K.C.C. v United Lubavitcher Yeshiva
2021 NY Slip Op 30336(U)
February 5, 2021
Supreme Court, Kings County
Docket Number: 504065/2017
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 504065/2017
Date of Submission: 1-22-21
Mot. Seq. No.: 15

----------X

K.C.C, an infant under the age of 14 years by her father and natural guardian, TYRONE CARBON, and TYRONE CARBON, individually,

Plaintiffs,

-against-

DECISION/ORDER

UNITED LUBAVITCHER YESHIVA and SHNEUR Z. BROWNSTEIN,

Defendants.

----------X

Upon the following e-filed documents, listed by NYSCEF as item numbers 251-265, 272, 278-279, 327-334, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendants United Lubavitcher Yeshiva and Shneur Z. Brownstein, move for an Order: (a) pursuant to CPLR §§ 5501(c) and 4404(a), 4405 & 4406, granting a new trial on damages based on the ground that the Court erred in permitting the jury to see the "catheter video" and in ruling that the jury from could not see the "accident video"; or (b) alternatively, pursuant to CPLR §§ 5501(c) and 4404(a), 4405 & 4406, granting a conditional remittitur of the jury's awards for pain and suffering, and medical expenses, as against the weight of the evidence and because they "materially deviate" from reasonable compensation; (c) scheduling a collateral source hearing to reduce the jury's awards for past and future medical expenses pursuant to CPLR 4545; and (d) for such other and further relief as this Court deems just and proper. Following the submission of defendants' initial motion papers, a collateral source hearing was held on January 12, 2021 and the parties were then given an opportunity to supplement their papers to address the collateral source issues.

Background:

This action arises out of an accident that occurred on February 15, 2017, at the intersection of St. John's Place and Nostrand Avenue in Brooklyn when the infant plaintiff, KCC (hereinafter "the infant plaintiff"), who was 11 years old, was run over by defendants' school bus. The plaintiffs were awarded partial summary judgment on the issue of liability and the matter proceeded to a jury trial on the issue of damages which was conducted form December 6, 2019 to December 18, 2019. The jury returned a verdict for $43.5 million; $10 million for past pain and suffering; $27 million for future pain and suffering; $580,000 for past medical expenses and $5.5 million for future medical expenses.

The Catheter Video:

The Court finds unpersuasive defendants' contention that permitting the jury to see a day in the life video showing how the infant plaintiff has to now catheterize herself multiple times a day to void urine. The decision whether to permit demonstrative evidence is entrusted to the discretion of the Trial Judge (*Harvey v. Mazal Am. Partners*, 79 N.Y.2d 218, 223–24, 590 N.E.2d 224, 227 (1992). As noted by the Court of Appeals, demonstrative evidence, "when validly and carefully used, there is no class of evidence so convincing and satisfactory to a court or a jury" (*People v. Acevedo*, 40 N.Y.2d 701, 704, 389 N.Y.S.2d 811, 358 N.E.2d 495). The *Acevedo* Court cautioned, however, that when considering whether to admit demonstrative evidence, courts must decide whether such evidence "instead of being helpful . . . may serve but to mislead, confuse, divert or otherwise prejudice the purposes of the trial" (40 N.Y.2d at 704–05, 358 N.E.2d at 497). The Court stated that when there is such a threat "the trial court itself must decide in the exercise of a sound discretion based on the nature of the proffered proof and the context in which it is offered, whether the value of the evidence outweighs its potential for

prejudice" (id.). Here, weighing all the relevant factors, the Court adheres to its trial ruling that the video was admissible since it was the best evidence to show the jury what the infant plaintiff has to go through on a daily basis to remove urine from her body. The video was neither misleading, confusing, or prejudicial to the defendants.

The Accident Video:

The Court also rejects defendants' contention that it was error to not allow the jury to see a video depicting in real time how the accident occurred. "The Supreme Court has broad discretion in determining the materiality and relevance of proffered evidence" (*Caplan v. Tofel*, 58 A.D.3d 659, 659, 871 N.Y.S.2d 656; *see People v. Scarola*, 71 N.Y.2d 769, 777, 530 N.Y.S.2d 83, 525 N.E.2d 728; *Gurgenidze v. Vitale*, 44 A.D.3d 900, 901, 843 N.Y.S.2d 522; *Klempner v. Leone*, 277 A.D.2d 287, 288, 715 N.Y.S.2d 743). Here, inasmuch as all issues concerning liability had been resolved prior to the commencement of the trial, the accident video was immaterial since it had no relevance to the issue of damages, especially since the defendants were not contesting that the infant plaintiff's injuries were caused by the accident. In the Court's view, by seeking to show the accident video to the jury, the defendants were attempting to show that the plaintiff's own negligence in running across the street contributed to the accident, an issue that had already been resolved against the defendants and one that would not be put before the jury.

Past and Future Pain and Suffering:

During the trial, compelling evidence was introduced demonstrating that the infant plaintiff suffered severe and disabling injuries as a result of the accident, including substantial crush injuries to her pelvis and urethra necessitating numerous orthopedic and urologic surgeries

and procedures. The infant plaintiff's vagina was severely damaged as a result of the accident necessitating substantial reconstructive surgery. Evidence was introduce to the effect that the infant will have to undergo dilation procedures at least four times a year for the remainder of her rest of her life to prevent her vagina from closing and to allow her to someday engage in sexual relations. The infant plaintiff now urinates through a catheter and will have to void urine in this manner for the rest of her life.

A jury's determination with respect to awards for past and future pain and suffering will not be set aside unless the award deviates materially from what would be reasonable compensation(*see* CPLR 5501[c]; *Garcia v. CPS 1 Realty, LP*, 164 A.D.3d 656, 659, 83 N.Y.S.3d 129; *Quijano v. American Tr. Ins. Co.*, 155 A.D.3d 981, 983, 65 N.Y.S.3d 221). "Prior damages awards in cases involving similar injuries are not binding upon the courts but serve to guide and enlighten them in determining whether a verdict constitutes reasonable compensation" (*Kusulas v. Saco*, 134 A.D.3d 772, 774, 21 N.Y.S.3d 325 [internal quotation marks omitted]; *see Taveras v. Vega*, 119 A.D.3d 853, 854, 989 N.Y.S.2d 362; *Miller v. Weisel*, 15 A.D.3d 458, 459, 790 N.Y.S.2d 189). However, consideration should also be given to other factors, including the nature and extent of the injuries (*see Taveras v. Vega*, 119 A.D.3d at 854, 989 N.Y.S.2d 362).

Here, the trial evidence clearly demonstrated that the infant plaintiff suffered severe and disabling injuries that are permanent in nature, which have caused her to suffer extensive pain, suffering and loss of enjoyment of life. The evidence also demonstrated that the infant plaintiff would continue to suffer pain and significant limitations from these injuries for the rest of her life. After review of the relevant case law submitted by the parties, the Court finds, however, that the awards for past and future pain and suffering deviate materially from what would be

reasonable compensation. It the Court's view, the trial evidence warrants a finding of damages for past and future pain and suffering of $7.5 million.

The Awards for Past and Future Medical Expenses:

A jury's verdict should not be set aside as against the weight of the evidence unless the evidence preponderates so heavily in favor of the moving party that the verdict could not have been reached on any fair interpretation of the evidence (*see Lolik v. Big V Supermarkets,* 86 N.Y.2d 744, 746, 631 N.Y.S.2d 122, 655 N.E.2d 163; *Artusa v. Costco Wholesale*, 27 A.D.3d 499, 500, 811 N.Y.S.2d 761; *Salim v. Gomez*, 20 A.D.3d 410, 797 N.Y.S.2d 307; *Harris v. Marlow,* 18 A.D.3d 608, 610, 795 N.Y.S.2d 608; *Bobek v. Crystal,* 291 A.D.2d 521, 522, 739 N.Y.S.2d 396; *Nicastro v. Park,* 113 A.D.2d 129, 133–134, 495 N.Y.S.2d 184). Great deference is to be accorded the fact-finding function of the jury as it had the responsibility of resolving any dispute as to the weight to be accorded to evidence, and as to the credibility of the witnesses (*see Stylianou v. Calabrese,* 297 A.D.2d 798, 799, 748 N.Y.S.2d 36; *Conforti v. Gaeta,* 190 A.D.2d 772, 773, 593 N.Y.S.2d 551; *Tarantino v. Vanguard Leasing Co.*, 187 A.D.2d 422, 423, 589 N.Y.S.2d 519; *Nicastro v. Park,* 113 A.D.2d at 133–134, 495 N.Y.S.2d 184). Applying these principles, the Court finds that the award for past medical expenses is supported by a fair interpretation of the evidence and is not excessive *(see, Nicastro v Park,* 113 AD2d 129; *see also, Hapgood v P & C Food Mkts.,* 149 AD2d 770). As will be discussed, in reaching this decision, the Court has not considered the evidence adduced at the collateral source hearing.

With respect to the award for future medical expenses, contrary to defendants' contention, there is a fair interpretation of the medical evidence that supports a finding that the cost of single vaginal dilation procedure is $15,000. Defendants' contention that the infant plaintiff would someday be able to endure these procedures without the benefit of anesthesia is

speculative, a conclusion the jury was not required to reach. Contrary to defendants' contention, it was for the jury to decide the number of years that the infant plaintiff would be sexually active and require the periodic dilation procedures.

Defendants' assertion that the infant plaintiff's need for future pain management was not established within a reasonable degree of medical certainty is without merit. Defendants' contention that the award for future pain and suffering must be set aside because the jury awarded more than plaintiff's counsel requested is also without merit. Plaintiff's counsel asked the jury to make an award for future medical expenses based on the life expectancy period stated in the PJI. As plaintiffs' counsel points out, the jury determined that the plaintiff would live for an additional 70 years, three years longer than the life expectancy period in the PJI. All in all, the trial evidence supports the jury award for future medical expenses.

The Collateral Source Issues:

It was established at the collateral source hearing that the infant plaintiff was awarded First-Party No-Fault Benefits in the amount of $50,000 which went towards paying for some of her past medical treatment. It was also established that April Carbone, the infant plaintiff's mother, was employed by Delta Airlines Inc. at the time of the accident who provided her and her family with health care insurance ("the Delta Plan"). The Delta Plan paid out a total of $176,519.37 for the infant plaintiff's medical treatment. The Delta Plan, however, was established under the Employee Retirement Income Security Act of 1974 (ERISA) and pursuant to ERISA and the plan itself, the Delta Plan has a statutory right to be reimbursed for these payments (see NYSEF Item No. 330). Defendants do not dispute this.

Ms. Carbone testified at the collateral source hearing that she was furloughed from her job with Delta in April 2020 due to COVID at which time her health coverage under the Delta Plan ceased. Around the same time, she procured family health care coverage under the Affordable Care Act ("ACA"). No evidence was adduced at the hearing as to how much the ACA carrier paid for the infant plaintiff's medical treatment from the time such coverage was procured to the time of the hearing. Although the infant plaintiff's mother intends to return to her job with Delta, as of the date of the hearing, she was still unemployed.

Ms. Carbone was unaware of any collection efforts by the infant plaintiff's medical providers to secure payments above those which were paid through No Fault, the Delta Plan, and the ACA coverage and she knew of no other sources that have paid for or would be obligated to pay for the infant plaintiff's medical care.

CPLR § 4545(a), in relevant part, provides:

> In any action brought to recover damages for personal injury . . . where the plaintiff seeks to recover for the cost of medical care. . . custodial care or rehabilitation services… or other economic loss, 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, **except for . . . those payments as to which there is a statutory right of reimbursement.** If the court finds that any such cost or expense was or will, **with reasonable certainty**, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits.

Because CPLR § 4545 is in derogation of the common law, its provisions must be strictly construed (*see Oden v. Chemung County Indus. Dev. Agency,* 87 N.Y.2d at 86, 637 N.Y.S.2d 670, 661 N.E.2d 142; *Young v. Tops Markets, Inc.*, 283 A.D.2d 923, 926, 725 N.Y.S.2d 489; McKinney's Cons. Laws of N.Y., Book 1, Statutes § 301[a]). The moving defendants bear the burden of establishing an entitlement to a collateral source reduction of an award for past or future economic loss (*see Oden v. Chemung County Indus. Dev. Agency,* 87 N.Y.2d at 89, 637 N.Y.S.2d 670, 661 N.E.2d 142; *Kastick v. U–Haul Co. of W. Mich.,* 292 A.D.2d 797, 798, 740 N.Y.S.2d 167; *Young v. Knickerbocker Arena,* 281 A.D.2d 761, 764, 722 N.Y.S.2d 596; *Faas v. State of New York,* 249 A.D.2d 731, 733, 672 N.Y.S.2d 145; *Adamy v. Ziriakus,* 231 A.D.2d 80, 86, 659 N.Y.S.2d 623) and the standard of proof is that of "reasonable certainty" (CPLR 4545[a]). "Reasonable certainty is understood as involving a quantum of proof that is greater than a preponderance of evidence but less than proof beyond a reasonable doubt. Each of the four judicial departments has interpreted 'reasonable certainty' as akin to the clear and convincing evidence standard, that the result urged by the defendant be 'highly probable' " (*id.* at 163–164, 848 N.Y.S.2d 200, quoting *Quezada v. O'Reilly–Green,* 24 A.D.3d 744, 746, 806 N.Y.S.2d 707).

In order to determine whether a party has established with "reasonable certainty" a payment by a collateral source, the defendants first "must establish with reasonable certainty that the plaintiff has received, or will receive, payments from a collateral source" (*Kihl v. Pfeffer,* 47 A.D.3d at 164, 848 N.Y.S.2d 200), and, second, "that collateral source payments which have been or will be received by the plaintiff must be shown to specifically correspond to particular items of economic loss awarded by the trier of fact" (*id.*). "Each case involving potential

future collateral source reductions to awards for economic loss must be judged on its own unique facts and merits" (*id.* at 167, 848 N.Y.S.2d 200).

Here, since the Delta Plan has a statutory right under the ERISA Law and the plan itself to be reimbursed for the amounts it paid for the infant plaintiff's medical treatment, these payments cannot be used to reduce the judgment under the clear wording of CPLR § 4545(a). While Ms. Carbone testified that she wants to go back to work with Delta when the furlough ends, the defendants did not establish by clear and convincing evidence that she will be given this opportunity and that she will resume receiving healthcare benefits under the Delta Plan. Although the defendants would be entitled to a reduction of the judgment for the amounts that have been paid by the ACA carrier for the infant plaintiff's medical treatment, since those amounts were not established, the Court is unable reduce the verdict by those amounts.

For the reasons stated by this Court in *Liciaga v. New York City Transit Authority*, No. 513495/2016, 2019 WL 5858083, at *4 (N.Y. Sup. Ct. Nov. 08, 2019), and for the various reasons stated in plaintiff's opposition, including that there have been numerous attempts to repeal the ACA, the Court must reject defendants' claim that any coverage the infant plaintiff may be entitled to under the ACA for future medical treatment should not be considered as an offset of the judgment amount.

Defendants contend that since Ms. Carbone was unaware of any collection efforts by the infant plaintiff's medical providers to secure payments above those which were paid by the No Fault carrier, the Delta Plan and the ACA carrier, it is apparent the medical providers have agreed to accept the amounts already paid as payment in full. Defendants therefore claim that the infant plaintiff's claim for past medical expenses to the extent that the claim is in excess of the amount of the ERISA lien, is unsupported and contrary to the weight of the evidence.

Defendants' did not, however, establish by clear and convincing evidence that the medical providers have written off their right to seek additional payment from the infant plaintiff. Indeed, there was no evidence introduced at the collateral source hearing that the infant plaintiff's medical providers have written off their right to additional payment.

Lastly, the defendants cite to no legal authority, and the Court knows of none, that permits the Court to consider the evidence adduced at the collateral source hearing in determining whether the awards for past and future medical expenses should be set aside as unsupported and against the weight of the evidence. These issues must be determined based on the trial record.

In sum, the defendants did not establish any collateral sources that would reduce plaintiff's recovery except for the $50,000 paid in First-Party No-Fault benefits. Accordingly, the awards for plaintiff's past medical expenses shall be offset by the sum of $50,000.

Accordingly, it is hereby

ORDRED that the branch of defendant's motion for a new trial on the issue of damages for future pain and suffering is **GRANTED** unless within 30 days after service of a copy of this decision and order, the plaintiff serves and files in the office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to reduce the verdict as to damages for past and future pain and suffering to the sum of $7.5 million; it is further

ORDERED that the award for past medical expenses shall be reduced by the sum of $50,000; and it is further

ORDERD that the motion is in all other respects **DENIED**, and plaintiffs may enter judgment in accordance with the decision and order.

This constitutes the decision and order of the Court.

Dated: February 5, 2021

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020