

Kerrigan v Wei Shen
2019 NY Slip Op 33850(U)
December 17, 2019
Supreme Court, Queens County
Docket Number: 706382/16
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
James G. Kerrigan,

Index
Number: 706382/16

Plaintiff,

- against -

Motion
Date: 11/4/19

Wei Shen M.D. and North Shore
University Hospital,

Motion Seq. No.: 2

Defendants.

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The following papers numbered 1 to 8 read on this motion by defendant, Wei Shen M.D., for judgment notwithstanding the verdict, or to set aside the verdict, or for a new trial.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that the motion is decided as follows

That branch of the motion by defendant, Dr. Wei Shen, for judgment notwithstanding the verdict is denied. That branch of the motion to set aside the jury's verdict on all issues and for a new trial on all issues upon the ground that the jury's verdict was against the weight of the evidence is denied. That branch of the motion which seeks, in the alternative, to set aside the jury's award for future pain and suffering and dismiss plaintiff's cause of action for future pain and suffering is denied, and that branch of the motion to set aside the jury's verdict awarding damages for past pain and suffering and for a new trial on damages for past pain and suffering, pursuant to CPLR 4404, unless plaintiff stipulates to the substantial reduction of the verdict upon the ground that the damages verdict is excessive in that it deviates materially from what would be reasonable compensation, in accordance with the standard set forth in CPLR 5501(c), is also denied.

It is undisputed that plaintiff suffered a fracture to his left distal fibula during arthroplasty (ankle replacement) surgery performed by Dr. Shen on March 22, 2016, which fracture required

repair with a metal plate and screws. The operative report states, inter alia, that "because the radiographic findings show that there was an unintentional distal fibula fracture that was cut by the saw, we exposed the distal fibula fracture site and holding the fracture site with a fracture reduction clamp, placed a Stryker pre-contoured distal fibula plate".

Plaintiff elicited one departure through his expert, Dr. Mark McMahon. He testified, based upon the medical records he reviewed, including x-rays and the operative report, that Dr. Shen placed the jig, or guide, for the cutting of plaintiff's tibia for the arthroplasty too far forward so that it went onto the fibula, the result of which was that instead of cutting the tibia only, the blade of the power saw that was used cut into the fibula as well, fracturing it. He opined that the misplacement of the jig was a departure from standard medical practice in 2016 and that departure caused the fibula fracture. He also opined, based upon the medical records, that plaintiff's testimony of constant and extreme soreness of his ankle at the fibula fracture site is consistent with the medical information and the fibula fracture, stating that the plate with the screws that was placed to repair the fracture is right under the skin and thus prominent, so it can be a painful condition, and that such condition was the normal sequela of the kind of fracture that plaintiff sustained. He also stressed that the plate with the screws is permanent.

The jury rendered a verdict in favor of plaintiff on May 15, 2019. Question 1 of the verdict sheet asked whether defendant Dr. Wei Shen departed from good and accepted medical practice during the left ankle replacement surgery on March 22, 2016. The jury answered yes. Question 2 of the verdict sheet asked whether this departure was a substantial factor in causing injury to plaintiff. The jury answered in the affirmative. The jury awarded plaintiff, in Question 3 of the verdict sheet, \$100,000 for past pain and suffering and, in Questions 4 and 5 of the verdict sheet, \$400,000 for future pain and suffering over a period of 10 years.

CPLR 4404(a) provides that a trial court "may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law...where the verdict is contrary to the weight of the evidence". A verdict is not against the weight of the evidence "unless the evidence so preponderates in favor of the movant that it could not have been reached on any fair interpretation of the evidence" (Evers v. Carroll, 17 AD 3d 629, 631 [2nd Dept 2005], quoting Schiskie v. Fernan, 277 AD 2d 441, 441 [2nd Dept 2000]). Indeed, "[f]or a court to conclude that a jury verdict is unsupported by sufficient evidence as a matter of law, there must be no 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" (Taino v. City of Yonkers, 43 AD 3d 401 [2nd Dept 2007]). Moreover, in deciding whether to set aside the verdict, the court should accord considerable deference to the jury's findings of fact (see Evers v. Carroll, supra).

Defendants' counsel contends that plaintiff did not prove a case sounding in medical malpractice against Dr. Shen even giving every favorable inference to plaintiff, that plaintiff's expert, Dr. McMahon, was unqualified to offer a medical opinion that there was a departure from good and accepted medical practice in the performance of the arthroplasty and that such departure was a substantial factor in causing injury to plaintiff because Dr. McMahon never performed ankle replacement surgery and thus did not have the requisite experience to render his opinion concerning the ankle replacement surgery that Dr. Shen performed, that Dr. McMahon's findings based upon his review of the medical records are inextricably intertwined with, and cannot be divorced from, his findings concerning the two physical examinations of plaintiff that he performed and the records of which were not permitted to be placed into evidence and testimony concerning them was precluded, and that plaintiff's counsel made improper and prejudicial comments in his summation. Defendants' counsel's arguments are wholly without merit.

The evidence adduced at trial supports the jury's findings both as to liability and damages for past and future pain and suffering. Moreover, Dr. McMahon established his qualifications as an expert by setting forth stellar professional and academic credentials as an orthopedic surgeon. Although he testified that he has not performed arthroplasty, he testified that he is familiar with such surgery in that such is part of the field of orthopedic surgery and is encountered in his career as an orthopedic surgeon, and that he has performed ankle surgeries, including repairing of ankle fractures and the placement of metal implants. His qualifications as an expert to opine on whether Dr. Shen departed from good and accepted medical practice in the manner in which he performed the ankle replacement surgery and whether such departure was a proximate cause of plaintiff's fibula fracture and resultant pain and suffering, both past and future, were clearly sufficient to have allowed him to offer testimony, and thus the jury was clearly entitled to credit his testimony. Moreover, the evidence adduced at trial clearly supported the jury's finding of future pain and suffering.

Counsel's next argument that it is impossible to determine whether Dr. McMahon's testimony was based solely upon his review of the medical records and not also informed by his examinations of plaintiff is also without merit. This Court notes that it had ruled that Dr. McMahon could not testify as to his findings of his

physical examinations of plaintiff because his reports of those examinations were never exchanged and thus could not be admitted into evidence, and consequently, he could not give testimony based upon his physical examinations of plaintiff, but that his testimony would be limited to his review of plaintiff's hospital records. Dr. McMahon's testimony was objectively based upon the medical records only, which he referenced and discussed in explaining his opinion based upon them. There is nothing in his testimony that was not based upon the records he reviewed and which was not derived from his explanation of those records alone so as to elevate beyond the level of pure speculation defendants' counsel's contention that Dr. McMahon's opinion may have also been based upon his own physical examination of plaintiff.

As to counsel's remaining argument for a judgment notwithstanding the verdict, or to set aside the verdict and order a new trial on liability and damages, that plaintiff's counsel made prejudicial remarks during his summation, there is nothing that counsel said concerning which this Court sustained defendants' counsel's objections and directed the jury to disregard them, that prejudiced defendants to such an extent as to have required this Court to declare a mistrial. Indeed, defendants' counsel never moved for a mistrial.

Defendants' counsel also contends, in the alternative, that the jury's award of \$100,000 for past pain and suffering is excessive and against the weight of the evidence and should be set aside and a new trial on damages for past pain and suffering ordered unless plaintiff stipulates to reduce the verdict for past pain and suffering to \$50,000.

In setting aside a jury award of damages as excessive pursuant to CPLR 5501(c), the Court must find that such award "deviates materially from what would be reasonable compensation." Although CPLR 5501(c) expressly addresses the Appellate Division's authority to overturn a jury's damages verdict, its "material deviation" standard has been applied to trial courts (see Osiecki v Olympic Regional Dev. Auth., 256 AD 2d 998; see also Cochetti v Galow, 192 AD 2d 974). In determining whether an award constitutes a material deviation, the Court is required to compare the jury's verdict to those verdicts resulting from factually similar situations (see Donlon v City of New York, 284 AD 2d 13). Defendants' counsel has not cited to any verdicts in any cases in support of his bare, perfunctory, one-sentence pronouncement that the jury's verdict for past pain and suffering should be reduced to \$50,000, and this Court is unaware of any jury verdicts in factually similar situations by which it may conclude that the jury's award of \$100,000 for past pain and suffering deviated materially from what would be considered fair compensation.

Likewise, with respect to future damages, although defendants' counsel argues that there was no evidence for an award of future damages at all and therefore that the award for future pain and suffering should be set aside and plaintiff's cause of action for future pain and suffering should be dismissed, as this Court has noted, there was ample evidence proffered at trial whereby the jury could have rationally made an award for future pain and suffering. Moreover, defendants' counsel has not made the alternative argument that if the evidence did support an award for future pain and suffering that the award of \$400,000 was excessive. No verdicts from cases involving similar fact patterns have been offered to show that such an award was a material deviation from fair compensation. Indeed, this Court notes that an award in this sum, based upon a period of ten years, is not at all disproportionate to the \$100,000 award for past pain and suffering for the period of slightly over three years from March 22, 2016 to the date of the verdict on May 15, 2019.

Accordingly, the motion is denied in its entirety.

Dated: December 17, 2019



KEVIN J. KERRIGAN, J.S.C.

FILED
 DEC 31 2019
 COUNTY CLERK
 QUEENS COUNTY