McGuire v Burke Rehabilitation Hosp.
2024 NY Slip Op 35491(U)
August 9, 2024
Supreme Court, Westchester County
Docket Number: Index No. 52035/2021
Judge: Alexandra D. Murphy

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.

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JOHN MCGUIRE and ELEANOR MCGUIRE,
Plaintiffs,

Index No. 52035/2021

– against –

Motion Seq. 3

BURKE REHABILITATION HOSPITAL,
Defendant.

DECISION AND ORDER AFTER TRIAL

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The Jacob D. Fuchsberg Law Firm, LLP, New York, NY (Rikki B. Dascal of counsel), for plaintiffs.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success, NY (Sari Havia and Christopher Simone of counsel), for defendant.

In an action to recover damages for medical malpractice, the defendant moves, pursuant to CPLR 4404(a), to set aside the jury verdict on the issue of liability as contrary to the weight of the evidence and for a new trial on the issue of liability, and to set aside, as contrary to the weight of the evidence and as excessive, the jury verdict on the issue of damages in the amount of $1,197,800 for past pain and suffering, and $865,000 for past medical expenses, and for a new trial on the issue of damages:

Papers Considered **NYSCEF Doc. 108-119; 123-127; 132-133**

1. Notice of Motion/Affirmation of Sari Havia, Esq./Exhibits A-I;
2. Affirmation of Rikki B. Dascal, Esq. in Opposition/Exhibits 1-3;
3. Reply Affirmation of Sari Havia, Esq.

Factual and Procedural Background

The plaintiff John McGuire, 92 years old, underwent a left knee revision surgery at White Plains Hospital on July 23, 2019. After the surgery, the plaintiff was transported to Burke Rehabilitation Hospital (Burke) for recovery. The plaintiff was a patient at Burke between July 30, 2019, and August 9, 2019. At the time of his admission, the plaintiff was assessed as a "yellow level" high fall risk.

On August 9, 2019, the plaintiff's knee buckled during a physical therapy session and during an occupational therapy session. The plaintiff was advised by his therapist to see his doctor. Prior to going to see his doctor, the plaintiff returned to his hospital room

to use the bathroom. While using the bathroom unassisted, the plaintiff's knee buckled causing him to fall and sustain injuries.

After the fall, the plaintiff was readmitted to White Plains Hospital. Upon his discharge from the hospital, the plaintiff rehabilitated at two different facilities. After a subsequent fungal infection and staph infection, the plaintiff underwent an above the knee amputation of his left leg in May 2020.

The plaintiff[1] commenced this action for medical malpractice against Burke with the filing of a summons and complaint on February 23, 2021. A trial was held before this Court and a jury between October 16, 2023, and October 23, 2023. The following relevant testimony was elicited.

Trial Testimony

The plaintiff testified that as a child he was inflicted with polio in his right leg which rendered his right leg weak. The plaintiff underwent a first left knee replacement in 1998 and a second left knee replacement in 2017. In July 2019, he had left knee revision surgery at White Plains Hospital and was discharged to Burke for rehabilitation.

The plaintiff testified that while at Burke he engaged in physical and occupational therapy. During a physical therapy session on August 9, 2019, his left knee buckled a couple of times. The plaintiff was holding onto his walker when his knee buckled, so he did not fall. According to the plaintiff, the therapist was aware that his knee had buckled. The plaintiff proceeded to occupational therapy where the therapist wanted to observe him getting in and out of the shower. As he stood up there was blood on his pants. The therapist advised the plaintiff to see the doctor. The plaintiff testified:

> Nobody came with me, I had to wheel myself to the elevator, went upstairs, and wheel myself to the room and my wife was waiting for me because it is visiting hours.
>
> And I said, I lay there bleeding, they want me to see the doctor but I have to call the nurse I have to go to the bathroom. And then [] I went inside the bathroom, I didn't shut the door, I went inside, my knee buckled again. I fell back on the seat and the blood was coming out of the cavity. There was blood all over the floor. My wife was yelling to get the nurse and she put -- two or three of them come in she applied pressure to the knee, you can see the knee cavity and I was bleeding. I didn't know, I was frightened. I didn't know what I was going to do, what happened now. Then while they were applying pressure, there was quite a few people at the bathroom door, and I heard a nurse, I heard a voice in the back saying oh, he's got to go to the hospital.

[1] Initially, the plaintiff's daughter Eleanor McGuire was a party to this action, but counsel subsequently withdrew the loss of consortium claim on behalf of Eleanor McGuire.

> So they called an ambulance and put me on the gurney and back to White Plains emergency room I went (NYSCEF Doc. 111 p. 57).

Dr. Martin Grossman, the plaintiff's expert in hospice and palliative medicine, testified that he reviewed the plaintiff's medical records from Burke. Based upon the medical records, Dr. Grossman testified that the plaintiff had an intercepted fall during his occupational therapy session on August 8th. The plaintiff also had intercepted falls during his physical therapy session and his occupational therapy session on August 9th. Dr. Grossman testified that the plaintiff's medical records did not designate the plaintiff as a fall risk on August 8th or 9th.

Dr. Grossman opined to a reasonable degree of medical certainty, that the plaintiff should have been designated as a yellow high fall risk on August 8th and August 9th "[b]ecause he had three near misses" (NYSCEF Doc. 111 p. 77). Dr. Grossman explained that a patient does not have to hit the ground for an incident to be considered a fall. Dr. Grossman testified that the failure to re-designate the plaintiff as a yellow high risk for falls on August 8th and 9th was a proximate cause of his injuries. He opined that the fall in the bathroom was the proximate cause of the shearing of the patella tendon and the likely reason why the plaintiff developed a fungal infection.

Dr. Sanford Davne, the plaintiff's expert in orthopedic surgery, opined with a reasonable degree of medical certainty that the plaintiff's fall on August 9, 2019, was the direct proximate cause of the patella tendon rupture, the wound dehiscence, the need for revision surgery and repair of the patella tendon, the fungal infection, and the above the knee amputation sustained by the plaintiff.

Loriann O'Brien testified on behalf of Burke. O'Brien is the director of information and operations for nursing and the nurse manager. Burke is an acute care facility where patients undergo three hours of therapy a day. The average length of stay for patients in O'Brien's unit is 16 days. O'Brien was part of the team that treated the plaintiff. O'Brien testified that when a patient is admitted to Burke a fall risk assessment is performed which includes an analysis of the patient's cognitive and functional status and any special instructions from the receiving facility. She identified three classifications for fall risk: independent or no risk for falls; yellow level or high risk for falls; and one-on-one supervision. O'Brien testified that a patient is assessed upon admission and every 12-hour shift thereafter. A patient is deemed a high risk for falls (also known as yellow level) based upon an algorithm that accounts for the patient's age, medications, cognitive ability, behavior, and injury.

If a patient is deemed a high risk for falls, the medical team places an order in the patient's chart stating that fall precautions have been ordered. The patient receives a yellow band, a yellow placard on their wheelchair, and a yellow placard on the doorjamb of the room. O'Brien testified that a high-risk fall designation requires that the patient be consistently re-educated about fall protocol and encouraged to use the call bell for any needs. O'Brien explained that for patients deemed a high risk for falls, an alarm is set on their wheelchair and on the bed so the alarm is activated every time the patient gets up. She explained that the chair alarm is a pad that goes underneath where the patient sits

and is connected to a box that has a loud piercing ring. The alarm activates if a high fall risk patient gets up to a standing position.

O'Brien testified that the plaintiff was classified as a yellow high risk for falls. She stated that the plaintiff was not assessed to be a one-on-one fall risk because he was alert and oriented to person, time, and place. He had sound judgment, was not impulsive, and was cooperative. The plaintiff had two call bells attached to his bed, a call bell in the bathroom, and a call bell at the sink. O'Brien testified that the consistent education, the chair alarm, and the bed alarm were in place for the plaintiff because he was designated as a high risk for falls.

O'Brien further testified that a patient at high risk for falls has fall precautions in place meaning, "[t]hat patient is going to be rounded on, that patient is going to be re-educated on safety, that patient is going to be prompted to toilet. That patient is going to be told that [if they need] to use the call bell for any assistance including ambulating or taking the wheelchair into the bathroom" (NYSCEF Doc. 113 p. 336).

O'Brien testified that the plaintiff remained a high fall risk for his entire admission at Burke and that his attending physician never ordered that his status as a high fall risk be changed. However, despite this testimony she admitted on cross examination that his hospital chart for August 8, 2019, and August 9, 2019, indicates he was not considered a yellow high risk for falls and that there was no indication in his chart to assist the plaintiff with activities (NYSCEF Doc. 113 p. 349; NYSCEF Doc. 125 p. 229-230). O'Brien further admitted on cross examination that despite the plaintiff having two intercepted falls on August 9, 2019, she wrote in his hospital chart that he did not have any falls on that day.

O'Brien testified that the plaintiff did not use the call button to request assistance to use the bathroom at the time he fell. She testified that prior to the fall in the bathroom, the plaintiff consistently used the call bell.

Dr. Ira Rashbaum testified on behalf of Burke as an expert in physical medicine and rehabilitation. Dr. Rashbaum opined that Burke appropriately designated the plaintiff as a high risk for falls and that the plaintiff remained at high risk for falls throughout his admission at Burke. Dr. Rashbaum further testified that Burke had appropriate fall prevention protocols in place during the plaintiff's admission.

On cross examination, however, Dr. Rashbaum admitted that according to the hospital records, the plaintiff was not designated as a yellow high risk for falls on August 7, 8, and 9, 2019.

Verdict

After summations and the charge, the jury returned a verdict in favor of the plaintiff finding that Burke departed from accepted standards of medical practice in its care and treatment of the plaintiff on August 9, 2019, and that such departure was a substantial factor in causing the plaintiff's injuries.

While the jury found that the plaintiff was also negligent, the jury concluded that the plaintiff's negligence was not a substantial factor in causing his injuries.

The jury awarded the plaintiff $1,197,800 in past pain and suffering and $865,000 for past medical expenses.

Burke now moves to set aside the verdict with respect to liability and damages as against the weight of the evidence. The plaintiff opposes the motion.

Discussion

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict on any fair interpretation of the evidence (*see* CPLR 4404[a]; *Walter v Matano*, 81 AD3d 636 [2d Dept 2011]; *Mancusi v Setzen*, 73 AD3d 992, 993 [2d Dept 2010]). "The jury's resolution of conflicting expert testimony is entitled to great weight, as it is the jury that had the opportunity to observe and hear the experts" (*Speciale v Achari*, 29 AD3d 674, 675 [2d Dept 2006]; *see Johnson v Jacobowitz*, 65 AD3d 610, 613 [2d Dept 2009]). Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert (*Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587, 588 [2d Dept 2011]).

In a medical malpractice action, the plaintiff must show that the defendant deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury (*see Mazella v Beals*, 27 NY3d 694, 705 [2016]).

Burke argues that the evidence at trial demonstrates that it properly designated the plaintiff as a high fall risk and implemented appropriate fall prevention protocols throughout the plaintiff's admission. Burke argues that there was no evidence that the plaintiff's fall risk was ever downgraded.

In opposition, the plaintiff argues that Burke departed from the standard of care by downgrading him from yellow high risk for falls.

The Court finds that the jury's verdict in favor of the plaintiff on the issue of liability was supported by a fair interpretation of the evidence. The Burke medical records, which were admitted into evidence, establish that on August 7, 2019, Burke downgraded the plaintiff from yellow high risk for falls to 'not considered a risk for falls' (NYSCEF Doc. 125 p. 226, 228-230). The hospital records demonstrate that the plaintiff was never re-designated a yellow level high fall risk. Further, the hospital records for August 7th through August 9th do not indicate that the plaintiff was provided with a bed alarm or a wheelchair alarm (NYSCEF Doc. 125 p. 228-230). O'Brien and Dr. Rashbaum's testimony that the plaintiff remained a high fall risk for his entire admission at Burke is belied by the medical records. Dr. Martin Grossman, the plaintiff's expert in hospice and palliative medicine, opined that the plaintiff should have been designated as a yellow high risk for falls on August 8th and August 9th.

Moreover, O'Brien testified that despite the plaintiff having two intercepted falls on August 9, 2019, she wrote in the hospital chart that he did not have any falls. She acknowledged that the physical therapist and the occupational therapist considered both incidents as falls. Thus, the jury could elect to believe and the testimony demonstrates that the plaintiff was downgraded to independent and was not equipped with a chair or bed alarm and not instructed to call for assistance to use the bathroom. This is further supported by O'Brien's testimony that prior to the date of the incident in the bathroom,

when the plaintiff was designated a yellow high risk for falls, the plaintiff consistently used the call bell.

Here, the jury was free to credit the testimony of the witnesses, including the plaintiff's expert witness, as well as the hospital records admitted into evidence, that Burke's conduct in removing the plaintiff from a designation of yellow level high fall risk was a deviation from accepted medical practice and that such deviation caused the plaintiff's injuries. Further, the jury was free to draw a reasonable inference that the plaintiff's use of the bathroom without assistance on August 9th was not a substantial factor in causing his injuries because he was no longer a yellow level high risk for falls. Accordingly, there is no basis to disturb the jury's determination.

Burke also argues that the damages awarded to the plaintiff for past pain and suffering are excessive. Burke argues that the only injuries sustained by the plaintiff that resulted from his fall in the bathroom was the wound dehiscence and patellar tendon repair. Burke argues that there was no evidence to demonstrate that the subsequent fungal infection, staph infection, and amputation were proximately caused by the plaintiff's fall in the bathroom. In opposition, the plaintiff argues that the jury's award of $1,197,800 for four years of past pain and suffering is reasonable.

The amount of damages awarded for personal injuries is primarily a question for the jury (*see Balsam v City of New York*, 298 AD2d 479 [2d Dept 2002]). However, the award may be set aside when it deviates materially from what would be reasonable compensation (*see* CPLR 5501 [c]; *Pellegrino v Felici*, 278 AD2d 212 [2d Dept 2000]). "The 'reasonableness' of compensation must be measured against relevant precedent of comparable cases" (*Buckham v 322 Equity, LLC*, ___AD3d___, 2024 NY Slip Op 03874, 3 [2d Dept July 24, 2024] *quoting Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept 2013]).

Here, Burke failed to demonstrate that the damages award deviates from what would be reasonable compensation. Dr. Davne, the plaintiff's expert, testified with a reasonable degree of medical certainty that the fungal infection occurred at the time of the plaintiff's fall when the wound became opened in the bathroom (NYSCEF Doc. 112 p. 221). Dr. Davne further opined, with a reasonable degree of medical certainty, that the plaintiff's fall at Burke was the direct cause leading to the amputation (NYSCEF Doc. 112 p. 227-228).

Burke relies upon the following cases in support of its argument that the damages awarded for past pain and suffering are excessive: *Kapassakis v Metro. Transp. Auth*, 193 AD3d 835 (2d Dept 2021) (finding that the plaintiff underwent arthroscopic surgery on her knee); *Cullen v Thumser*, 178 AD3d 895 (2d Dept 2019) (finding that plaintiff sustained a torn meniscus requiring arthroscopic surgery); *Castillo v MTA Bus Co.*, 163 AD3d 620 (2d Dept 2018) (finding that the plaintiff sustained a torn lateral and medial menisci in the left knee requiring arthroscopic surgery); and *McEachin v City of New York*, 137 AD3d 753 (2d Dept 2016) (finding that the plaintiff sustained cartilage damage in the knee requiring arthroscopic surgery and that the plaintiff would eventually require a knee replacement). However, the cases relied upon by Burke are distinguishable as they do not involve an above the knee amputation.

Burke further argues that the award for past medical expenses is not supported by the evidence and either a collateral source hearing should be conducted, or the damages should be reduced to the amount of the Medicare lien. The plaintiff argues that during the trial his attorney attempted to stipulate to the amount of the Medicare lien and agrees that the award should be reduced to the lien amount of $140,431.06 (NYSCEF Doc. 116). Thus, the Court finds that the damages award are reduced to the amount of the Medicare lien.

Burke argues that the liability determination should be reversed because the jury charge on Burke's negligence was too broad. Under CPLR 4404(a), a trial court has the discretion to order a new trial "in the interest of justice" (CPLR 4404 [a]; *see Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976]). In considering whether to exercise its discretionary power to order a new trial based on errors at trial, the court "must decide whether substantial justice has been done, whether it is likely that the verdict has been affected . . . and must look to [its] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision" (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d at 381 [internal citations omitted]; *Lariviere v New York City Tr. Auth.*, 131 AD3d 1130, 1132 [2d Dept 2015]).

Burke is not entitled to a new trial in the interest of justice. Initially, this contention has not been preserved. In any event, the trial transcript establishes that with respect to the negligence charge, the Court adopted the exact language proposed by Burke's attorney (NYSCEF Doc. 115 p. 525-526).

The parties' remaining contentions have been considered by the Court and are found to be without merit.

Accordingly, it is

ORDERED that the branch of the defendant's motion to set aside so much of the jury verdict as awarded the plaintiff $865,000 for past medical expenses is **GRANTED**, and the award for past medical expenses is reduced to $140,431.06; and it is further

ORDERED that the remaining branches of the defendant's motion to set aside the jury verdict as against the weight of the evidence is **DENIED** in entirety.

Dated: White Plains, New York
August 9, 2024

HON. ALEXANDRA D. MURPHY, J.S.C.