the $1000 per hour rate for attorney James R. Duffy, the $650 per hour rate for Mary Ellen Duffy, and the $300 per hour rate for other attorneys in the firm, the blended rate would be $650 per hour on a dollar-per-hour basis. That blended rate is reasonable in the context of a case that meets the *Yalango* case standards. A blended rate at this level has been affirmed as reasonable by the appellate courts in New York. *Yalango* in 1994, some twenty-four years ago, approved a rate of $550 per hour where the statutory criteria had been met.

This Court is mindful of the discretion granted to it as "the justice of the trial part to which the action had been sent for trial" pursuant to Section 474-a (4) of the Judiciary Law. The Court is further mindful of the legislative intent in limiting the award of contingent fees in medical malpractice cases. The legislative intent was to reduce the attorneys' fees payable in medical malpractice actions. The traditional one-third of gross recovery less disbursements was the baseline and traditional retainer in medical malpractice cases similar to personal injury retainers in other types of actions. A survey of the reported cases wherein relief was sought from the statutory schedule limitations shows recoveries of less than the traditional one-third affording due deference to the statute. There is no mathematical formula and each case is *sui generis.*

In the matter of *Contorino v Fla. Ob/Gyn Ass'n*, 283 AD2d 67 (2d Dept 2001), the Second Department affirmed the trial court's approval of fees in a somewhat similar case of $1,000,000 where the presumptive statutory sliding scale fee was $560,000, or an hourly rate of $166.67. In that case, the trial lasted for six weeks and the reduced stipulated structured settlement of $4,250,000 served as the basis for the court's calculations wherein the court concluded that the sliding scale fee would be 13.58% of the final recovery, which in that court's opinion did not constitute adequate compensation. The ultimate award of fees in the amount of $1,000,000 constituted approximately 24% of the gross recovery.

Here, the firm of Duffy and Duffy has expended in excess of 2887 hours at a blended rate of $650 hours, which would more than support a finding by this Court of a fee of $1,876,550. However, in the circumstances, this Court finds that there is a limitation upon the upward limit imposed by the terms of the retainer agreement at one-third of the recovery, or $1,409,280 [$4,227,842 ÷ 3]. The statutory imperative is that an amount less than one-third should be awarded even where the statutory criteria of hardship due to insufficiency and unreasonableness have been met.

In its discretion and after due deliberation, and being guided by appellate court decisions, this Court finds that a fee of $1,200,000 which would result in an hourly rate award of $416 per hour is warranted as a reasonable fee where the presumption of validity of the statutory fee has been successfully rebutted. This award reflects 28% of the settlement.

Accordingly, in accordance with the statute and controlling case law and the facts and circumstances herein and in the exercise of its discretion, plaintiffs' counsel's application for an increase in the statutory fee is **GRANTED**,

and the sum of $1,200,000 is awarded as and for a contingent counsel fee in accordance with Judiciary Law § 474-a. It is,

ORDERED, that a copy of this Order shall be served on all persons entitled to receive notice of the application, to wit: the plaintiffs herein and the Commissioner of the Suffolk County Department of Social Services.

The foregoing constitutes the decision and Order of the Court.

Dated: July 17, 2018

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**