

At an IAS Part 15 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 16th day of June 2009

-----X
MARGARET WALSH, :
: :
Plaintiff, :
: :
-against- :
: :
CAROL BROWN, M.D, ITZHAK AVITAL, M.D., :
HISHALAL ZVULON, M.D., and MEMORIAL :
HOSPITAL FOR CANCER AND ALLIED :
DISEASES-SLOAN KETTERING INSTITUTE, :
: :
Defendants :
-----X

Index No. 2903/2006

AMENDED ORDER

PRESENT: HON. MARSHA L. STEINHARDT

The following papers numbered 1 to 4 read on this motion

	<u>Papers Numbered</u>
Notice of Motion-Order to Show Cause and Affidavits (Affirmations) Annexed _____	1
Answering Affidavit (Affirmation) <u>Cross-Motion</u> _____	2, 3
Reply Affidavit (Affirmation) _____	4
Affidavit (Affirmation) _____	_____
Pleadings-Exhibits _____	_____
Stipulations-Minutes _____	_____
Filed Papers _____	_____

Plaintiff moves this court for an Order entering judgment in favor of plaintiff on the issues of liability and past pain and suffering in accordance with the jury verdict; and for an order pursuant to CPLR §4404(a) as a matter of law in favor of plaintiff as to her future pain and

06/29/03 Decision and order The plff. is directed to enter judgment in the tota (Page 2 of 697)

suffering, or alternatively, granting a new trial as the jury's verdict was against the weight of the evidence with respect to plaintiff's future pain and suffering; and for such other and further relief as to this court may seem just and proper. Defendants, Carol Brown, M.D. and Memorial Hospital for Cancer and Allied Diseases, cross move for an Order pursuant to CPLR §4404(a) setting aside the jury's verdict and dismissing the plaintiff's complaint, or in the alternative, for an Order pursuant to CPLR §5501(c) setting aside the jury's verdict as excessive and for such other and further relief as to this court may seem just and proper.

This is a medical malpractice case wherein plaintiff alleges that injury to her right femoral nerve resulted from the improper use of a surgical retractor during surgery to remove her uterus and lymph nodes. A jury rendered a verdict in favor of the plaintiff awarding her \$750,000 for past pain and suffering.

It is the contention of the plaintiff that she is entitled to judgment on the issues of liability and past pain and suffering in accordance to the jury's verdict. Furthermore, plaintiff seeks either additur or a new trial as to future pain and suffering as supported by the uncontroverted testimony regarding the continuing nature of her right femoral neuropathy. Defendants contend that the verdict must be set aside because plaintiff failed to introduce competent expert proof sufficient to support a prima facie case of medical malpractice. Defendants submit that the jury's award for past pain and suffering is excessive and must be set aside and a new trial ordered unless the plaintiff stipulates to damages not to exceed \$150,000. They also claim that the jury's decision to award no damages for future pain and suffering is well supported by the evidence and should not be disturbed.

06/29/03 Decision and order The plff. is directed to enter judgment in the tota (Page 3 of 697)

Now, upon the foregoing papers and oral argument on May 21, 2009 and due deliberation had thereon, that part of plaintiff's motion to enter judgment is Granted; plaintiff's motion to enter judgment as a matter of law in her favor as to future pain an suffering is Granted with an additur of \$150,000; plaintiff's request for a new trial on future damages is Denied. Defendants' cross motion is Denied in its entirety.

CPLR §4404 (a) confers the right to set aside a jury verdict as a matter of law or to order a new trial when the verdict is contrary to the weight of the evidence. The Courts of this state however, recognize the sanctity of the jury room and are reluctant to set jury verdicts aside. "A jury verdict should not be set aside as against the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" Exarhouleas v Green 317 Madison, LLC, 46 AD3d 854, 855 (2d Dept 2007). It is for the jury to make a determination as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses. Bertelle v New York City Tr. Auth., 19 AD3d 343 (2d Dept 2005); Corcoran v People's Ambulette Serv., 237 AD2d 402, 403 (2d Dept 1997). The discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict. Nicastro v Park, 113 AD2d 129, 133 (2d Dept 1985).

The standard for determining whether a jury verdict is contrary to the weight of the evidence is whether the verdict could not have been reached upon any fair interpretation of the evidence. Lolik v. Big v. Supermarkets, 86 N.Y.2d 744, 746 (1995); Handwerker v. Dominick L. Cervi, Inc., 57 AD3d 615 (2d Dept 2008); Tapia v. Datco, Inc., 32 AD3d 842 (2d Dept 2006).

When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view. Tapia v. Dattco, Inc., supra. Here, a fair interpretation of the evidence supports the jury's conclusion.

The evidence before the jury was legally sufficient to support its findings that the defendant deviated from accepted medical practice and that the deviation was the proximate cause of the plaintiff's injury. Contrary to defendant's assertion, there was a rational basis for the jury's verdict and it was supported by a fair interpretation of the evidence adduced at trial. Plaintiff's expert, Dr. Osborne testified that defendant, Dr. Brown, departed from accepted medical practice in the manner in which the retractor blades were positioned during surgery. Dr. Brown, at trial and in her deposition, testified that Margaret Walsh's femoral neuropathy was caused by either a stretch injury due to positioning or a retractor injury. The jury answered "Yes" to the question of whether defendant departed from good and accepted medical practice in the placement of a retractor during the surgery. Clearly, the jury's findings were based on a fair interpretation of the evidence and not against the weight of the evidence.

Defendant contends that the verdict is excessive and should be set aside. An award may be set aside when it deviates materially from what would be reasonable compensation, however, the amount of damages to be awarded for personal injuries is primarily a question for the jury. Iovine v City of New York, 286 AD2d 372, 373 (2d Dept 2001). Although prior damage awards are not binding upon the courts, the courts look for guidance in cases involving similar injuries to

determine whether a verdict in a given case constitutes reasonable compensation, Senko v Fonda, 53 AD2d 638, 639 (2d Dept 1976).

Both sides submit Lalanne v Nyack Hospital, 45 AD3d 645 (2d Dept 2007) as guidance for this court in considering whether the verdict is excessive. The plaintiff in Lalanne, like the plaintiff herein, claimed that the improper use of a retractor during a hysterectomy caused a compression injury to the femoral nerve. In that case the jury determined that the plaintiff's damages totaled \$750,000. The plaintiff in Lalanne claimed that the malpractice caused neuropathy of her femoral nerve which produces weakness requiring the use of a cane. In the trial of the case before this court, similar testimony was given by the plaintiff, Margaret Walsh. This jury also awarded damages in the amount of \$750,000. The facts and award in Lalanne support, as reasonable, the amount of the jury's award in this case.

The evidence further supports an additur of \$150,000 for future pain and suffering. The jury's failure to award future damages was against the weight of the evidence. Defendant's own examining physician, Dr. Bosco, testified that plaintiff has permanent residual weakness in the right femoral nerve distribution. This finding was a result of a physical examination performed of plaintiff three months before trial. Dr. Bosco also testified that, at the time of trial, any reinnervation of the nerve would already have occurred, thus, plaintiff's condition is not expected to improve. Dr. Bosco agreed that plaintiff's complaint of numbness, tendency for the knee to buckle, use of quad cane to walk, lack of sensation below the knee, transient and shooting pain

006/2903 Decision and order The plif. is directed to enter judgment in the tota (Page 6 of 697)

down her leg are now permanent. Based on this testimony, the court finds that plaintiff's condition is permanent and future damages in the amount of \$150,000 is warranted.

The plaintiff is directed to enter judgment in the total amount of \$900,000 in accordance with the foregoing.

This constitutes the decision, opinion and order of this court.

Enter,



J. S. C