

Roam v Roussis

2022 NY Slip Op 34140(U)

December 6, 2022

Supreme Court, New York County

Docket Number: Index No. 805042/2014

Judge: David B. Cohen

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

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

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INDEX NO. 805042/2014

KYLIE ROAM,

Plaintiffs,

MOTION SEQ. NO. 005

- v -

GEORGE P. ROUSSIS, M.D., JOSEPH TRENTACOSTA,
M.D., deceased by the Administrator of the Estate, EWA
KIRPAN-TRENTACOSTA, INTERBORO OB/GYN
ASSOCIATES, P.C. and STATEN ISLAND UNIVERSITY
HOSPITAL,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 196, 197, 198, 199,
200, 201, 203, 204, 205

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

In this medical malpractice action, defendant Staten Island University Hospital (“SIUH” or “the hospital”) moves, pursuant to CPLR 4404(a), to: a) set aside the verdict in favor of plaintiff Kylie Roam and instead enter judgment in its favor; or, in the alternative b) set aside the verdict and grant it a new trial; or, in the alternative c) set aside the jury’s apportionment of fault and grant it a new trial on apportionment; or, in the alternative d) vacate the pain and suffering award. Plaintiff opposes the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

Factual Trial Testimony

The trial of this action was conducted before the undersigned and a jury between May 10 and 24, 2022. The trial transcript has been filed by SIUH as an exhibit to its motion (Doc. 199) and all references preceded by a “T” refer to the same.

In June 2011, plaintiff, then 8 years of age, began experiencing pain in her lower right abdomen (T. 263-265). Her parents took her to the emergency room (“ER”) at SIUH, where she was diagnosed with a urinary tract infection and discharged (T. 264). Approximately three months later, on September 24, 2011, plaintiff experienced severe pain and vomiting and visited her pediatrician, Dr. George Roussis (T. 206-207, 265-266). Dr. Roussis treated plaintiff for constipation but her condition did not improve (T. 59, 206-207, 267-268). Two days later, on September 26, 2011, plaintiff, who was still in pain, returned to the ER at SIUH at approximately 12:30 p.m. (T. 577). Her chief complaint was of abdominal pain, the severity of which she estimated to be a 9 out of 10 (T. 56, 58, 995). She also said she had had pain in her lower right quadrant for the previous three days (T. 58-59).

At approximately 1:50 p.m., plaintiff was examined by Mei Chow, a physician’s assistant (“PA”) in the ER at SIUH (T. 60). Attending physicians in SIUH’s ER worked in tandem with PAs to diagnose and treat patients (T. 55, 245). PA Chow noted that plaintiff had sudden and sharp pain, was not eating or defecating, and was nauseous (T. 61). At the time of plaintiff’s visit, PA Chow was working with attending physician Dr. Christopher Graziano, a specialist in emergency medicine (T. 51, 151, 140-143, 199). Dr. Graziano’s examination of plaintiff revealed abdominal tenderness (T. 200). He suspected that plaintiff had appendicitis and ordered numerous blood and urine tests, as well as a CT scan (T. 66, 212-215).

The CT scan, performed at approximately 4:00 p.m., revealed a cystic mass measuring 6.4 x 6.2 cm and containing internal septations (divisions) (T. 72, 83). The study also revealed that plaintiff’s uterus was compressed between the mass and her bladder, and her ovaries could not be seen (T. 72-73). The preliminary CT report reflected that the mass was most likely an ovarian cyst

(T. 73). The radiologist also noted “a small amount of free fluid in the anterior pelvis,” which may have indicated a leak from the cyst that was causing plaintiff’s pain (T. 222-223, 254).

In order to further examine plaintiff’s condition, especially given that her ovaries could not be seen on the CT scan, the radiologist ordered an ultrasound, which was conducted at about 6:10 p.m. (T. 77, 222-224). The preliminary reading of the ultrasound confirmed the presence of a right ovarian cyst 7 cm long, and the preliminary ultrasound report noted “positive flow,” indicating that there was blood flow to the ovary (T. 78- 81, 84, 227). This finding was significant because an ovarian cyst can cause an ovary to twist, a condition known as torsion (T. 84). Torsion can interrupt blood flow to the ovary and, if the blood supply is cut off for a significant period of time, the ovary can become necrotic and lose its viability (T. 84-85).

Since Dr. Graziano, an emergency room physician, was not familiar with treatment options for ovarian cysts, he determined that plaintiff needed a gynecological consult (T. 84, 86, 227) and, before contacting SIUH’s on-call gynecologist (“OB/GYN”), asked plaintiff’s mother whether there was a gynecologist she wanted plaintiff to visit (T. 89, 274-275). Dr. Graziano remembered that the diagnosis of a 7 cm ovarian cyst was an unusual diagnosis for an 8 year old, and recalled speaking to plaintiff’s mother about the condition (T. 190, 228-229). At the request of plaintiff’s mother, PA Chow or Dr. Graziano contacted co-defendant Dr. Joseph Trentacosta, an OB/GYN who had treated plaintiff’s mother for several years (T. 100). Plaintiff was reassessed prior to the call so that any change in her condition could be communicated to Dr. Trentacosta (T. 232). Dr. Trentacosta, who was advised of plaintiff’s age and test results, including the CT scan and ultrasound findings, indicated that plaintiff could be safely discharged, and that she should follow up with him as an outpatient (T. 99-100, 230). SIUH then made an appointment for plaintiff to see Dr. Trentacosta the next morning (T. 99, 135, 278).

Dr. Graziano explained that, when a consulting physician was contacted, that physician would, depending on the information he or she was provided, either come to the hospital to examine the patient, direct that the patient be admitted or transferred, or direct that the patient be discharged and seen as an outpatient (T. 231). Following the discussion with Dr. Trentacosta, and pursuant to Dr. Trentacosta's direction, the plan was to discharge plaintiff, who was to visit Dr. Trentacosta the next morning (231). At approximately 6:45 p.m., Dr. Graziano had a conversation with plaintiff's mother during which he advised her that plaintiff was to see Dr. Trentacosta the following morning (T. 102-103). In addition to providing written discharge instructions, Dr. Graziano testified that he orally instructed plaintiff's mother that plaintiff's ovary was at a high risk of torsion and instructed her regarding certain conditions, such as the return of pain, which would require plaintiff to revisit the ER (T. 102-104, 112-113, 236-238). He also said he advised plaintiff's mother that the ovary could be lost given the size of the mass (T. 112-113).

Prior to her discharge at 7:07 p.m., plaintiff was again examined by Dr. Graziano, who noted that she was not in pain (T. 104, 108-109, 125-126, 585, 664, 1031). Plaintiff was not prescribed any pain medication during her visit (T. 96). Dr. Graziano testified that, although a patient can feel pain when an ovary is torsed, the pain can dissipate if the ovary untorses on its own (T. 192-193). Dr. Graziano maintained that, if plaintiff had been in pain, she would not have been discharged because such pain could have indicated intermittent torsion or another issue with the mass that required urgent evaluation (T. 233). However, plaintiff's mother, who could not recall any conversations she had with the nursing staff or PA Chow, insisted that, contrary to the notation in plaintiff's medical records, plaintiff was in pain at the time of her discharge (T. 281-282).

The following day, September 27, 2011, a SIUH radiologist issued a report reflecting that plaintiff had a “Complex cystic right ovarian mass with thick septation. Given the size of the mass, superimposed torsion cannot be excluded. Surgical consultation is suggested to evaluate this mass” (T. 132). The radiologist’s finding that plaintiff may have had torsion reflected that there was blood flow to the ovary and, thus, that such torsion could affect the flow (T. 1100).

The same day, Mark Aponte, a PA at SIUH, faxed the ultrasound and CT reports to Dr. Trentacosta (T. 134, 457). Dr. Trentacosta’s office confirmed receipt of the reports and advised that plaintiff was present at the office at that time (T. 134). According to plaintiff’s mother, Dr. Trentacosta did not physically examine plaintiff; instead he advised her that he would not treat an 8 year old and handed her a business card for another OB/GYN, Dr. Davidov (T. 285-286).¹ Instead of contacting Dr. Davidov, however, plaintiff’s mother called plaintiff’s pediatrician, Dr. Roussis, seeking a recommendation for a pediatric surgeon (T. 289). Dr. Roussis recommended that plaintiff be seen by Dr. Francisca Velcek, a pediatric surgeon, and plaintiff’s mother scheduled an appointment with Dr. Velcek for October 1, 2011, four days later (T. 290, 308).²

Dr. Velcek examined plaintiff on October 1, 2011 and scheduled surgery for removal of plaintiff’s cyst for October 4, 2011 (T. 290-293). Dr. Velcek did not find that plaintiff presented with torsion or any other surgical emergency but decided that the cyst should be removed to prevent torsion in the future (T. 544). Dr. Velcek removed the cyst on October 4, 2011 (T. 462-463). Upon opening plaintiff’s abdominal cavity, she observed the right ovary and cyst, which was twisted three times, discoloration of the ovarian mass and uterus, and a normal fallopian tube (T. 463). Dr. Velcek removed the cyst and the right ovary (T. 463). Dr. Velcek’s surgical report did

¹ It is unclear why Dr. Trentacosta agreed to examine plaintiff on September 26, 2011, despite being told her age, but then declined to examine her based on her age when she appeared at his office the following day.

² The claims against Dr. Velcek were dismissed by order of this Court (Rakower, J.) entered April 9, 2019 (Doc. 161), which granted her motion for summary judgment.

not: 1) indicate the presence of any necrosis; 2) reflect that the ovary was not viable or unsalvageable; or 3) explain the basis for removing the ovary with the cyst (T. 498, 539). Dr. Velcek's report did indicate, however, that the ovary "was replaced completely by the tumor" (T. 541).

Expert Testimony

Plaintiff's expert OB/GYN, Dr. Richard Luciani, opined that Dr. Trentacosta departed from accepted standards of medical practice by: (1) advising SIUH to discharge plaintiff for further consultation; (2) failing to appreciate that plaintiff had a surgical emergency; and (3) referring plaintiff to another OB/GYN, instead of a surgeon, for treatment (T. 448-451). Dr. Luciani opined that, if Dr. Trentacosta could not treat plaintiff, he should have referred her back to the ER at SIUH. He further stated that plaintiff should have been examined by a surgeon "either later [in the] evening [on the day she presented to SIUH] or first thing [the next day]" so that she could have been properly evaluated" (T. 455). Additionally, Dr. Luciani opined that Dr. Trentacosta's departures from accepted practice were a proximate cause of the loss of plaintiff's ovary (T. 448-451). He explained that plaintiff's discharge from SIUH delayed the evaluation and treatment of her intermittent ovarian torsion, which allowed full torsion to occur, thereby resulting in the nonviability of the ovary and the need for removal of the same, instead of just the cystic portion thereof (T. 461-462).

Dr. Luciani further testified that, had SIUH admitted plaintiff, "it would have allowed for a timely and proper evaluation by a gynecological surgeon and/or pediatric surgeon which would have resulted in surgery in saving the ovary" (T. 467-468). He also said that the loss of the ovary caused plaintiff "decreased ovarian reserve" (T. 464). Although he conceded that plaintiff still had hundreds of thousands of eggs, he simultaneously asserted that she was at a higher risk of

infertility because of the loss of one ovary (T. 464-467). He also admitted that plaintiff would have required surgery regardless of when she was diagnosed (T. 515).

On cross examination, Dr. Luciani admitted that, if plaintiff had been in pain following her discharge from SIUH, as plaintiff's mother said she was, then the ovary was still viable through October 1, 2011, when she saw Dr. Velcek (T. 532-533). Although he testified that the SIUH emergency room performed a proper work up, ordered the appropriate tests and consultation, and properly relied on the recommendations of Dr. Trentacosta, he emphasized that he was not an expert in emergency medicine (T. 528).

Plaintiff's expert in pediatric emergency medicine, Dr. Joeli Hettler, testified that Dr. Graziano departed from accepted practice in agreeing to discharge plaintiff since plaintiff "needed to have surgery on her ovary" during "a window of opportunity where the ovary had blood flow, and if [plaintiff] had [torsion], at the time, the ovary was at risk for losing blood flow, and not be viable anymore" (T. 597-98). Dr. Hettler also opined that the discharge instructions provided to plaintiff were inappropriate and constituted a departure from accepted practice because they failed to indicate that plaintiff was at risk for torsion and, thus, loss of blood flow and the possible loss of her ovary (T. 604-606).

On cross examination, Dr. Hettler testified that, when a hospital's "discharge instructions aren't applicable" it was "standard" for her to "write [a discharge instruction] specifically for [the] patient" (T. 674). Dr. Hettler also opined that an emergency room physician should not defer to a consulting specialist (T. 632, 635). Additionally, Dr. Hettler conceded that, in a 2018 affidavit, she admitted that Dr. Graziano appropriately sought an OB/GYN consultation from Dr. Trentacosta (T. 663).

Plaintiff's pediatric surgical expert, Dr. Gerard Weinberg, testified that plaintiff's ovary was salvageable on September 26, 2011 but became nonviable somewhere between that date and October 1, 2011 (T. 734, 758).

On cross-examination, Dr. Weinberg admitted that he did not know precisely when the ovary became nonviable (T. 771). He conceded that it was appropriate for Dr. Trentacosta, an OB/GYN surgeon, to examine plaintiff on September 27, 2011, the day after her discharge from SIUH (T. 762). Dr. Weinberg determined that the ovary was "necrotic," although this was not mentioned by Dr. Velcek in any of her records and was not in the pathology report (T. 775- 82, 795). Rather, as noted above, Dr. Velcek noted in her surgical report that the ovary was removed because it was replaced by the tumor (T. 797).

Dr. Weinberg was also questioned regarding a 2018 affirmation he submitted in connection with summary judgment motion practice in this action. In the affirmation, he stated, inter alia, that it was his "opinion within a reasonable degree of medical certainty that [as of October 4, 2011] the ovary had not been torsed long enough for the tissue to have become necrotic" (T. 795, Doc. 200 at par. 20). He further opined, contrary to Dr. Velcek's determination, that the "cyst did not completely take over the ovary. There was still ovarian tissue left" and "[t]his was a resectable cyst that would have left enough ovarian tissue remaining" (T. 796, Doc. 200 at par. 20).

Dr. Trentacosta's OB/GYN expert, Dr. Gary Mucciolo, opined that Dr. Graziano did not depart from accepted practice in discharging plaintiff since it was appropriate for her to follow up with Dr. Trentacosta the following morning (T. 851-853).

Dr. Rahul Sharma, SIUH's expert in emergency medicine, testified that the hospital did not depart from the standard of care in its treatment of plaintiff (T. 984, 992). Dr. Sharma testified that, given the diagnosis of an ovarian cyst, it was appropriate for Dr. Graziano and PA Chow to

consult with, and rely on, the recommendations of Dr. Trentacosta (T. 1002, 1006, 1009-1010). Dr. Sharma confirmed that it is the specialist, in this case Dr. Trentacosta, who appropriately determines whether a plaintiff requires emergency surgery (T. 999). He further opined that the hospital's decision to discharge plaintiff was not a deviation from accepted medical standards since she was pain free, she was seen by a specialist, her ultrasound confirmed that there was blood flow to the ovary, there was no surgical emergency warranting her admission to the hospital, and she was scheduled for a follow up visit by Dr. Trentacosta the following day (T. 1011-1013, 1016). Although plaintiff and her mother both testified that plaintiff was in pain at the time of her discharge, Dr. Sharma said he was "convinced" that plaintiff "was not sent home in acute pain" (T. 1013-1014).

Dr. Sharma opined that the hospital properly provided plaintiff with a combination of oral and written discharge instructions, particularly since the said instructions explicitly directed plaintiff to follow up with Dr. Trentacosta the next morning (T. 1018, 1070).

Dr. Beth Rackow, SIUH's expert OB/GYN, opined that the treatment rendered by the hospital was appropriate and did not cause the loss of plaintiff's ovary (T. 1117-1118). She explained that ovarian cysts in pediatric patients are typically treated, or at least managed by, an OB/GYN, whose expertise is in the female reproductive system (T. 1123). Dr. Rackow opined that, as of October 4, 2011, plaintiff's ovary was viable and therefore did not require removal (T. 1119, 1126, 1132). Additionally, Dr. Rackow represented that the loss of an ovary "should not impair a woman's fertility" (T. 1149). Specifically, she stated that plaintiff's remaining ovary still had hundreds of thousands of eggs available, and that a "woman can absolutely conceive with only one ovary" (T. 1148-1149).

The Jury Verdict

On May 24, 2022, the jury rendered a verdict determining that SIUH departed from accepted medical practice by discharging plaintiff and by failing to provide her with appropriate discharge instructions, and that these departures were substantial factors in causing plaintiff injury (T. 1390-1391). Additionally, the jury determined that Dr. Trentacosta departed from accepted medical practice by failing to immediately send plaintiff back to the hospital to be further evaluated and treated, and that such departure was a substantial factor in causing plaintiff's claimed injury (T. 1391). The jury apportioned 75% of fault to SIUH and 25% to Dr. Trentacosta and awarded plaintiff \$100,000 for past pain and suffering and \$500,000 for future pain and suffering for 21 years (T. 1391-1392).

The Instant Motion

SIUH now moves, pursuant to CPLR 4404(a), for the relief set forth above, arguing that the jury's findings against it must be set aside and the claims against it dismissed. Docs. 196-200. In support of this argument, the hospital asserts that plaintiff failed to set forth a prima facie claim of medical malpractice. Doc. 198 at 2-8. Specifically, it maintains that plaintiff was discharged at the direction of Dr. Trentacosta, the consulting OB/GYN specialist, the hospital scheduled an appointment for plaintiff to visit Dr. Trentacosta the following morning, and that any causal connection between the hospital's alleged negligence in providing inappropriate discharge instructions and plaintiff's injury would have been severed once plaintiff visited Dr. Trentacosta the day after her discharge. Doc. 198 at 3-6. SIUH further maintains that Dr. Trentacosta's unexpected refusal to treat plaintiff delayed her timely examination by a surgeon and, thus, severed any causal link between any delay it caused and plaintiff's injuries. Doc. 198 at 18.

The hospital further asserts that, assuming plaintiff's mother truthfully testified that plaintiff was in pain following her discharge until her October 1st visit with Dr. Velcek, Dr. Luciani opined that such pain would have been indicative of a viable ovary which could have been saved (T. 532-533; Doc. 198 at 12). Thus, urges SIUH, Dr. Luciani's admission is tantamount to a concession that the discharge could not have been a proximate cause of the loss of the ovary. Doc. 198 at 14.

SIUH further asserts that, in the event that the claims against it are not dismissed, the jury's apportionment of fault, i.e., 75% against SIUH and 25% against Dr. Trentacosta, "cannot be reconciled with any rational view of the evidence" and must be adjusted such that Dr. Trentacosta is assessed a majority of the fault. Doc. 198.

Additionally, SIUH demands that the jury's \$600,000 pain and suffering award be vacated. Doc. 198. In support of this argument, SIUH asserts that plaintiff's claimed injury is reduced fertility and, since she was only 19 years old at the time of trial and had not yet attempted to become pregnant, she did not suffer a legally cognizable injury prior to trial. Doc. 198. Further, SIUH maintains that any award for future loss of fertility is entirely speculative and must be vacated. Doc. 198.

SIUH further argues that it was deprived of a fair trial by plaintiff's summation. Doc. 198 at 22-25. Specifically, the hospital asserts that plaintiff misstated the law on proximate cause while addressing the concept of "loss of chance", representing that it was the jury's "job, to determine whether or not [defendants'] actions increased [plaintiff's] risk of losing her ovary; diminishing her risk of saving her ovary" (T. 1349). Plaintiff's counsel then advised the jury that, if they "find that by *any* percentage [defendants'] actions increased [plaintiff's] risk of losing her ovary, they are negligent" (T. 1349 [emphasis added]). SIUH further maintains that plaintiff's counsel later

compounded her inaccurate rendering of the law by stating that “if you find [plaintiff’s] chances of having infertility problems in the future, reducing her fertility in the future have been reduced by *any* percentage and that was the result of negligence, you must find for the [p]laintiff; whether that is 50, 30, 10, five, one, half of a percent, you must find for the [p]laintiff” (T. 1352 [emphasis added]). Following summations, counsel for both defendants objected to plaintiff’s foregoing characterization of the law and asked for a mistrial (T. 1356-1357). This Court ruled that the comments by plaintiff’s counsel constituted “appropriate fair comments in summations” and that, in any event, its instructions to the jury would clarify the proximate cause standard (T. 1359).

In opposition, plaintiff argues that the motion must be denied because the jury rationally determined that SIUH was negligent. Doc. 203 at pars. 6-19. She also maintains that the verdict cannot be set aside since it was not palpably wrong. Doc. 203 at par. 5. Specifically, plaintiff asserts that, since her experts and those for the defendants agreed that the only treatment for plaintiff’s condition was surgery, SIUH’s decision to discharge her, without referring her to a surgical facility, was a departure from the standard of care. Doc. 203 at par. 7.

Plaintiff further asserts that the jury correctly found that the hospital negligently provided plaintiff’s mother with discharge instructions. Specifically, plaintiff claims that SIUH discharged her without advising her mother that she needed surgery as soon as possible and could lose her ovary if it torsed. Doc. 203 at par. 8. Although Dr. Graziano testified that he orally advised plaintiff’s mother that plaintiff had a high risk of torsion (Doc. 199 at 113-114), plaintiff’s mother denied that this ever occurred (T. 281; Doc. 203 at par. 8). She maintains that the jurors logically believed that Dr. Graziano never told her mother about the risk since, had her mother known about it, she would not have brought her to see Dr. Trentacosta, an OB/GYN, but to a surgeon. Doc. 203 at par. 8.

Next, plaintiff argues that, since the jury found that SIUH was negligent in discharging her and in providing deficient discharge instructions, and that both of these negligent acts caused her injury, SIUH is liable despite any subsequent negligence by Dr. Trentacosta. Doc. 203 at par. 11. She urges that, since she required surgery, she should not have been discharged from SIUH, where surgery could have been performed, and that her discharge to Dr. Trentacosta, which delayed surgery and therefore increased the risk of torsion, was a departure from the standard of care and caused her injury. Doc. 203 at par. 11.

Next, plaintiff argues that the jury properly apportioned 75% of liability to SIUH and 25% to Dr. Trentacosta. Doc. 203 at pars. 20-21. She asserts that SIUH's argument that Dr. Trentacosta should bear more liability is disingenuous since SIUH had the opportunity at trial to prove Dr. Trentacosta liable and did not attempt to do so. Doc. 203 at par. 20. Rather, Dr. Trentacosta and SIUH both argued at trial that Dr. Velcek unnecessarily removed plaintiff's viable ovary. Doc. 203 at par. 20.³ Plaintiff maintains that the jury's apportionment should not be disturbed because SIUH knew that: she had a tumor on her ovary; the ultrasound established that the ovary was still viable; surgery offered her the best chance of saving the ovary; and discharging her to Dr. Trentacosta, who could not perform surgery in his office, delayed the necessary surgery. Doc. 203 at par. 21. Although she concedes that she argued at trial that liability should be apportioned equally between SIUH and Dr. Trentacosta, the jury's apportionment was not "so far beyond the realm of the credible evidence" as to warrant disturbing the same. Doc. 203 at par. 21.

Plaintiff further argues that this Court should disregard SIUH's argument that her pain and suffering award must be vacated since she has not yet attempted to become pregnant and that the damages awarded for future infertility are speculative. Doc. 203 at par. 22. She urges that where,

³ During the trial, this Court ruled that, given the dismissal of the claims against Dr. Velcek, the parties were precluded from asking "any question that suggests that [she] deviat[ed] from the standard of care" (T. 709).

as here, liability is founded upon a negligent failure to timely perform surgery, it is sufficient for a plaintiff to show that a timely performed surgery would have provided her with a “substantial possibility” or “substantial likelihood” of a better outcome. Doc. 203 at par. 23.

In reply, SIUH reiterates its argument that the verdict is against the weight of the evidence. Doc. 204 at 3-6. It further asserts that the jury’s apportionment of fault cannot be reconciled with any reasonable view of the evidence. Doc. 204 at 7. Next, SIUH asserts that plaintiff fails to refute its argument that plaintiff’s summation deprived it of a fair trial. Doc. 204 at 7-8. Finally, SIUH reiterates its contention that the jury improperly awarded plaintiff damages for a future loss of fertility since the testimony of plaintiff’s expert OB/GYN, Dr. Luciani, was speculative. Doc. 204 at 8-9.

LEGAL CONCLUSIONS

Setting Aside The Verdict As Against The Weight Of The Evidence

CPLR 4404(a) provides as follows:

(a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, 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 of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

A jury verdict may not be set aside as against the weight of the evidence unless "the evidence so preponderate[d] in favor of the [moving party] that [it] could not have been reached on any fair interpretation of the evidence" (*Killon v Parrotta*, 28 NY3d 101, 107-108 [2016] [citation omitted]; *see also Cohen v Hallmark Cards*, 45 NY 2d 493, 499 [1978] [verdict cannot be set aside unless "there is simply no valid line of reasoning, and permissible inferences which could possibly lead rational people to the conclusion reached by the jury"]; *Rozon v Schottenstein*,

204 AD3d 94, 103 [1st Dept 2022] [citations omitted]). “Great deference is accorded to the [jury, which] had the opportunity to see and hear the witnesses” and was “in the best position to assess the credibility of the witnesses” (*Rozon v Schottenstein*, 204 AD3d at 101 [citations omitted]).

Here, the evidence, including the testimony of witnesses and experts, “created factual and credibility issues that were properly determined by the jury” (*Rozon v Schottenstein*, 204 AD3d at 103). Since the resolution of the case turned on the evaluation of conflicting testimony, it was incumbent upon the jury to resolve such a conflict (*see Rozon v Schottenstein*, 204 AD3d at 103 [citation omitted]) and this Court finds that its verdict was not against the weight of the evidence.

Despite SIUH’s claim that “the evidence failed to establish a causal link between a delay in treatment and the loss of [plaintiff’s] ovary”, Dr. Luciani, plaintiff’s expert OB/GYN, testified that SIUH departed from accepted medical standards in failing to admit plaintiff and that the hospital’s failure to have her evaluated by a gynecological surgeon and/or pediatric surgeon delayed her proper diagnosis and treatment and deprived her of the chance to have surgery to save the ovary. Plaintiff’s emergency medicine expert, Dr. Hettler, testified that Dr. Graziano of SIUH departed from accepted medical practice by discharging plaintiff since plaintiff required surgery while she still had blood flow to the ovary. She also opined that Dr. Graziano departed from accepted standards of medical care since, as a specialist in emergency medicine, he should have known that plaintiff needed surgery.

Dr. Hettler further opined that SIUH’s discharge instructions departed from accepted medical standards because they failed to indicate that plaintiff was at risk for torsion and, thus, at risk for more pain and the possible loss of her ovary. Although Dr. Graziano testified that he told plaintiff’s mother about the risk of torsion, plaintiff’s mother denied this at trial and the jury was in the best position to determine who was more credible. The jury, which appears to have deemed

the testimony of plaintiff's mother more credible, was thus able to rationally conclude that the improper instructions caused plaintiff injury.

Dr. Graziano of SIUH testified that plaintiff was not in pain at the time of her discharge, whereas plaintiff's mother testified that plaintiff was in pain at that time. Dr. Graziano admitted that, assuming plaintiff was in pain at that time, she could have had torsion or another condition warranting immediate surgical intervention. Thus, the jury, which evidently believed that plaintiff was in pain when she was seen by Dr. Graziano, an emergency room physician admittedly not familiar with treatment for an ovarian cyst, rationally concluded that her discharge by SIUH was a substantial factor in causing her injury. Although SIUH directed plaintiff to visit Dr. Trentacosta the following morning, the jury appears to have found that this was a deviation from the standard of care since plaintiff needed to undergo surgery as soon as possible. The verdict also suggests that the jury determined that SIUH was negligent in discharging plaintiff based on the recommendation of Dr. Trentacosta despite the fact that he did not examine her at the hospital.

Relying on *Datiz v Shoob*, 71 NY2d 867 (1988), SIUH argues that it cannot be jointly liable with Dr. Trentacosta since it was not involved in decisions regarding plaintiff's diagnosis and treatment. However, this argument is disingenuous insofar as Dr. Graziano examined plaintiff and participated in the decision to refer her to Dr. Trentacosta. Additionally, although SIUH attempts to insulate itself by arguing that Dr. Graziano is merely an emergency physician, this ignores that the hospital failed to provide plaintiff with an ER doctor capable of providing her with the urgent treatment she needed.

Apportionment of Fault

For the reasons set forth above, the jury's apportionment of fault was not against the weight of the evidence (*see Scott v Posas*, 194 AD3d 454, 456 [1st Dept 2021] citing *Killon v Parvotta*,

28 NY3d 101, 107-108 [2016]). As plaintiff asserts, she demanded that the jury apportion liability 50%-50% between SIUH and Dr. Trentacosta, and the apportionment of 75% liability to the hospital and 25% to Dr. Trentacosta cannot be set aside since the jury had a rational basis for determining these percentages (*See Cohen v Hallmark Cards*, 45 NY2d at 499).

Allegedly Prejudicial Summation

This Court finds that the comments made by plaintiff's counsel during summation, which related to proximate cause, do not warrant setting aside the verdict. The comments by plaintiff's counsel were, at most, "isolated remarks that constituted either fair comment on the evidence or a fair response to defendants['] arguments with respect to witness credibility, and were not the type of comments that could have deprived defendant of a fair trial" (*Nieves v Riverbay Corp.*, 95 AD3d 458, 459 [1st Dept 2012]). Further, to the extent SIUH maintains that counsel's comments were prejudicial because "the evidence as to proximate cause was tenuous, at best" (Doc. 198 at 25), this argument is duplicative of its contention that the verdict was against the weight of the evidence (*See generally Eccleston v New York City Health & Hospitals Corp.*, 266 AD2d 426, 427 [2d Dept 1999]). Moreover, any juror confusion arising from counsel's comments would have been obviated by this Court's instructions regarding proximate cause (*See generally Lentino v Rosedale Gardens, Inc.*, 79 AD2d 554 [1st Dept 1980] [new trial ordered where IAS Court failed to instruct jury regarding burden of proof and proximate cause]).

Damages Award

SIUH asserts that the \$600,000 damages award must be set aside since it was based on the jury's improper speculation that plaintiff suffered decreased fertility as a result of the actions of SIUH.⁴ Plaintiff correctly cites *Stewart v New York City Health and Hospitals Corporation*, 207

⁴ SIUH does not argue that the verdict must be set aside on the ground that it is excessive.

AD2d 703, 704 (1st Dept 1994) in opposing this argument. In *Stewart*, plaintiff claimed that her fallopian tube was negligently removed, resulting in a reduction of her future fertility. The defendant conceded that the reduction in fertility was 5 to 10 percent and moved to set aside the verdict as against the weight of the evidence, asserting such a small percentage was unsubstantial. The Appellate Division, First Department disagreed, holding that plaintiff did not have to prove that defendant's negligence actually deprived her of the ability to naturally conceive and bear children, but rather that "plaintiff merely had to prove that defendant's negligence caused her to lose her fallopian tube and that such negligence deprived her of a substantial possibility of that ability."

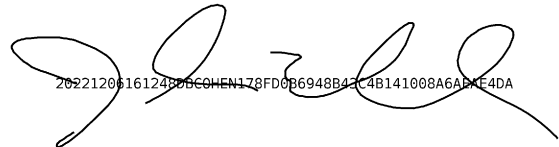
In rendering its verdict herein, it is evident that the jury relied on the testimony Dr. Luciani who, as noted above, testified that the loss of the ovary caused plaintiff "decreased ovarian reserve" and that, although she still had hundreds of thousands of eggs, she was at a higher risk of infertility because of the loss of one ovary.

In arguing that plaintiff's damages based on reduced fertility are speculative, SIUH relies on *Gill v Calfee*, 206 AD3d 492 (1st Dept 2022), which is clearly distinguishable since the First Department held therein that the opinion of plaintiff's expert, that a defendant doctor and hospital "created a lost opportunity to avoid further . . . injury" was speculative "given that plaintiff's lab results were inconclusive, and [plaintiff's] symptoms resolved with fluid treatment" (*Gill*, 206 AD3d at 493). Initially, *Gill* involved a motion for summary judgment and not the resolution of factual issues by a jury. Additionally, here, unlike in *Gill*, it is undisputed that plaintiff was diagnosed with a tumor on her ovary before her discharge from SIUH. Thus, it was up to the jury to determine whether she was in pain at the time she left the hospital and, if so, whether SIUH should have acted more urgently in addressing the tumor.

Accordingly, it is hereby:

ORDERED that the motion by defendant Staten Island University Hospital is denied in all respects; and it is further

ORDERED that the parties' remaining contentions are either without merit or need not be addressed given the findings above.



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12/6/2022

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE