

Sec 19
(PD)
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SHANIA-GAY FFRENCH,

Plaintiff,

-against-

GUIRLANE AGNANT, M.D., MOUNT VERNON
OB/GYN ASSOCIATES, KEITH S. EDWARDS,
M.D., GARY C. GUERRINO, M.D. and THE
MOUNT VERNON HOSPITAL,

Defendants.

FILED

NOV 10 2009

TIMOTHY C. IDONI
COUNTY CLERK
MOUNT VERNON WESTCHESTER

NOTICE OF MOTION

Index No.: 14401/02

Please refer to:
Hon. Nicholas Colabella

French

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CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

COUNSEL:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Barbara D. Goldberg, dated September 8, 2009, with exhibits; the annexed Memorandum of Law; and all the prior pleadings and proceedings heretofore had herein, the undersigned will move this Court, at a motion term thereof, before Hon. Nicholas Colabella, on Monday, September 28, 2009, at 9:30 a.m. or as soon thereafter as counsel may be heard, for an Order, pursuant to CPLR 4404(a), setting aside the verdict rendered following the trial of this matter, and granting:

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- (1) judgment notwithstanding the verdict in favor of the defendant, Keith S. Edwards, M.D.; or in the alternative,

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- (2) a new trial on all issues; or as a further alternative,
- (3) a new trial as to damages unless plaintiff stipulates to substantial reductions; and, in the event the parties cannot agree,
- (4) a hearing for purposes of taking collateral source reductions in accordance with CPLR § 4545(a) and structuring a judgment in accordance with CPLR Article 50-A, and
- (5) such other and further relief as to this Court seems just and proper.

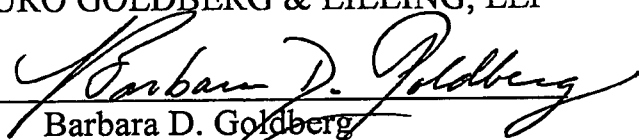
PLEASE TAKE FURTHER NOTICE that answering papers are to be served at least seven (7) days before the return date of this motion, pursuant to CPLR 2214(b).

Dated: Great Neck, New York
September 8, 2009

Yours, etc.

MAURO GOLDBERG & LILLING, LLP

By:


Barbara D. Goldberg

60 Cutter Mill Road, Suite 200
Great Neck, New York 11021
(516) 487-5800

Of counsel to:

Bartlett, McDonough, Bastone & Monaghan, LLP
Attorneys for Defendant Keith S. Edwards, M.D.

TO: MEAGHER & MEAGHER, ESQS.
Attorneys for Plaintiff
175 Main Street - Suite 205
White Plains, New York 10601
(914) 328-8844

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
SHANIA-GAY FFRENCH,

Plaintiff,

AFFIRMATION

Index No.: 14401/02

-against-

GUIRLANE AGNANT, M.D., MOUNT VERNON
OB/GYN ASSOCIATES, KEITH S. EDWARDS,
M.D., GARY C. GUERRINO, M.D. and THE
MOUNT VERNON HOSPITAL,

Defendants.
-----X

BARBARA D. GOLDBERG, an attorney duly admitted to practice before the
Courts of this State, hereby affirms pursuant to penalty of perjury as follows.

I am a member of the firm of MAURO GOLDBERG & LILLING, LLP, of
counsel to BARTLETT, McDONOUGH, BASTONE & MONAGHAN, LLP,
attorneys for the Defendant, KEITH S. EDWARDS, M.D. ("Dr. Edwards").

I am fully familiar with the facts and circumstances set forth herein, and in
the annexed Memorandum of Law, by virtue of a review of the trial transcript and
conversations with Christopher A. Terzian, Esq., who represented Dr. Edwards at
the trial of this action. I make this Affirmation in support of Dr. Edwards's motion
for an Order, pursuant to CPLR 4404(a), setting aside the verdict rendered

following the trial of this matter and (1) granting judgment notwithstanding the verdict in favor of Dr. Edwards; or in the alternative, (2) granting a new trial; or as a further alternative, (3) granting a new trial as to damages unless plaintiff stipulates to substantial reductions; and, in the event the parties cannot agree, (4) granting a hearing for purposes of taking collateral source reductions in accordance with CPLR § 4545(a) and structuring a judgment in accordance with CPLR Article 50-A.

The relevant factual background and the grounds for the motion are set forth in the annexed Memorandum of Law. All factual statements contained in the Memorandum of Law are incorporated herein by reference, and affirmed as if set forth herein. The motion is based on the complete trial transcript and trial exhibits, and for the convenience of the Court, a complete copy of the transcript is being provided herewith, under separate cover, as Exhibit "A". The transcript, which is lengthy, has been bound in three separate volumes, and the page references in the Memorandum of Law are to the particular volume and page numbers. In addition, the following Exhibits are annexed hereto for the Court's convenience:

Exhibit "B": Verdict Sheet

Exhibit "C": Mount Vernon Hospital

Emergency Room Records

- Exhibit "D": Dr. Edwards's Office Records
- Exhibit "E": Excerpts from Mount Vernon Hospital
Records for March, 2000 Admission
- Exhibit "F": Dr. Guerrino's Office Records
- Exhibit "G": Excerpts from Planned Parenthood Records
- Exhibit "H": Excerpts from Montefiore Medical Center
Records

As set forth in detail in the Memorandum of Law, judgment notwithstanding the verdict should be entered in favor of Dr. Edwards on the ground that plaintiff failed, as a matter of law, to establish proximate causation. Plaintiff's allegations with respect to Dr. Edwards, who specializes in internal medicine, focus on three separate visits in 2000: February 7th, February 26th and July 6th. Plaintiff claims that on each of these occasions, she complained of numbness and weakness in her legs – symptoms which allegedly should have prompted a referral to a neurologist or investigation by means of an MRI or CAT scan. Plaintiff claims that if such a referral had been made, or such testing performed, it would have led to the diagnosis of an intramedullary astrocytoma, a benign tumor in her thoracic spine; that surgery would have been performed to "debulk" or remove the astrocytoma;

and that this would have prevented the neurological injury and loss of function in her legs, which she experienced following surgery that was performed in August, 2001.

The evidence is insufficient to establish proximate causation because plaintiff's own experts conceded that the complication which occurred during the August, 2001 surgery – a loss of function in the spinal cord signaled by abnormal “somato-sensory evoked potential” responses (“SSEP responses”) during the surgery – could have occurred *even if the surgery had been performed earlier, corresponding to the time when, allegedly, Dr. Edwards should have referred plaintiff to a neurologist or ordered further testing.* Furthermore, neither of plaintiff's experts linked the complication during the surgery to the size of the astrocytoma or the alleged delay in diagnosis, and neither explained what, in his opinion, actually caused the loss of function in plaintiff's legs. Additionally, plaintiff's experts acknowledged that an astrocytoma is a slow-growing tumor, and that because of the infiltrating nature of an astrocytoma, which develops from the cells of the spinal cord, a smaller tumor may actually be more difficult to remove than a larger tumor, since it is harder for the surgeon to distinguish it from the surrounding tissue. Finally, plaintiff's experts conceded that, although the tumor was Stage 1-2 when it was diagnosed, they could not determine its stage prior to

that time. Therefore, the size of the tumor at the point when Dr. Edwards allegedly should have referred plaintiff to a neurologist or ordered further testing cannot be known. Under the circumstances, plaintiff did not establish that, more probably than not, the alleged delay in diagnosis attributable to Dr. Edwards was a substantial factor in causing injury or depriving her of a substantial chance for a better outcome.

In the alternative, even if the Court were to conclude that the proof was legally sufficient to establish a prima facie case, the verdict would nevertheless be against the weight of the evidence. In addition to the deficiencies in the proof of causation outlined above, the verdict finding that Dr. Edwards departed from good and accepted medical practice in his treatment of the plaintiff is against the weight of the evidence. While plaintiff testified that she complained of neurological symptoms such as numbness, weakness and tingling in her legs on each of the occasions when she was treated by Dr. Edwards, Dr. Edwards's contemporaneous records, and the records of other health care providers who treated plaintiff during the same period, are devoid of such complaints.

It is not believable that if plaintiff had indeed made such complaints, her health care providers would have consistently failed to document them, even though they documented other complaints and recommended appropriate treatment.

Furthermore, as outlined in the Memorandum of Law, plaintiff has given inconsistent and contradictory statements as to when her neurological symptoms began, what she recalled about the different visits to Dr. Edwards, and the nature of the back pain that she allegedly experienced during the time that she was treated by Dr. Edwards.

In addition, the jury's finding that the plaintiff was not negligent with regard to her medical care is against the weight of the evidence, and this is yet a further basis upon which a new trial should be granted if the action is not dismissed as a matter of law. Plaintiff was instructed on several occasions by Dr. Gary Guerrino, a subsequent treating physician, to follow up with a neurologist or go to a neurology clinic at Mount Vernon Hospital, but concededly failed to do so for a period of several months – despite allegedly worsening symptoms. Since Dr. Guerrino had instructed plaintiff as to the importance of obtaining a neurology consultation, and she testified that she was experiencing progressively worsening symptoms of leg numbness and leg weakness, her failure to heed his advice cannot fairly be seen as the response of a reasonable person under similar circumstances. Accordingly, the jury's finding that plaintiff was not negligent with respect to her medical care is against the weight of the evidence. The finding that plaintiff was not negligent is also inconsistent with the jury's findings that Dr. Edwards and the

other health care providers (with the exception of Dr. Bauer, a chiropractor) who treated her during the same time period departed from accepted practice and that such departures were substantial factors in causing injury to the plaintiff.

The grounds for seeking a new trial as to damages as a further alternative are that: (1) Dr. Edwards's liability, if any, should be limited to the alleged worsening of plaintiff's ability to ambulate from February, 2000 to the time of the surgery in August, 2001, rather than the sequellae of the surgery; and (2) the damages awarded by the jury are grossly excessive, against the weight of the evidence and deviate materially from what would be reasonable compensation (CPLR § 5501 [c]).

The jury awarded a total of \$47,950,000, as follows:

Past medical expenses:	\$350,000
Past pain and suffering:	\$4,500,000
Past rehabilitation services:	\$40,000
Future pain and suffering:	\$25,000,000
Future medical expenses:	\$16,000,000
Future rehabilitation services:	\$2,000,000
<u>Total amount awarded:</u>	\$47,950,000

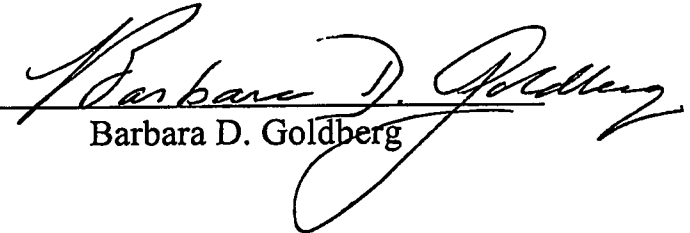
All the awards for future damages were made over a period of 50 years (Exhibit "B").

As set forth in the Memorandum of Law, the awards for past and future pain and suffering far exceed the awards sustained by the Appellate Divisions in cases where plaintiffs have suffered comparable or far worse injuries. Similarly, the awards for future economic loss are based on speculation and are not supported by the evidence. At a minimum, they are excessive in light of the evidence as to plaintiff's actual physical condition and probable future needs. Accordingly, the awards for past and future pain and suffering should be set aside and a new trial ordered unless plaintiff stipulates to substantial reductions. The awards for future economic loss should be stricken in their entirety, or in the alternative, a new trial should be ordered as to these items of damages unless plaintiff stipulates to substantial reductions.

WHEREFORE, for the reasons set forth above and in the accompanying Memorandum of Law, it is respectfully requested that the verdict be set aside and that judgment notwithstanding the verdict be entered in favor of Dr. Edwards. In the alternative, there should be a new trial, or as a further alternative, a new trial as to damages unless plaintiff stipulates to substantial reductions. In addition, it is

respectfully requested that, in the event the parties cannot agree, the Court order a hearing for taking any applicable collateral source reductions pursuant to CPLR § 4545(a) and structuring a judgment in accordance with CPLR Article 50-A, together with such other and further relief as to this Court seems just and proper.

Dated: Great Neck, New York
September 8, 2009


Barbara D. Goldberg