

**Weber v Kim**

2020 NY Slip Op 32356(U)

July 17, 2020

Supreme Court, New York County

Docket Number: 805208/15

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 11

----- X Index No.: 805208/15

SONJA WEBER,

Plaintiff,

-against-

PETER S. KIM, M.D., and GOTHAM  
GASTROENTEROLOGY, P.L.L.C.,

Defendants,

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**Joan A. Madden, J.:**

In this post-trial motion, the plaintiff, Sonia Weber, moves to set aside the verdict in favor the defendant on the grounds that the jury’s verdict that defendant Dr. Peter Kim (“Dr. Kim”) did not depart form accepted medical practice is against the weight of the credible evidence and that plaintiff was deprived of a fair trial based on prejudicial conduct of defense counsel and “improper findings” by the Court.

Defendants Dr. Kim and Gotham Gastroenterology, P.L.L.C. oppose the motion and argue it should be denied as plaintiff has failed to demonstrate that the verdict in favor of defendants is not supported by a fair interpretation of the evidence; that the record supports the verdict; and plaintiff’s argument that she was deprived of a fair trial based on defense counsel’s conduct and certain court “findings” are without merit.

Background

In this trial, Ms. Weber alleged that Dr. Kim, a board-certified gastroenterologist, departed from accepted medical practice with respect to his care and treatment of her from 2011 through 2013, regarding her intestinal complaints. Specifically, Ms. Weber claimed that Dr. Kim

was negligent in diagnosing plaintiff with, and treating her for, Crohn's disease, when she was suffering from lymphoma of the small bowel.

The evidence at trial showed that Ms. Weber's first visit to Dr. Kim was in 2009 regarding abdominal complaints. At that time, Dr. Kim performed a capsule endoscopy, a test in which a patient swallows a pill containing a camera with a battery life of eight hours which records thousands of images of the small intestine. As a result of this test, Dr. Kim diagnosed Ms. Weber with Irritable Bowel Syndrome. This capsule endoscopy was one of three such tests which Dr. Kim performed, and, while this history is tangentially relevant to Dr. Kim's care, neither this test nor Dr. Kim's treatment in 2009, were in issue at trial.

Plaintiff's claims of negligence involved subsequent care and treatment Dr. Kim provided between 2011 and 2013. During this time, Dr. Kim tested, diagnosed and treated Ms. Weber for Crohn's disease. Medical evidence at trial centered on Ms. Weber's symptoms, the interpretation and implication of two Cat Scans ("CT Scans") and a colonoscopy in 2011; two capsule endoscopies ("PillCams") in 2012; and Cimzia, a biologic medication Dr. Kim prescribed in connection with his diagnosis that Ms. Weber was suffering from Crohn's disease. While Dr. Kim performed the colonoscopy and the two capsule endoscopies, the two CT Scans upon which Dr. Kim testified he relied, were performed by two different radiologists.

Plaintiff presented the following evidence in support of her claims. In 2011, Ms. Weber saw Dr. Kim and requested a colonoscopy, which he performed and which he reported as normal. About a week later, Ms. Weber contacted Dr. Kim with complains of abdominal pain. Before seeing Dr. Kim, Ms. Weber had a CT scan on August 1, 2011, which was provided to Dr. Kim, who testified that he reviewed and relied upon it.

The report found:

“distal small bowel loop with marked wall thickening. Findings may represent an infectious etiology. Follow-up to exclude inflammatory bowel disease suggested. There is no obstruction. No significant adenopathy.”

Based on this report, Dr. Kim ordered a CTE, a Cat Scan with Enterography, which uses CT imaging and a contrast material to view the small intestines which was performed on August 25, 2011, by a different radiologist than the one who performed the August 1, 2011 scan. This radiologist reported an:

“abnormal loop of the small bowel in the mid pelvis which demonstrates diffuse bowel wall thickening and suggests follow-up with a small bowel capsule endoscopy.”

The report further states that:

“this area is reviewed on the prior CT dated August 1, 2011 and is normal. This implies that the abnormality is inflammatory in nature.”

As a result of these reports, in January 2012, Dr. Kim performed a capsule endoscopy or PillCam and testified that he identified several ulcers on various images from the tests.

Dr. Kim further testified as ulcers are a symptom of Crohn's disease, that, based on these images, together with Ms. Weber's other symptoms, including fatigue, weight loss and abdominal pain, he diagnosed Ms. Weber as suffering from Crohn's disease. At this point, Dr. Kim prescribed Cimzia, a biologic drug used in the treatment of Crohn's disease. In April 2012, Ms. Weber reported feeling better; however, in May 29, 2012, she complained of symptomatology, including abdominal pain, which she reported was not as severe as pain she had previously experienced.

Dr. Kim continued Ms. Weber on Cimzia, and Ms. Weber did not experience any flare-ups of symptoms until August 2012. Dr. Kim performed another capsule endoscopy in December 12, 2012. According to Dr. Kim, this capsule endoscopy showed that Ms. Weber's ulcers had

healed, and that Ms. Weber's condition improved on Cimzia. However, in September 2013, Ms. Weber, who had been living in San Diego, emailed Dr. Kim that she was experiencing a flare-up with intense stabbing pain and bloating. Subsequently, Ms. Weber was diagnosed with diffuse large B cell lymphoma of the small bowel at the University of California, San Diego, for which she underwent chemotherapy and radiation. At trial, four years post treatment, her cancer was in remission.

At trial, plaintiff claimed that Ms. Weber never had Crohn's disease, and that from 2011 through 2013, during the time Dr. Kim provided care and treatment to Ms. Weber, she suffered from lymphoma of the small bowel, which Dr. Kim misdiagnosed as Crohn's disease.

Plaintiff's overarching theory of liability was that the standard of care required a biopsy to diagnose Crohn's disease, and to rule out cancer, and that as Dr. Kim did not order a biopsy, he departed from the standard of care in treating Ms. Weber. Defendants disputed that during Ms. Weber's medical care by Dr. Kim, the standard required a biopsy, and contended that Dr. Kim's diagnosis of, and treatment for, Crohn's disease, was within the standard of care, based on Ms. Weber's symptoms, the two CT Scans, the PillCams and her improvement on Cimzia. With respect to Ms. Weber's improvement on Cimzia, defendants contended that plaintiff's improvement supported the diagnosis of Crohn's disease, as ulcers are associated with Crohn's disease and they had healed.

In support of her claims, plaintiff called two experts, Dr. Brian Behm ("Dr. Behm"), board certified in internal medicine and gastroenterology, who testified regarding the diagnosis and treatment of Crohn's disease, and issues related to diagnosing lymphoma; and Dr. Adrienne Phillips, board certified in internal medicine, oncology and hematology, who testified to cancer related issues.

Defendants called Dr. Stephen Hanauer, board certified in internal medicine and gastroenterology, who testified with respect to gastrointestinal issues, including those related to the alleged departures; Dr. Michael Grossbard, board certified in oncology, who testified regarding issues related to cancer; and Dr. Maxwell Chait, board certified in gastroenterology, who testified regarding capsule endoscopies.

The experts for plaintiff and defendants offered sharply conflicting opinions regarding the medical implications of Ms. Weber's symptoms and condition at various points during Dr. Kim's care; whether the standard of care required a biopsy to diagnose Crohn's disease and whether Dr. Kim should have ordered a biopsy to rule out cancer, and the interpretation and medical significance of the images on the PillCams.

#### Motion to Set Aside the Verdict

CPLR 4404(a) provides that "the court may set aside a verdict, or any judgment entered thereon ... where the verdict is contrary to the weight of the evidence ...." The standard used in determining a motion to set aside a verdict as against the weight of the evidence is whether the evidence so preponderated in favor of the moving party, that the verdict "could not have been reached on any fair interpretation of the evidence." Lolik v. Big V Supermarkets, Inc., 86 NY2d 744, 746 (1995), quoting Moffatt v. Moffatt, 86 AD2d 864 (2d Dept 1982), aff'd 62 NY2d 875 (1985) To apply this standard, the court's analysis "involves what is in large part a discretionary balancing of many factors." Cohen v. Hallmark Cards, 45 NY2d 493, 499 (1978)(internal citation omitted).

As indicated above, plaintiff moves to set aside the verdict as against the weight of the evidence and on the grounds that defendant was deprived of a fair trial, in part based upon

alleged prejudice due to the two interrogatories regarding liability which were submitted to the jury. Since the discussion of these two issues are interrelated, they will be considered together.

The interrogatories submitted asked:

- 1(a) Did defendant Dr. Peter S. Kim depart from accepted medical practice in diagnosing and treating plaintiff Sonja Weber for Crohn's disease during his care of her?
- 2(a) Did Dr. Kim depart from accepted medical practice in not attempting to rule out cancer during his care and treatment of Sonja Weber?

The jury answered "no" to both interrogatory 1(a) and 2(a).

Plaintiff contends that the following seven interrogatories she proposed should have been submitted to the jury based on the testimony of her liability expert, Dr. Brian Behm regarding departures.

Did Dr. Kim depart from accepted medical practice by:

- 1 diagnosing Ms. Weber with Crohn's disease based on the CT Scan and CTE of August 1, 2011 and August 25, 2011;
- 2 by ruling out cancer of the small bowel based on the CT Scan and CTE of August 1, 2011 and August 25, 2011
- 3 by diagnosing Crohn's disease as the cause of Sonja Weber's symptoms based on the January 2012 pill capsule endoscopy;
- 4 by reading the December 2012 pill capsule endoscopy as showing significant improvement in what he diagnosed as Crohn's disease;
- 5 by continuing to treat Sonja Weber for Crohn's disease until she was diagnosed with lymphoma;
- 6 by not diagnosing non-Hodgkin's lymphoma after the CT Scan and CTE Scan were done in August 2011;
- 7 by not performing testing to do restaging of his diagnosis of Crohn's disease after the May 29, 2012 visit.

At the outset, as noted above, plaintiff's overarching theory of liability was that Dr. Kim should have ordered a biopsy to rule out cancer and to diagnose Crohn's disease. In this connection, when asked by the court to detail the evidence regarding departures in support of the proposed interrogatories, plaintiff pointed to the following testimony of Dr. Behm. As to the first interrogatory, plaintiff pointed to testimony that a CT scan is not a specific test and a scope and biopsy is needed to rule in Crohn's disease. (Trial Transcript ("TT") at 683).

As to the second interrogatory relating to cancer, plaintiff relied on Dr. Behm's opinion that Dr. Kim departed by ruling out cancer based on the CT and CTE scans of August 2011, as they showed an abnormal area of the small intestine and that a tissue biopsy was not needed to determine if it is "something that is benign" or "cancerous." (TT at 692-693). As to the third interrogatory, Dr. Behm testified that it was a departure for Dr. Kim to diagnose Crohn's disease based on the PillCam, as the PillCam is not specific and cannot rule in Crohn's disease,<sup>1</sup> and is limited as it does not allow for a tissue biopsy (TT at 726).

As to plaintiff's theories regarding proposed interrogatories four through six, like the theories in her proposed interrogatories one through three, they were based on the need for a biopsy. Although at the pre-charge conference, in response to the court's questioning, plaintiff argued that further "investigation" was needed, the only testimony as to this issue was that biopsies were needed to rule in Crohn's disease and rule out lymphoma.

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<sup>1</sup> Dr. Behm testified that sensitivity is to rule out a disease if negative, and specificity would rule in a disease if positive. He testified that the CT and CTE scans and capsule endoscopies have low specificity and therefore cannot rule in Crohn's disease, or rule out cancer, and that a biopsy is needed. (TT at 685-686).

As to the seventh interrogatory involving the May 27, 2020 visit, Dr. Behm testified that Dr. Kim departed by not ordering a restaging of testing, which restaging would consist of CT or MR enterography, and colonoscopy.<sup>2</sup> With the exception of this interrogatory, the evidence showed that plaintiff's theory in each instance was primarily that Dr. Kim failed to order a biopsy to rule in Crohn's disease and rule out cancer. The two interrogatories submitted to the jury encompassed this theory and permitted plaintiff to argue at particular points during Dr. Kim's treatment, a biopsy or other tests should have been performed. Plaintiff was not precluded from making such argument, and plaintiff's attempt to fault the interrogatories which were submitted is without merit.

Moreover, this conclusion is supported by the record of the pre-charge conference. As noted above, the court specifically asked plaintiff to detail the testimony of Dr. Behm in support of the proposed interrogatories. During the discussion, plaintiff was questioned regarding the theory as to the actions Dr. Kim should have taken to further "investigate." (TT at 1785). When questioned that the evidence indicated that he should have ordered a biopsy, as to interrogatories one through six, plaintiff did not specify any other tests. At the conference, defendant argued that two departures should be submitted, that Dr. Kim departed from accepted medical practice in diagnosing and treating Ms. Weber for Crohn's disease, and that Dr. Kim departed from accepted practice in not ruling out lymphoma. (TT at 1796-98).

The court then held a conference with the attorneys off the record for the purpose of resolving the issues surrounding the interrogatories, with the understanding that the parties' right to object to the interrogatories was reserved. After the conference, three interrogatories

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<sup>2</sup> It is noted that these tests were the same tests either ordered or performed by Dr. Kim in diagnosing Crohn's disease.

were proposed and read into the record (TT at 1805). Plaintiff then stated that she agreed with interrogatories one and two, which were submitted, but did not agree with the third interrogatory as “it was worded.” (TT at 1805). The proposed third interrogatory read, “Did Dr. Kim depart from accepted medical practice by not referring Sonya Weber for testing based on Ms. Weber’s symptomatology on May 29, 2012, after taking Cimzia?” Plaintiff then withdrew the request for this interrogatory on the grounds that the first two interrogatories were general and that the third interrogatory was specific. (TT at 1805-1807). The third proposed interrogatory reflects the wording of plaintiff’s proposed interrogatory seven, and Dr. Behm’s testimony as to this alleged departure.

In connection with plaintiff’s argument that plaintiff was prejudiced based on the two interrogatories, defendant claims plaintiff waived this argument, based on the following statement by trial counsel:

Yes, Judge. In an attempt to compromise because the defendants objected to our having our specific departures and specific departures on the verdict sheet, we initially agreed to number one and two and I submit they are a conglomeration of specific departures that were elicited by Dr. Behm. But then the Court insisted on being very specific on question number three based on that we do not agree to one and two or three because we have cobbled together departure questions in one and two which were much more specific and specifically elicited but on question number three it’s a very specific question that is not even the specific response given and rationale given by Dr. Behm and, therefore, I object and do not agree to the proposed verdict sheet.

(TT at 1805-06).

After this statement, the court read into the record Dr. Behm’s testimony regarding the third interrogatory in which he testified that restaging included the previously indicated tests (TT at 1806). Plaintiff’s appellate counsel then stated:

Judge, in light of the wording, plaintiff will withdraw number three as a separate question and go with two general questions that the court has formulated along with defense counsel understanding that the theory of number three is subsumed in the general questions.

(TT at 1807).

Based on the statements of plaintiff's trial and appellate attorneys, a reasonable inference can be drawn that plaintiff waived any objection to the verdict sheet, and with respect to the third interrogatory (plaintiff's proposed interrogatory 7), plaintiff withdrew that interrogatory, and thus any objection is unpreserved.

In any event, this is not dispositive of this issue, as plaintiff has not shown prejudice by the interrogatories submitted to the jury. As noted above, the jury interrogatories, as framed, permitted plaintiff to argue that at any particular point during Dr. Kim's care, he departed from accepted practice in diagnosing plaintiff with Crohn's disease and in not ruling out cancer based on Ms. Weber's symptomology and test results, and in not ordering a biopsy. Plaintiff's argument that the wording of the two interrogatories made it possible for the jury to answer "no" to the questions without considering each of plaintiff's proposed seven departures, does not provide grounds for a different conclusion.

As an example, plaintiff contends that the jury could answer "no," that Dr. Kim did not depart in diagnosing and treating Ms. Weber for Crohn's disease, while never considering whether he departed by continuing to treat her for Crohn's disease until she was diagnosed with a lymphoma. Plaintiff contends that the jury would have to answer "no," to the question even if it had found that Dr. Kim departed by continuing to treat her for Crohn's disease. This argument is unavailing as the questions ask if he departed by treating Ms. Weber for Crohn's

disease during Dr. Kim's care and treatment of her, did not limit the time frames and refers to the entire course of Dr. Kim's care and treatment.

The determination of interrogatories to be submitted to the jury is within the broad discretion of the court. Lunn v. County of Nassau, 115 AD2d 457, 458 (2d Dept 1985); see CPLR 4111(c). However, this discretion is not unlimited, and in an action based on negligence where the plaintiff has presented different theories of negligence, it is an error for a court to deny a request to submit interrogatories on each theory. Abato v. Beller, 122 AD3d 554, 555 (2d Dept 2014).

Here, plaintiff alleges that it was error for the court not to submit each of the seven interrogatories proposed by plaintiff. However, plaintiff failed to establish the legal basis for the conclusion that each of the interrogatories were based on separate theories of negligence. It is evident from the foregoing discussion that in the instant case, plaintiff presented theories of negligence that Dr. Kim departed from accepted medical practice in diagnosing Crohn's disease and in not attempting to rule out cancer during the period he provided care and treatment to Ms. Weber. Mazella v. Beals, 27 NY3d 694 (2016) supports this conclusion. In that case, plaintiff's expert testified that the defendant psychiatrist departed from accepted medical practice in prescribing Paxil for 10 years and adding Zyprexa without properly monitoring or seeing decedent, and/or providing ineffective care of decedent during the last visit prior to his suicide. Defendant argued that plaintiff presented three different theories of liability and three interrogatories should have been submitted to the jury.<sup>3</sup> The court found that the verdict sheet

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<sup>3</sup> These departures are discussed in footnote six in Mazella.

was proper as “there was a single theory of liability presented to the jury based on the defendant's continuum of negligent treatment.” Id. at 712.

The cases plaintiff discusses do not require a different result as they are distinguishable based on the facts and applicable law. Abato v. Beller, 122 AD3d 554 (2d Dept 2014), is distinguishable as it involved two different theories of liability; one based on the failure of the defendant oral surgeon to communicate to plaintiff's orthodontist a change in the preoperative plan which they had agreed upon, and the other based on the failure to move the mandibular midline. The preoperative plan had included a jaw advancement and moving plaintiff's mandibular midline. The defendant advanced the jaw, but changed the plan, and did not move the mandibular midline.

Likewise, Cicione v. Meyer, 33 AD3d 646 (2d Dept 2006) is distinguishable as it involves two different theories of informed consent, one based on allegedly insufficient information regarding the risks involved in a vaginal delivery following a cesarean section (VBAC), and the second involving the risks of inducing labor with Prepidil Gel and Pitocin. The Second Department ordered a new trial based on the trial court's failure to submit two interrogatories to the jury as plaintiff requested, and based this determination, in part, on the wording of the interrogatory which read:

“Did the defendant Anthony Royek, M.D., before obtaining the plaintiff Denise Cicione's consent to the VBAC and/or the induction of labor, provide appropriate information or get informed consent from Denise Cicione?”

Id. at 648.

The Second Department held that the merger of two theories in the interrogatories made it possible for the jury to find the defendant not liable on one theory and “due to the wording of the interrogatory, [to] not consider the other separate theory.” Id. (internal citation omitted).

Here, the interrogatories do not contain this defect since, as discussed above, the interrogatories refer to the entire course of Dr. Kim's treatment.

In Steidel v. County of Nassau, 182 AD2d 809, 810 (2d Dept 1992), plaintiff's theory as described by the court was that "if the preparations for a Caesarean section had been speedier, the anesthetic halothane would have been administered, and the administration of this drug would have averted the subsequent amniotic fluid embolism." Plaintiff's expert testified to several departures including one based on the defendant hospital having a first year resident treat plaintiff, a delay from the time a senior doctor ordered an immediate caesarean section and the time plaintiff entered the operating room, and the failure to administer the anesthetic immediately. The court noted that plaintiff requested a general interrogatory be submitted to the jury and the jury's verdict as to liability consisted of the following statement, "We find for the plaintiff Monica Steidel." Id at 812. In reversing, the court held that "[w]here, at the plaintiff's own request, there has been a general verdict, a new trial must be ordered whenever it appears that one of several theories submitted to the jury is not supported by legally sufficient evidence, even if other theories were supported." Id at 813.

Streidel is distinguishable as, here, plaintiff did not request "a general interrogatory," and the briefs do not raise any issue as to the lack of evidence to support any of plaintiff's proposed interrogatories. Thus, the rationale in Streidel for the court's determination reversing and ordering a new trial is inapplicable to the circumstances here.

With respect to the argument that the verdict is against the weight of the evidence, plaintiff relies on the previously discussed testimony of Dr. Behm, the testimony of Dr. Phillips, and certain testimony by Dr. Kim which plaintiff alleges are "admissions," and certain testimony on cross examination of defense experts, Dr. Chait, Dr. Grossbard and Dr. Hanauer,

which plaintiff alleges are concessions. Plaintiff argues, citing Nicastro v. Park, 113 AD2d 129, 134 (2d Dept 1985), that “there is no fair interpretation of the evidence on the jury’s finding of no departures.”

In regard to this issue, plaintiff argues that the nature of the evidence in this case and, in particular, certain alleged concessions by defense experts is similar to the evidence in Nicastro where the Second Department found the weight of evidence warranted setting aside the verdict in favor of the defendant. In Nicastro, the issue involved a claim of departures in misdiagnosing a developing myocardial infarction as a virally induced pleurodynia based on tests which defense experts admitted were inconclusive, and in the absence of symptoms associated with pleurodynia.

Here, as discussed below, the record does not reflect similar concessions by the defense experts who testified that the tests were consistent with Crohn’s disease, and that Ms. Weber’s symptoms were also consistent with Crohn’s disease. Thus, I conclude that Nicastro is not controlling as argued by plaintiff and does not support setting aside the verdict.

In determining whether the evidence warrants setting aside the verdict, the testimony that plaintiff cites cannot be viewed in isolation but must be considered in the context of the witnesses’ testimony as a whole, and in relation to other evidence, and particularly to the standard of care. A careful analysis of the cited evidence reveals that while certain testimony arguably supports some aspects of plaintiff’s experts’ opinions, that other testimony supports defendants’ experts’ opinions, and that it was for the jury to evaluate and give such weight to the opinions as it found warranted.

With respect to Dr. Kim’s testimony, plaintiff’s contention that certain testimony he gave are “admissions” is without merit, as the questions and answers to which plaintiff points,

in context, are general questions regarding the standard of care, and Dr. Kim's answers do not constitute admissions. Specifically, Dr. Kim did not testify that he departed from accept medical practice in treating Ms. Weber, he only testified to what the standard of care required. For instance, plaintiff points to Dr. Kim's answers that good medical practice requires a doctor to consider the more dangerous conditions when diagnosing a patient; that if a patient has signs and symptoms of a condition that could be cancer, it would be a departure for a doctor not to consider cancer; and that if he did not consider malignancy in Ms. Weber, it would be a departure (TT at 114-18). A review of this testimony clearly establishes that Dr. Kim's answers were not admissions but rather responses to questions framed with respect to the standard of care.

Plaintiff also argues that the foregoing answers are "admissions" as Dr. Kim's records do not contain any notes that he considered cancer. In this connection, Dr. Kim testified that when he treated Ms. Weber for Crohn's disease based on her symptoms, the results of the CT scans and PillCams, he always considered cancer as part of his differential diagnosis. (TT at 457-58, 237-38). The absence of notes in his records does not establish that Dr. Kim did not consider cancer in light of this testimony. This was an issue of fact for the jury to weigh in evaluating the evidence. Nicastro v. Park, as argued by plaintiff, does not require a different result, as discussed above, the facts of that case are distinguishable from the evidence plaintiff points to in support of her argument.

Plaintiff also points to Dr. Kim's testimony at his first deposition that Ms. Weber's intestinal lymphoma was likely there in 2011, and that he did know not if she ever had Crohn's disease. (TT at 169-71, 374-75). In this regard, Dr. Kim testified at his second deposition and at trial that the lymphoma was not there in 2011, and that Ms. Weber did have Crohn's disease.

Dr. Kim offered as an explanation that he gave those answers at his first deposition because he did not have all the medical records and, in particular, did not have the surgical and biopsy reports from UCSD, nor access to his video endoscopy and that he gave the answer as to the lymphoma “in retrospect” based on its location (TT at 160-71). This was an issue of fact for the jury to consider in evaluating Dr. Kim’s care and treatment and credibility.

In connection with the testimony of Dr. Hanauer, defendants’ gastroenterology expert, defendants point to his testimony that it was not a departure to not order a biopsy, specifically, a double balloon scan endoscopy, based on the 2011 CT and CTE scans (TT at 1606), and that Dr. Kim properly relied on the radiologists reports and interpretations regarding these scans (TT at 1772). In addition, Dr. Hanauer testified that it was proper for Dr. Kim to treat Ms. Weber for Crohn’s disease based on her history, the CT and CTE scan and the two PillCams (TT at 1615). Dr. Hanauer based this opinion, in part, on the images from January 2012 PillCam showing focal ulcerations consistent with Crohn’s disease (TT at 1613), that since Ms. Weber was improving on Cimzia between January and September 2012, a biopsy at that time was not indicated (TT at 1629-32), and there was no indication for a biopsy until the December 12, 2013 MRI enterography noted changes (TT at 1645-46).

Plaintiff contends that Dr. Hanauer’s opinions are undermined based on his testimony on cross-examination that the images from the CT and CTE scans in 2011 could be inflammation or neoplastic, that is cancer (TT at 1718); that if Ms. Weber did not have Crohn’s disease, then she had cancer (TT at 1718); that to rule out cancer, you need a biopsy (TT at 1727). It was for the jury to evaluate Dr. Hanauer’s testimony on cross-examination with respect to the weight to be given to his opinions.

With respect to Dr. Grossbard, defendants' oncology expert, at issue in this motion is his testimony on cross examination regarding his opinion that Ms. Weber, based on her age and history of rheumatoid arthritis, was at only a slightly higher risk of lymphoma (TT at 1404-05); that the abnormality in the images on the CT scans in 2011 were in the same location where the lymphoma was found (TT at 1460-62; 1468); that had a biopsy been done between 2011-2013 with "reasonable probability" it would have diagnosed the lymphoma (TT at 1164-67); his testimony that Ms. Weber did not have Crohn's disease from 2010-2014, and that the UCSD records do not indicate any evidence of Crohn's disease (TT at 1481).

Plaintiff asserts Dr. Grossbard's testimony that Ms. Weber was at only a slightly higher risk of lymphoma was undermined by his testimony at a prior trial that lymphoma is a leading cause of cancer in people aged 39 and is a more common disease. This assertion is unavailing as the prior testimony does not necessarily conflict or contradict his testimony in the Weber trial.

As defendants point out, the remaining testimony of Dr. Grossbard when viewed in light of his testimony that Ms. Weber's improvement on Cimzia between January 2011 and December 2012 was not consistent with marginal zone lymphoma (TT at 1544-45); that plaintiff's family history of lymphoma was not significant because the type of lymphoma at issue, "extra nodule marginal zone lymphoma, has not been shown to be of any familial risk" (TT at 1404); and his testimony that contrary to Dr. Philip's testimony, persistent inflammation between the two CT Scans in August 2011, did not indicate that Dr. Kim should have done a biopsy at that time. TT at 1403-04. Based on the foregoing, it was for the jury to give such weight as it determined appropriate in light of the totality of Dr. Grossbard's testimony.

With respect to Dr. Chait's testimony, he testified that the January 10, 2012 capsule endoscopy was consistent with Crohn's disease where you see ulcers (TT at 1153-55; 1158-59), and not lymphoma, due to the absence of nodularity (TT at 1291-94); and that after Ms. Weber had been prescribed Cimzia, the December 12, 2012 PillCam study showed marked improvement and such improvement was not consistent with lymphoma (TT at 1165-68, 1295-96). Dr. Chait also testified that the failure to do a biopsy was not a departure from accepted medical practice, specifically that neither PillCam studies required a biopsy (TT at 1161, 1294, 1297-98).

Plaintiff asserts Dr. Chait based his opinion regarding the January 2012 capsule endoscopy on the absence of nodularity and the presence of ulcers, and this opinion was undermined by Dr. Chait's testimony on cross-examination that lymphoma in the small bowel can cause ulcerations and that there was nodularity evident in the January 2012 images (TT at 1178, 1215), and that the findings in the January study were also consistent with lymphoma (TT at 1335). Plaintiff's assertion that Dr. Chait testified that the January 2012 findings were consistent with lymphoma is not supported by the record, as when asked that question, he began to answer, "There are findings that are potentially, but the most consistent..." when plaintiff's counsel stated, "No, no" and Dr. Chait then said he could not answer "yes" or "no" (TT at 1335). For the same reasons given in connection with plaintiff's contentions regarding Dr. Hanauer and Dr. Grossbard's testimony, it was for the jury to evaluate Dr. Chait's opinion in light of all of his testimony.

Plaintiff also asserts that the motion is supported by evidence that Dr. Kim did not question Ms. Weber about any family history of cancer, and that Dr. Chait and Dr. Grossbard both testified Dr. Kim should have inquired about such history. Plaintiff points to Dr.

Grossbard's testimony that relatives of patients with diffuse large B-cell lymphoma (DLBCL) have an increased risk of developing this cancer. In response, Dr. Kim testified that he questioned her generally about her family history, but not specifically about cancer. It was for the jury to determine the weight to be given to, and the significance of this testimony, with respect to the evidence regarding the standard of care.

Finally, in support of plaintiff's argument regarding the weight of the evidence, plaintiff points to the testimony of Dr. Phillips, her expert oncologist. Specifically, plaintiff points to Dr. Phillip's opinion that Ms. Weber had lymphoma in 2011 based on the reports, that the imaging of the CT and CTE showing an abnormality in the small bowel; her age, history of rheumatoid arthritis, family history of Hodgkins or non-Hodgkins lymphoma, and plaintiff's history of Methetrate, that she was at an elevated risk of lymphoma, and "malignancy" rises to the top of the differential diagnosis (TT at 985-86, 987-88) Dr. Phillips testified that further "investigation" was needed which consisted of biopsy (TT at 1000).

As noted above, the inquiry by a court in connection with a motion to set aside the verdict as against the weight of credible evidence is whether the evidence so preponderated in favor of movant that the verdict could not have been reached on any fair interpretation of the evidence (Cruz v. Bronx Lebanon Hosp Ctr., 129 AD3d 631, 633 (1<sup>st</sup> Dept 2015), aff'd 27 NY3d 925 (2016)), which inquiry "does not involve a question of law, but rather requires a discretionary balancing of factors." Nicastro v. Park, 113 AD2d at 1323.

Based on a review of the opinions and testimony of the experts called by plaintiff and defendants, together with the testimony and evidence cited by plaintiff in support of this motion, and viewing the specific testimony cited by plaintiff in light of the experts' testimony and

opinions as a whole, I conclude that it cannot be said that the evidence so preponderated in favor of plaintiff so as to warrant setting aside the verdict.

In this regard, I note that plaintiff's theories of departure were based on Dr. Behm's testimony that Dr. Kim departed from the standard of care by not ordering a biopsy at various points during the treatment of Ms. Weber based on her symptoms and test results. I further note that the plaintiff and defense experts disagreed on this issue, and the defense experts' testimonies cited by plaintiff in large part addressed the interpretation of tests, the symptoms associated with Crohn's disease and cancer, but do not specifically contradict their testimony.

Neither Cicione v. Meyer, 33 AD3d 646 nor Reilly v. Ninia, 81 AD3d 913 (2d Dept 2011), two additional cases cited by plaintiff, compel a different conclusion. In Cicione, the defendant doctor admitted that Pitocin should have been discontinued once the uterine rupture was suspected, and it was undisputed that it was not stopped at that time. Here, contrary to plaintiff's argument, the record does not contain any similar admission.

For the same reason the decision in Reilly is not based on "analogous" evidence. In Reilly, the court set aside the verdict in favor of the defendant hospital on the grounds that the expert for the hospital based his opinion of no departures on assumed facts, not supported by, or fairly inferable from, the evidence, or known personally to the witness, and that the witness responded "maybe," to the question of whether the drug in issue should have been discontinued.

#### Arguments as to Court Rulings

Plaintiff claims that the court erred with respect to ruling that Dr. Behm, in testifying to his opinion that the images on the PillCam were of poor quality, should not state his opinion that the poor quality was due to "poor prep" by the plaintiff. Plaintiff mischaracterizes the court's ruling as precluding Dr. Behm from testifying what could be seen on the image (TT at

724-25). The court's ruling did not preclude Dr. Behm from testifying as to what the photos showed and that the view was obscured, and the record reflects that Dr. Behm testified that based on the images, it was difficult to get clear pictures because "[s]ome of the views are partially obscured by the material here, so this [is] a product of food that has been eaten, some of the secretions of the small intestine. So it does—does at least make it more difficult to get clear pictures." (TT at 724). This was followed by testimony that what was being seen were "food and other material in the intestine," that you could not "see as deeply into the small intestine as you could on the ... January pill camera," and that "the food particles interfere with viewing the wall." (TT at 725). The court did, however, rule that Dr. Behm should not testify that the poor quality of the images was due to "poor prep" absent notice of this opinion in the expert exchange or in the bill of particulars (TT at 723). In any event, plaintiff's claim is without merit, as the issue was what could be seen and interpreted from the images and not the cause of the food particles in the intestine, and Dr. Behm testified as to his opinion in this regard. Thus, plaintiff has failed to establish any prejudice based on this ruling.

Plaintiff also claims prejudice based on defendants' expert exchange which misstated the medical school and institutions where defendants' expert gastroenterologist, Dr. Hanauer, completed his residency and fellowships. Plaintiff claims this prevented counsel from identifying the expert in order to research the expert's prior testimony at other trials or depositions to potentially use to impeach his opinion at trial.

Defendant conceded that the information was incorrect but denied intentionally providing the wrong information and asserted that plaintiff knew that the expert was Dr. Hanauer based on a statement to that effect which an attorney from plaintiff's firm made to defendants' counsel. The claim of prejudice is unavailing as the court ruled that the cross-

examination of Dr. Hanauer would go forward, and that he would be recalled several days later, giving plaintiff the opportunity for research, and that he would be subject to questioning with respect to his qualifications and in connection with impeachment material, including prior testimony.

Plaintiff's counsel objected to the ruling and proceeded with cross-examination of Dr. Hanauer with the understanding that he was subject to recall. Then, during the witness' testimony, plaintiff's counsel stated that she declined the opportunity and opted not to recall Dr. Hanauer. TT at 1731-32. Accordingly, plaintiff has waived any objections based on this issue. Moreover, plaintiff fails to produce any material which could have been used to impeach Dr. Hanauer's opinions.

#### Arguments Based on Defendants' Summation

Plaintiff further claims prejudice based on remarks by defense counsel in summation regarding that the jurors should have put themselves in Dr. Kim's shoes and remarks regarding the lack of questioning of Dr. Hanauer about opinions in transcripts of his prior testimony. In both instances, the court gave curative instructions.

With respect to the remark about the jury putting themselves in Dr. Kim's shoes, the remark was made in the following context during defense counsel's summation.

It's easy. It's very, very easy to say would have, could have, should have, but that's not the law. That's not what the law asks you to do, and that's not your job. Your job is to look at this case, in the shoes---from the shoes of Dr. Kim. Stand in his shoes and look forward prospectively.

(TT at 1827).

Defendants contend that the full remark urges the jury to evaluate the evidence based on what Dr. Kim knew at the time of the alleged malpractice and not based on hindsight, and that

this is consistent with the PJI instruction given in this case that Dr. Kim would be liable only “on the basis of facts and conditions existing at the time of the claimed negligence.” (TT at 1854, 1931).

Although plaintiff did not object at the time of the remark, after a luncheon recess, and before defense counsel resumed her summation, plaintiff objected, and the court gave the following curative instruction:

In viewing the evidence in this case and the issues presented, you are to view the evidence with respect to what Dr. Kim knew at the time in issue but you may not put yourself in the place of any—of either of the parties to this lawsuit. You cannot put yourself in the place of plaintiff or in the place of defendant.

In this instance, plaintiff objects on the grounds that the court did not reference defense counsel’s remark and argues that the lack of such reference failed to cure the prejudice. Plaintiff’s argument is unavailing, as demonstrated by the above sequence of events, and the context of the remarks, the curative instruction addressed the issue with sufficient clarity and precision for the jury to understand its significance.

With respect to the remarks regarding the lack of transcripts, plaintiff argues that these remarks compounded the prejudice based on the inaccurate information regarding Dr. Hanauer’s medical school and training, particularly as plaintiff was “denied the ability,” to obtain the transcripts.

In opposition, defendants argue that defense counsel provided a legitimate justification for her remarks, specifically defense counsel stated they were meant to address Dr. Hanauer’s motive in testifying when transcripts of his testimony at this trial could be used in future trials (TT at 1845), that the court *sua sponte* instructed the jury to disregard these remarks (TT at 1844), and plaintiff’s counsel specifically declined to ask for a mistrial based on these remarks.

As defendants assert, the court did give a curative instruction that the jury was not to consider nor draw any inference from the fact that plaintiff did not question Dr. Hanauer regarding prior testimony from transcripts at prior trials.<sup>4</sup>

The record also reflects that while strenuously objecting to the remarks, plaintiff's counsel stated, "I think it is a basis for a mistrial." However, when asked if she was moving for a mistrial, counsel stated "no." (TT at 1846). Plaintiff argues that defendants cannot rely on the fact that plaintiff's counsel did not seek a mistrial, as subsequently, and prior to the verdict, defense counsel made a motion for a mistrial based on comments by plaintiff's counsel in summation. Plaintiff's counsel then made a motion for a mistrial based on comments regarding Dr. Hanauer and transcripts. (TT at 2019-50). The court denied both motions as insufficient based on the record before it.

Plaintiff also argues that it was an error for the court to deny the mutual motions for a mistrial. The court rejects plaintiff's argument that these mutual motions fall under "the principle that parties to a civil dispute are free to chart their own litigation course," citing Mill Rock Plaza Associates v. Lively, 224 AD2d 301, 301 (1<sup>st</sup> Dept 1996). Rather, "the decision to grant or a deny a mistrial is within the sound discretion of the trial court and is to be made on a case-by-case basis." Chung v. Shakur, 273 AD2d 340 (2d Dept 2000). Here, for the reasons stated above with respect to the objections to comments by defense counsel and plaintiff's counsel in their respective summations, and the court's curative instructions, it was not error for

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<sup>4</sup> Plaintiff also argues that the curative instruction exacerbated the prejudice. However, I note this argument is speculative and jurors are generally able to understand and follow the court's instruction.

the court to deny motions for a mistrial. Significantly, plaintiff fails to cite any law supporting her position that mutual motions for mistrial should be granted.

Plaintiff now argues that the verdict should be set aside as plaintiff was denied a fair trial based on misconduct by defense counsel with respect to inaccurate information regarding Dr. Hanauer's education and training which plaintiff asserts, deprived plaintiff of the "ability" to get transcripts, and defense counsel's remarks regarding the transcripts in summation.

At the outset, I note that plaintiff was not deprived of the "ability" to get the transcripts. There were three days between Dr. Hanauer's original testimony and the date he was to return for continued examination based on information or impeachment material, including prior testimony, which plaintiff's research revealed. Thus, plaintiff had the opportunity to obtain prior testimony or other impeachment material. Significantly, plaintiff's counsel declined to take advantage of this opportunity, and fails to submit any such material on this motion. Moreover, plaintiff does not base any objection on the substance of the expert exchange.

With respect to defense counsel's remarks in summation, while improper, under the circumstances here, where plaintiff declined the opportunity to recall Dr. Hanauer, absent any proffer of the transcripts or other materials which provided a basis to impeach Dr. Hanauer's opinions, absent any claim that the substance of the expert exchange with respect to the anticipated testimony was inaccurate, and based on the curative instruction, it cannot be said that plaintiff was deprived of a fair trial so as to warrant setting aside the verdict.

### Conclusion

In view of the above, it is

ORDERED that plaintiff's motion to set aside the verdict as against the weight of credible evidence and on the ground that plaintiff was deprived of a fair trial based on prejudicial conduct of defense counsel and "improper findings" by the court is denied.

DATED: July 17, 2020

**Joan  
Madden**

Digitally signed by Joan Madden  
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J.S.C.