

Dunbar v Egol

2020 NY Slip Op 33689(U)

November 4, 2020

Supreme Court, New York County

Docket Number: 805468/2014

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 805468/2014

JESSIE DUNBAR, as Administrator of the goods,
chattels and credits of EARTHA ALLEN, deceased, and
JESSIE DUNBAR, Individually,

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION AND ORDER

KENNETH A. EGOL, M.D.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 78, 79, 82, 84

were read on this motion to/for SET ASIDE VERDICT.

In this wrongful death action, defendant Kenneth A. Egol, M.D. ("Dr. Egol") moves, pursuant to CPLR 4404(a), for an order 1) setting aside the jury's verdict and directing judgment in his favor; or 2) setting aside the jury's verdict and directing a new trial; or 3) setting aside the jury's award for the emotional pain and suffering Eartha Allen ("decedent") endured between the moment that she realized that she was going to die up to the moment of death and vacating the claim; and 4) setting aside the verdict and directing a new trial on the issue of damages "unless plaintiff stipulates to a substantial reduction of the jury's awards"; and 5) granting a hearing for purpose of determining collateral source set-offs pursuant to CPLR 4545 and structuring a judgment pursuant to CPLR article 50-A and General Obligations Law § 15-108; and 6) for such other relief as this Court deems just and proper (Docs. 70-76, 82). Plaintiff Jessie Dunbar, as administrator of the goods, chattels and credits of decedent, and individually, opposes the motion

in part (Docs. 78-79). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On May 6, 2013, decedent sustained a trimalleolar fracture to her ankle when she was hit by a taxicab while crossing the street (Docs. 1; 71 at 19, 170-171). However, due to decedent's underlying medical conditions, including hypertension, her ankle surgery was delayed until December 20, 2013, at which time Dr. Egol performed open reduction and internal fixation on decedent's ankle at New York University Hospital ("NYU"), which included placement of hardware to repair the fracture (Doc. 71 at 119, 123). Following the surgery, the hardware became exposed, requiring another surgery on March 14, 2014 ("the second surgery") to close the wound with a skin graft from decedent's right thigh (*id.* at 212). Dr. Egol was not present during the second surgery, which was performed by Dr. Pierre Saadeh (Dr. Saadeh"), a plastic surgeon, and the hardware was not removed (*id.*). On March 31, 2014, decedent was admitted to Bellevue Hospital ("Bellevue") with complaints of diarrhea, nausea, vomiting, confusion and memory loss, and she remained there until her death on July 21, 2014 (*id.* at 213-214, 350).

In December 2014, plaintiff, decedent's daughter, commenced this action as against, *inter alia*, Dr. Egol, Dr. Saadeh and the New York City Health & Hospitals Corporation ("NYCHHC") to recover damages for medical malpractice (Doc. 1). Prior to trial, a settlement was reached with NYCHHC for \$750,000 and the action was discontinued as against Dr. Saadeh (Doc. 71. at 2). Plaintiff also settled an underlying motor vehicle case relating to this same incident for \$100,000 (Doc. 78 at 59). Following a trial on January 27, 29, and 31 and February 3, 5, 6, 13, 14, 18 and

20, 2020, the jury rendered a verdict against Dr. Egol and awarded plaintiff \$4.75 million in damages (Doc. 71-72).

At trial, Dr. Egol testified, *inter alia*, that decedent appeared for her first follow-up visit on January 8, 2014, at which time he observed that the incision had superficial epidermolysis (death of the superficial layer of the skin) (*id.* at 155, 160, 162). At that time, Dr. Egol prescribed decedent Keflex, an antibiotic, for ten days to prophylactically deal with any bacteria in the wound and directed her to return to his office in three weeks (*id.* at 159-161, 169). At her second post-operative visit on January 29, 2014, Dr. Egol observed that the wound had worsened and that there was superficial eschar (tissue death) and scabbing and he directed decedent to return in four weeks (*id.* at 166, 169, 250-251). He did not prescribe any antibiotics at such time (*id.* at 170).

When decedent returned to Dr. Egol's office on March 7, 2014, he observed that a scab had fallen from the lateral side of the incision and that the hardware was exposed (*id.* at 172-175, 179). He was concerned that bacteria could enter the wound and get on the steel hardware and cause complications, including sepsis (*id.* at 175, 184, 193-195). Decedent was scheduled for a second surgery on March 10, 2014 for irrigation and debridement of the wound, as well as for the possible removal of the hardware (*id.* at 184-185, 188, 194). The second surgery was intended to be a joint surgery with Dr. Saadeh, a plastic surgeon who was to be responsible for any portion of the surgery requiring a flap or skin graft to cover the open wound (*id.* at 205-206, 212). However, the March 10, 2014 surgery was cancelled and rescheduled for March 14, 2014 (*id.* at 203). Dr. Egol was not present for the second surgery because he was in New Orleans for a conference and he did not arrange to have another orthopedist at the second surgery (*id.* at 207-208, 245-246). Dr. Egol conceded that he would have been "solely" responsible for the hardware component of the second surgery and that he told Dr. Saadeh that the hardware should not come out because the bone had

not yet healed (*id.* at 206, 246-247). Therefore, Dr. Saadeh proceeded with the surgery alone and performed an irrigation, debridement and grafting with a flap (*id.* at 212, 546-547).

On March 31, 2014, decedent was admitted to Bellevue with severe sepsis (*id.* at 213). According to Dr. Egol, decedent's partner, Dwight Mitchell ("Mitchell"), informed his physician assistant that they did not want decedent to be transferred back to NYU (*id.* at 249-250). However, nowhere in his notes did he indicate that decedent no longer wanted Dr. Egol to be her doctor (*id.* at 276, 278). Dr. Egol represented that he was not decedent's physician when she was hospitalized in Bellevue but, on April 8, 2014, a Bellevue resident called him to ask his opinion about what should be done with respect to the care and treatment of decedent's ankle and he gave his opinion (*id.* at 276). Dr. Egol did not, however, testify as to what he told the Bellevue resident (*id.*). Although Dr. Egol had courtesy privileges at Bellevue, he did not visit decedent during her hospitalization (*id.* at 249-250). Decedent had to undergo several unsuccessful surgeries at Bellevue relating to her ankle before her death in July 2014 (*id.* at 213, 269).

Relevant portions of Dr. Saadeh's deposition testimony were read during the trial, including his representation that removing the hardware during the second surgery was not a decision he could make (*id.* at 207). He affirmed that this determination rested with the orthopedist who had placed the hardware, in this case Dr. Egol (*id.*). Dr. Saadeh further testified that he had never removed hardware from an ankle (*id.* at 209). However, Dr. Saadeh also testified that Dr. Egol was not required to attend the second surgery and that he could have asked for another orthopedist to be present during the procedure (*id.* at 573, 1016-1017).

Plaintiff offered the expert testimony of Dr. Asit Shah (Dr. Shah"), who testified that it was a departure from good and accepted medical practice to perform an irrigation and debridement without removing the exposed hardware (*id.* at 332, 336). He agreed with Dr. Egol's testimony

that, if bacteria were to get into the ankle, it could colonize on the hardware (*id.* at 314-315). Specifically, Dr. Shah concluded that, since decedent was in sepsis and was hypotensive when she went to Bellevue on March 31, 2014, there was an infection that was penetrating a localized region and affecting decedent systemically, causing her unstable condition (*id.* at 350-351, 355). According to Dr. Shah, the bone in the ankle would still have been able to heal even with a systemic infection or sepsis (*id.* at 346). He maintained that one had to assume that the infection was coming from the hardware and the ankle with the open wound because the hardware had become exposed to the elements and was no longer sterile (*id.* at 332-333, 355). Further, Dr. Shah testified that, since decedent's Keflex prescription lasted only 10 days, it would have been preferable to schedule decedent's second post-operative appointment earlier than three weeks (*id.* at 322-323). Moreover, he asserted that, given the worsening condition of the wound by January 29, 2014, the wound should have been monitored weekly or biweekly and, thus, Dr. Egol should not have scheduled decedent's next appointment four weeks later without prescribing an antibiotic (*id.* at 324-325). According to Dr. Shah, Dr. Egol had many available options to manage the wound and prevent it from opening including, *inter alia*, removing the hardware and seeking a plastic surgery consult (*id.* at 326-327).

Dr. Shah further testified that, given the condition of the wound, Dr. Egol also departed from good and accepted medical practice by failing to participate in decedent's surgery on March 14, 2014 or by finding a substitute orthopedic surgeon to be present at said surgery to address the issue of the hardware (*id.* at 341-343). He insisted that the exposed hardware was obviously infected and should have been removed during the second surgery, and that removing the hardware would have allowed the ankle more space for the wound to heal (*id.* at 332-333, 336-337). Moreover, Dr. Shah testified that it was a departure from good and accepted medical practices for

Dr. Egol to tell a physician at Bellevue, where decedent was hospitalized, without seeing the patient, not to remove the hardware unless the fracture healed (*id.* at 354).

Mitchell testified, *inter alia*, that decedent never missed a medical appointment (*id.* at 450-451); that it was Dr. Egol's decision, jointly with the Visiting Nurse Service, that decedent be taken to the hospital on March 31, 2014 and; that she was taken to Bellevue because NYU's emergency room was closed due to Hurricane Sandy (*id.* at 465-466). According to Mitchell, decedent did not want to be in Bellevue and wanted Dr. Egol to continue to be her doctor (*id.* at 467-468). At some point during decedent's hospitalization at Bellevue, Dr. Egol told Mitchell that he was not permitted to treat decedent at Bellevue (*id.* at 468).

Dr. Edward M. Delsole ("Delsole"), whose deposition testimony was read at trial, said that physicians at Bellevue could have removed the hardware but, when asked whether they could "override" Dr. Egol's suggestion to leave the hardware in place, he maintained that, "I think override is a strong word. I would say [that] they were certainly allowed to have their own thoughts, discuss it with [Dr. Egol] if they felt strongly differently" (*id.* at 522).

Dr. Angelo Scotti ("Dr. Scotti"), plaintiff's infectious disease expert, testified that, based on his review of the medical records, decedent was in septic shock when she was admitted to Bellevue on March 31, 2014 because the wound in the right ankle was infected (*id.* at 632). He based this opinion on the fact that "[NYU] did a culture on the wound" during decedent's second surgery that tested positive for corynebacterium, suggesting that bacteria was in the wound (*id.* at 632-633). He explained that bio film forms on a foreign body, allowing bacteria to remain on the foreign body even after antibiotics are administered, and that bacteria will remain there until the foreign body is removed (*id.* at 601-602). Dr. Scotti further opined that the hardware left in decedent's ankle was a cause of the infection (*id.* at 638). Although decedent was discharged with

a two-week supply of the antibiotic Levaquin, Dr. Scotti testified that the fact that decedent became very sick after stopping the antibiotics indicates that the antibiotics were only suppressing the bacterial infection and that it could not be eradicated without removing the hardware (*id.* at 637-638, 641). Additionally, he opined that, within a reasonable degree of medical certainty, if the exposed hardware would have been removed and decedent would have been put back on antibiotics, she would not have had sepsis and would not have died (*id.* at 686).

Dr. Amit Uppal ("Dr. Uppal"), one of the physicians who treated decedent at Bellevue testified, *inter alia*, that, in July 2014, decedent's health had deteriorated, the antibiotics were no longer working, that decedent was informed that there was nothing else that could be done and that decedent said that she wanted to continue to be fed by a feeding tube (*id.* at 768-772). This was corroborated by plaintiff's testimony that Dr. Uppal informed decedent that "she had reached the end of her life" and that decedent was conscious during this conversation (*id.* at 812).

Dr. Bruce Hirsch ("Dr. Hirsch"), Dr. Egol's infectious disease expert, testified that decedent did not have an infection when she was admitted to Bellevue on March 31, 2014 and that she only developed a severe infection in June 2014 from a urinary tract infection, which was unrelated to the ankle (*id.* at 892-893). Moreover, Dr. Hirsch testified that, based on several operative reports from Bellevue, there was no infection of the wound (*id.* at 893-894). Relying on pertinent portions of decedent's medical chart from July 2014, when the hardware was removed, Dr. Hirsch opined that, because the fracture had healed and there was bleeding, "there could not have been a severe destructive infection in the beginning" because this would have prevented the fracture from healing (*id.* at 904). Contrary to Dr. Scotti's expert testimony regarding corynebacterium, Dr. Hirsch denied that this bacterium commonly found on the surface of the skin could result in persistent infection and sepsis that ultimately caused decedent's death (*id.* at 889-890). However, on cross

examination, Dr. Hirsch conceded that an open wound could expose the hardware to bacteria, cause infection of the local tissue, and spread and cause sepsis (*id.* at 928). He also conceded that a culture may only show the bacteria taken from the tissue that was removed and may not identify all the bacteria in the wound (*id.* at 920-921).

Dr. Bruce Seideman ("Dr. Seideman"), an expert in orthopedic surgery, testified, *inter alia*, that it was not a departure for Dr. Egol to have been absent from the second surgery because Dr. Saadeh could have requested the assistance of another orthopedic surgeon during the surgery if he required one (*id.* at 1057). Additionally, he affirmed that removal of the hardware during the second surgery would have been "inappropriate" because the function of immobilizing the bone is to allow the bone to heal and prevent the patient from developing a serious infection (*id.* at 1058-1059). He confirmed that the decision to remove the hardware on March 14, 2014 rested with Dr. Egol or a substitute orthopedic surgeon (*id.* at 1069-1070). Dr. Seideman further testified that Dr. Egol did not commit medical malpractice when he advised physicians at Bellevue in April 2014 not to remove the hardware because the bone had not yet healed and, moreover, Dr. Egol's opinion was not binding on the treating physicians at Bellevue since he was not decedent's physician at the time of the subject conversation and had not been so for over a month (*id.* at 1062).

The jury found that Dr. Egol departed from good and accepted medical practice by: 1) failing to appropriately monitor and treat decedent after her January 29, 2014 visit; 2) by failing to perform or otherwise obtain the participation of another orthopedic surgeon in the second surgery; 3) by failing to remove or order the removal of the hardware in decedent's ankle when it became exposed in March 2014; and 4) advising Bellevue physicians not to remove the hardware in decedent's ankle when he received a call from a Bellevue doctor in April 2014 (Doc. 72).

Furthermore, the jury concluded that Dr. Egol's actions were a substantial factor in causing decedent's injuries and death (*id.*).

The jury awarded the following in damages: \$2 million for "[e]motional pain and suffering [that decedent] endured between the moment [that she] realized that she was going to die up to the moment of death"; \$2 million for "[p]ain and suffering of [decedent] from March 7, 2014 to the moment of death"; and \$750,000 in "[h]ospital expenses" (*id.*) However, the jury declined to award plaintiff any damages for loss of guidance (*id.*).

Dr. Egol now argues that the jury's verdict must be set aside and the case dismissed because, *inter alia*, plaintiff failed to establish the element of proximate cause of decedent's injury or death so as to set forth a *prima facie* case of medical malpractice (Doc. 70 at 19-22). Specifically, Dr. Egol maintains, *inter alia*, that plaintiff failed to demonstrate that the retention of the ankle hardware was the cause of decedent's deteriorating condition and ultimate death because there was no proof of an infection at the site of the hardware (*id.* at 20). Moreover, Dr. Egol argues that he could not have caused decedent's injuries and death because, *inter alia*, she was under the exclusive care of Bellevue, where she remained for approximately four months, and that he last treated her several weeks before she entered Bellevue (*id.* at 20).

Alternatively, Dr. Egol argues that a new trial should be ordered because the submission of liability theories relating to a time period during which he was no longer decedent's treating physician deprived him of a fair trial (*id.* at 21). It was improper, claims Dr. Egol, to submit to the jury a question about whether he had "departed from accepted practice by not (1) removing or ordering the removal of hardware in March 2014; and (2) advising the Bellevue physicians to remove the hardware in April 2014" because "the notion that he had the authority or ability to

remove or direct the removal of the hardware in all of March 2014 or April 2014 is unsupportable" (*id.* at 21).

Dr. Egol also contends that the testimony of Dr. Shah that he (Dr. Egol) deviated from accepted practice in advising the Bellevue resident not to remove the hardware was insufficient to establish liability as a matter of law because it was not based on facts in the record (*id.* at 22). According to Dr. Egol, although his conversation with the Bellevue resident was a subject of his trial testimony, he never testified, nor was he asked, about the content of this conversation (*id.* at 22). Thus, Dr. Egol maintains that it was improper for plaintiff to ask Dr. Shah to assume that "Dr. Egol testified that he was contacted by a doctor at Bellevue in addition to speaking with Dr. Saadeh and that *his testimony [was that] he told them not to remove the hardware unless the fractures were healed*" (emphasis added) (Doc. 71 at 353). Dr. Egol argues that Dr. Shah's opinion, premised on such an assumption, renders his conclusion regarding this departure insufficient and, thus, was improperly submitted to the jury (Doc. 70. at 22). Dr. Egol also argues that the submission of four theories of liability could only have signaled to the jury that he must have departed from accepted practice in some manner, depriving him of a fair trial (*id.* at 22).

Additionally, Dr. Egol contends that the \$2 million award for emotional pain and suffering that decedent felt between the moment that she realized that she was going to die up until the moment of death must be set aside because such an award should have been subsumed under the award for pain and suffering endured between her injury and death, and not as a separate award (*id.* at 23-26). He claims that, although a separate pain and suffering award is allowed under the doctrine of "pre-impact terror," this doctrine is inapplicable here (*id.* at 24-26). Dr. Egol further represents that, even if the Court vacates the \$2 million "pre-impact" terror award, the additional

\$2 million awarded for pain and suffering is excessive when compared to existing case law and thus warrants a reduction (*id.* at 27-31).

Dr. Egol also contends that this Court should set aside the jury award of \$750,000 for past medical expenses because it appears that Bellevue accepted the insurance payment of \$256,966 in full satisfaction of the amount billed and, thus, that neither plaintiff nor the estate incurred any past medical expenses (*id.* at 31-32). Dr. Egol argues that, at a minimum, a collateral source hearing should be ordered to determine what amount was expended (*id.* at 32). Dr. Egol also maintains that, pursuant to General Obligations Law § 15-108, any judgment against him must include a set-off representing the \$750,000 settlement with NYCHHC and the prior settlement of the motor vehicle case (*id.* at 32).

In opposition to the motion, plaintiff urges this Court to deny that branch of Dr. Egol's motion seeking to set aside the verdict and issue a directed verdict in his favor or a new trial, arguing that "there is more than ample evidence in the instant record to support each of the four departures found by the [j]ury and that such departure[s] w[ere] a substantial factor in causing [decedent's] injuries" (Doc. 78 at 36). Plaintiff maintains that liability was established through, *inter alia*, evidence demonstrating that Dr. Egol failed to treat and prevent decedent's incisional wounds from worsening and opening, which caused the hardware to become exposed; that he failed to be present at the surgery or to find a suitable orthopedic surgeon to remove the hardware from decedent's ankle; and that he committed medical malpractice when he advised the Bellevue physician not to remove the hardware (*id.* at 36-47).

Plaintiff argues, *inter alia*, that Dr. Egol did not object to submitting to the jury a separate question for emotional pain and suffering endured by decedent from the moment that she realized that she was going to die up to the moment of death and that any contention with respect to the

formulation of this question is thus improperly raised in this motion (*id.* at 48-53). Moreover, plaintiff maintains that there was no fundamental error in providing the jury with two questions instead of one because Dr. Egol does not argue that there was jury confusion or an inconsistent verdict and that there is no reason that the jury would not have awarded \$4 million had the questions been combined (*id.* at 51-53). Additionally, plaintiff maintains that, regardless of whether the award is considered separately or for a total amount of \$4 million, the case law supports a finding that the award(s) did not deviate from what is fair and reasonable compensation (*id.* at 53-57).

Plaintiff does not oppose that branch of the motion seeking a set-off pursuant to General Obligations Law § 15-108 with respect to the \$750,000 settlement with NYCHHC and does not oppose that branch of the motion seeking a collateral source hearing with respect to the jury's award of \$750,000 for hospital expenses (*id.* at 58). However, plaintiff contends that Dr. Egol is not entitled to a set-off for the \$100,000 settlement that plaintiff received in the motor vehicle case because the medical records submitted into evidence demonstrate that the injuries decedent sustained in the motor vehicle accident were unrelated to Dr. Egol's alleged medical malpractice, i.e., "a cerebral concussion and a period of post-concussion syndrome, brain abnormalities demonstrated by a positive head [CT] scan performed at [NYU] on September 20, 2013, aggravation of pre-existing hypertension, blunt trauma to the sternum, irregular heartbeat with associated chest pain, shortness of breath, . . . soft tissue swelling, muscle spasm, difficulty sleeping, apprehensiveness and fatigue" (*id.* at 59). Thus, plaintiff maintains that the settlement of the underlying motor vehicle action represents damages separate and apart from those sustained as a result of Dr. Egol's actions (*id.* at 59-60).

LEGAL CONCLUSIONS:

Motion to Set Aside the Liability Verdict

CPLR 4404 (a) provides, in relevant part, that "the 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 or it may order a new trial . . . where the verdict is contrary to the weight of the evidence [or] in the interest of justice." However, "great deference is accorded to the fact-finding function of the jury, and determinations regarding the credibility of witnesses are for the factfinders, who had the opportunity to see and hear the witnesses" (*Desposito v City of New York*, 55 AD3d 659, 661 [2d Dept 2008]). A jury's resolution of disputed factual issues, as well as any inconsistencies in witnesses' testimony, is also entitled to deference (*see Bykowsky v Eskenazi*, 72 AD3d 590, 590 [1st Dept 2010], *lv denied* 16 NY3d 701 [2011]). It is also the function of the jury to determine whether a witness is credible and what weight ought to be given to the testimony of experts (*see Devito v Feliciano*, 84 AD3d 645, 645 [1st Dept 2011]; *see also Harding v Noble Taxi Corp.*, 182 AD2d 365, 370 [1st Dept 1992]).

The standard for setting aside the verdict and entering judgment as a matter of law in favor of the moving party is whether "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [individuals] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]; *see Smyth v Murphy*, 177 AD3d 492, 492 [1st Dept 2019]; *Bligen v NY City Tr. Auth.*, 161 AD3d 487, 488 [1st Dept 2018]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 347 [1st Dept 2006]). Therefore "if 'it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the

evidence" (*Garrett v NY City Tr. Auth.*, 2018 NY Slip Op 30529[U], 2018 NY Misc LEXIS 1068, *8 [Sup Ct, NY County 2018], quoting *Cohen v Hallmark Cards, Inc.*, 45 NY2d at 499). If, however, a defendant seeks "to set aside the verdict and a new trial, the standard of review is whether the jury's verdict was based on a fair interpretation of the evidence" (*Njinga v Alexiades*, 2020 NY Slip Op 32268[U], 2020 NY Slip Op 32268[U], 2020 NY Misc LEXIS 3258, *2 [Sup Ct, NY County 2020]; see *Delgado v Bd. of Educ.*, 65 AD2d 547, 547 [2d Dept 1978]).

Here, although Dr. Egol maintains, *inter alia*, that the hardware was not the cause of decedent's injuries and death, the jury here was presented with a classic battle of the experts with respect to, *inter alia*, what should have been the appropriate treatment after January 29, 2014, whether it was proper for Dr. Egol to advise the Bellevue physicians not to remove the hardware, whether the exposed hardware should have been removed and whether said failures caused decedent's sepsis and death (see *Johnson v Jacobowitz*, 65 AD3d 610, 613 [2d Dept 2009]; *Gaspard v Aronoff*, 153 AD3d 795, 796-797 [2d Dept 2017]).

Although Dr. Egol specifically argues that decedent was under the exclusive care of Bellevue and relies on the gap of time between his last treatment of decedent and her death to argue lack of causation, there was expert testimony from which the jury could conclude that the hardware in decedent's ankle caused the infection before she arrived at Bellevue and that he exacerbated her condition by directing the physicians there not to remove it. Moreover, Mitchell's testimony suggests, at the very least, that decedent went to Bellevue involuntarily due to Hurricane Sandy, that she still considered Dr. Egol to be her physician at the time that she was admitted there, and, as evidenced by the April 2014 call, Dr. Egol was still making decisions with respect to her treatment during her hospitalization, belying his argument about Bellevue's exclusive control of her care.

Dr. Egol also argues that this Court should set aside the jury's verdict with respect to his alleged medical malpractice arising from his advice to the Bellevue physicians not to remove the hardware in decedent's ankle because he did not testify about what he told the Bellevue resident during the April 2014 call. This argument is without merit. While this Court concedes that "an expert's opinion must be based on facts in the record or personally known to the witness, and that the expert may not assume facts not supported by the evidence in order to reach his or her conclusion" (*Erbstein v Savasatit*, 274 AD2d 445, 446 [2d Dept 2000]; see *Pascocello v Jibone*, 161 AD3d 516, 516 [1st Dept 2018]; *Espinal v Jamaica Hosp. Med. Ctr.*, 71 AD3d 723, 724 [2d Dept 2010]), Dr. Shah's expert opinion, premised on the assumption that Dr. Egol directed the Bellevue physicians not to remove the hardware in the ankle, is supported by the evidence. Dr. Egol consistently testified that the hardware should not have been removed unless the fracture was healed and conceded that he gave his opinion to the Bellevue physician about how to treat decedent (Doc. 71 at 276). Moreover, the medical records reflect the following: "[Dr. Egol] was the surgeon who initially placed this hardware. He has been contacted directly and he has discussed the case with Dr. Saadeh of plastic surgery. For now, orthopedic hardware must stay in place" (Doc. 71 at 502). This allowed the jury to infer the content of the call and, thus, although Dr. Egol did not testify specifically about what he told the Bellevue physician, Dr. Shah's conclusion was based on "facts in the record."

Based on the foregoing, and "according due deference to the jury's credibility determinations, [this Court] find[s] that the evidence did not so preponderate in [Dr. Egol's] favor [such] that the jury's verdict could not have been reached on any fair interpretation of the evidence" so as to warrant a new trial (*Salovin v Orange Regional Med. Ctr.*, 174 AD3d 1191, 1194 [3d Dept 2019]; see *Rose v Conte*, 107 AD3d 481, 483-484 [1st Dept 2013]).

Given the findings above, Dr. Egol has also failed to satisfy the more stringent standard necessary to set aside the verdict and direct judgment in his favor and that branch of the motion is therefore denied.

Motion to Set Aside the Damages Verdict

"To determine whether a jury award deviates materially from what is considered reasonable compensation, courts 'are required to look to similar appealed verdicts to determine whether a material deviation exists'" (*Yanes v City of NY*, 2020 NY Slip Op 32607[U], 2020 Misc LEXIS 4240, *35 [Sup Ct, NY County 2020], quoting *Matter of 91st St. Crane Collapse Litig.*, 154 AD3d 139, 153 [1st Dept 2017]). However, "such awards are not binding, given the unique nature of pain and suffering in individual cases" and "[c]ourts, in giving deference to jury awards, have considered that the jury had an opportunity to hear testimony first hand and concluded that the award at issue was appropriate" (*Raefski v Christian Hirsch, M.D.*, 2020 NY Slip Op 30970[U], 2020 NY Misc LEXIS 1507, *35 [Sup Ct, NY County 2020]; see generally *Matter of Murphy-Clagett v A.O. Smith Corp.*, 173 AD3d 529, 530-531 [1st Dept 2019]).

As an initial matter, although Dr. Egol now argues that the jury should have been asked to deliberate on a single pain and suffering award, which would encompass the emotional pain and suffering that decedent endured before her death, including her fear of impending death, the parties agreed to the verdict sheet before it was submitted to the jury and, despite having ample opportunity to object to its contents, Dr. Egol concedes that no objection was raised on the record with respect to the final verdict sheet or the jury charge (Doc. 70 at 26).¹ Thus, any such objection

¹ By way of an affirmation, Dr. Egol's trial counsel avers that objections to the submission of two separate components of pain and suffering to the jury were raised off the record (Doc. 73).

with respect to the subject questions are deemed waived as a matter of law (*see Pedraza v NY City Tr. Auth.*, 2019 NY Slip Op 32742[U], 2019 NY Misc LEXIS 5037, *5 [Sup Ct, NY County 2019]; *Malki v Krieger*, 213 AD2d 331, 334 [1st Dept 1995]).

Assuming, *arguendo*, that Dr. Egol's contention is reviewable as "a legal argument which appeared upon the face of the record and which could not have been avoided if brought to the opposing party's attention at the proper juncture" (*Bonilla v Rotter*, 36 AD3d 534, 535 [1st Dept 2007]; *see Devore v Pfizer*, 58 AD3d 138, 143 [1st Dept 2008]), this Court finds that there was no error in submitting two separate pain and suffering questions to the jury.

While this Court recognizes that emotional pain and suffering resulting from apprehension of impending death can be a factor considered under a conscious pain and suffering award (*Ramos v Shah*, 293 AD2d 459, 460 [2d Dept 2002] ["in determining damages for conscious pain and suffering experienced in the interval between injury and death, when the interval is relatively short, the degree of consciousness, severity of pain, apprehension of impending death, along with duration, are all elements to be considered"]; *Hyung Kee Lee v NY Hosp. Queens*, 118 AD3d 750, 752 [2d Dept 2014] ["admissible evidence established the decedent's conscious pain and suffering during the days prior to his death and on the day of his death[,] . . . [including proof that decedent was] complaining of pain, discomfort, hunger, difficulty breathing, and [that he had a] feeling that he was dying"]; *Arias v State*, 8 Misc3d 736, 740 [Court of Claims, 2005] [the Court considered whether decedent knew that he was dying under the award for conscious pain and damages]; *see also Mancuso v Health*, 172 AD3d 1931, 1936 [4th Dept 2019]), Dr. Egol has failed to demonstrate that a separate assessment of these awards was fundamentally improper. Dr. Egol does not argue that the separate awards were confusing for the jury and any such argument would be unavailing because the separate questions provided more clarity to the jury about the awards sought.

Therefore, that branch of the motion seeking to set aside the award for " the [e]motional pain and suffering [decedent] endured between the moment she realized that she was going [to] die up to the moment of death" and vacate the claim is denied.

This Court also denies that branch of the motion seeking a reduction of the damages awarded because, affording due deference to the jury's determination, the awards for conscious pain and suffering and emotional suffering, even if considered together for a total of \$4 million, was not excessive when considering the extent of her injuries, the duration of decedent's hospitalization and her knowledge of impending death, which even Dr. Egol concedes was "traumatic and devastating to decedent" (Doc. 70 at 23) (*see Hyung Kee Lee v New York Hosp. Queens*, 118 AD3d 750, 752 [2d Dept 2014] [\$3.7 million for the decedent's conscious pain and suffering for the span of 3 ½ days "of pain, discomfort, hunger, difficulty breathing, and feeling that he was dying" did not deviate from what would be reasonable compensation"]; *Raefski v Christian Hirsch, M.D.*, 2020 NY Misc LEXIS 1507 at *36 [\$2.25 million for 10 days of conscious pain and suffering which included postoperative pain, three surgical procedures and sepsis following 10 days of hospitalization was not unreasonable]).

Post-Verdict Hearings

General Obligations Law § 15-108 provides, in relevant part, that "[w]hen a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury . . . it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it." Further, "[i]n any action brought to recover damages for . . . wrongful death, where the plaintiff seeks to recover for cost of medical care, . . . evidence shall

be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source" (CPLR 4545). "Any collateral source deduction . . . shall be made by the trial court after the rendering of the jury's verdict" (*id.*).

As an initial matter, since plaintiff agrees that a collateral source hearing should be held to determine appropriate set-offs with respect to the past medical expenses award and concedes that "[Dr. Egol] is entitled to a \$750,000 set-off for [p]laintiff's pretrial settlement with NYCHH[C]," (Doc. 78 at 58), these branches of the motion are granted without opposition.

However, despite plaintiff's objection, this Court agrees with Dr. Egol that he is entitled to a hearing pursuant to CPLR 4533-b with respect to the settlement reached in the underlying motor vehicle case (Doc. 82 at 11). It is well-settled that, "[u]nder successive and independent liability, . . . the initial tort-feasor may well be liable to the plaintiff for the entire damage proximately resulting from his [or her] own wrongful acts, including aggravation of injuries by a successive tort-feasor" (*Ravo v Rogatnick*, 70 NY2d 305, 310 [1987] [internal citations omitted]). However, "[t]he successive tort-feasor, . . . is liable only for the separate injury or the aggravation his [or her] conduct has caused" (*id.*). "Thus, where, as here, injuries are independently inflicted by both an original and successive tortfeasor, the successive tortfeasor is entitled to a hearing pursuant to CPLR 4533-b to determine what portion of the settlement paid by the original tortfeasor was for the original injuries, and what portion may be attributable to the aggravation injuries" (*Mavashev v NY City Tr. Auth.*, 300 AD2d 552, 553-554 [2d Dept 2002]).

CPLR 4533-b provides, in relevant part, that:

"[i]n an action . . . for wrongful death, and proof as to payment by or settlement with another joint tort-feasor, or one claimed to be a joint tort-feasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury. The court shall deduct

the proper amount, as determined pursuant to [General Obligations Law § 15-108], from the award made by the jury"

Although plaintiff asserts that the settlement of the motor vehicle case pertained exclusively to "pain and suffering separate and apart from anything caused by [Dr.] Egol's medical malpractice," this Court finds that a hearing, pursuant to CPRL 4533-b, must be held by a trial judge to determine what portion, if any, of the settlement was for decedent's original injuries and what portion is attributable to the aggravation injuries (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 85-86 [1986]; *Neenan v Kamalian*, 292 AD2d 433, 433 [2d Dept 2002]; *Small v. New York City Health & Hosps. Corp.*, 2004 NYLJ LEXIS 2535, *6-7 [Sup Ct, Kings County 2004]).

All remaining arguments are either without merit or need not be addressed given the findings above.

In accordance with the foregoing, it is hereby:

ORDERED that that branch of defendant Kenneth A. Egol M.D.'s motion seeking to set aside the verdict and direct judgment in his favor or, alternatively, order a new trial is denied; and it is further

ORDERED that that branch of defendant Kenneth A. Egol M.D.'s motion seeking to set aside the jury's award for emotional pain and suffering endured by decedent between the moment

that she realized that she was going to die up to her death and vacating said claim is denied; and it is further

ORDERED that that branch of defendant Kenneth A. Egol M.D.'s motion seeking to set aside the verdict and direct a new trial on the issue of damages, unless plaintiff stipulates to a substantial reduction of the jury's award, is denied; and it is further

ORDERED that the branch of the motion seeking a collateral source hearing to determine appropriate set-offs with respect to the past medical expenses award is granted without opposition and will be scheduled by the reassigned Justice; and it is further

ORDERED that that branch of plaintiff's motion seeking, pursuant to General Obligations Law § 15-108, a \$750,000 set-off relating to plaintiff's pretrial settlement with New York City Health & Hospitals Corporation is granted without opposition and will be considered at the collateral source hearing; and it is further


ORDERED that a hearing shall be held to determine what portion of the verdict, if any, is entitled to set-offs relating to the underlying motor vehicle case; and it is further

ORDERED that the parties are to contact the reassigned part in January 2021 to select a date for the hearings; and it is further

ORDERED that, within 20 days after this order is uploaded to NYSCEF, plaintiff's counsel shall serve a copy of this decision and order, with notice of entry, on defendant Kenneth A. Egol M.D.; and it is further

ORDERED that this constitutes the decision and order of this Court.

11/4/2020
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE