

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part IA-29

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LYDIA WILLIAMS.

Plaintiff,

Index No. 14520/01

-against-

DECISION/ORDER

NEW YORK CITY HEALTH AND
HOSPITALS CORP., et al.,

Defendants.

-----X
HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant medical malpractice action asserting that defendants had departed from good and accepted medical practice in unnecessarily performing a mastectomy and did so without properly informing plaintiff of other options. A trial was held before this court and the jury rendered a verdict in favor of the plaintiff and against defendant Dr. Karen Hiotis only. The jury awarded plaintiff \$3,000,000 for past pain and suffering and \$3,500,000 for future pain and suffering, intended to cover 41.9 years. Defendants New York City Health and Hospitals Corporation ("NYCHH") and Dr. Hiotis now move to set aside the jury's verdict as contrary to the weight of the evidence pursuant to CPLR §4404(a) or, in the alternative, to set aside the jury award as excessive pursuant to CPLR §5501(c). For the reasons set forth below.

defendants' motion is granted in part and denied in part.

Section 4404(a) of the CPLR provides that "upon a motion of any party or on its own initiative, a court may set aside a verdict . . . 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 . . . where the verdict is contrary to the weight of the evidence, [or] in the interest of justice." The standard for setting aside a verdict is very high. The Court of Appeals has held that a verdict may be set aside only when "there is simply no valid line of reasoning and permissible inferences" which could have led to the conclusion reached by the jury. *Cohen v Hallmark Cards, Inc.*, 45 N.Y.2d 493 (1978). The First Department held that a verdict "will not be set aside "unless the preponderance of the evidence is so great that the jury could not have reached its verdict upon any fair interpretation of the evidence." *Pavlou v City of New York*, 21 A.D.3d 74, 76 (1st Dept 2005). Moreover, the evidence must be construed in the light most favorable to the party that prevailed at trial. *See Motichka v Cody*, 279 A.D.2d 310 (1st Dept 2001). Where the case presents conflicting expert testimony, "[t]he weight to be accorded the conflicting testimony of experts is 'a matter peculiarly within the province of the jury.'" *Torricelli v Pisacano*, 9 A.D.3d 291 (1st Dept 2004) (citation omitted); *see also Cholewinski v Wisnicki*, 21 A.D.3d 791 (1st Dept 2005).

Defendants are not entitled to have the jury's verdict as to liability regarding the alleged malpractice set aside because the jury's verdict is sufficiently supported by the evidence. Plaintiff was diagnosed with breast cancer on or about January 19, 2000. On November 22, 2000, she underwent a modified radical mastectomy with axillary dissection, performed by Dr. Hiotis. A subsequent pathological review of the breast tissue and lymph nodes removed showed that they were all negative for cancer. At trial, plaintiff's expert Dr. Pfeiffer testified that in this

case, a mastectomy was not necessary and that a lumpectomy or re-excision were proper alternative treatments. In contrast, defendants' expert Dr. Lerner testified that a mastectomy was the only appropriate treatment. Therefore, this case presented a classic jury issue of conflicting expert testimony. *See Torricelli*, 9 A.D.3d 291; *Cholewinski*, 21 A.D.3d 791. The jury listened to the testimony of both experts and evaluated their credibility and, on that basis, resolved the conflict in favor of plaintiff. It was not unreasonable for the jury to do so. Moreover, defendants' argument that plaintiff failed to establish that the alleged departure from the accepted standard of care was the proximate cause of plaintiff's injury is without merit. The alleged departure was the performance of the mastectomy, which itself is the very injury plaintiff suffered.

Defendants are not entitled to have the verdict set aside on plaintiff's informed consent claim as that claim is also supported by sufficient evidence. In order to make out a claim for informed consent, the plaintiff must prove that the physician failed to disclose to the patient alternative treatments and the reasonably foreseeable risks involved and establish that a reasonably prudent person would not have undergone the treatment but for the lack of informed consent. *See NY Public Health Law §2805-d(1) and (3)*. In the instant case, Dr. Hiotis testified that she told plaintiff that a lumpectomy was not a viable option for her. Dr. Lerner further testified that Dr. Hiotis acted properly and gave plaintiff adequate information. However, Dr. Pfeffer, plaintiff's expert, testified that Dr. Hiotis's discussion with plaintiff constituted a departure from the standard for informed consent and that plaintiff should have been offered other options, such as a lumpectomy or re-excision. Again, this conflicting testimony presented an issue for the jury to decide. Moreover, there was sufficient evidence to establish that a

reasonably prudent person in plaintiff's position would not have undergone the mastectomy if offered other options, thereby establishing proximate cause.

Defendants' argument that the jury's finding that Dr. Hiotis was 100% liable and that plaintiff was not liable at all is against the weight of the evidence is without merit. Although plaintiff delayed treatment for her condition, the jury's finding that the delay in treatment did not contribute to her injury is supported by sufficient evidence. The jury apparently found that, based on the credible evidence, plaintiff's delay did not cause her condition to deteriorate to the point where the mastectomy was required. This finding is consistent with the jury's conclusion that the mastectomy was not necessary at all. Finally, defendants' argument that the verdict should be set aside and a new trial ordered because of allegedly prejudicial rulings at trial and because of plaintiff's closing argument is without basis.

The next issue the court must address is whether the jury's award of \$6,500,000 was excessive. The standard to be applied is whether the award "deviates materially from what would be reasonable compensation." CPLR §5501(c). In order to determine whether the award was excessive, the court must compare the instant case with analogous cases with awards that have been previously upheld. *See Donlon v City of New York*, 284 A.D.2d 13, 18 (1st Dept 2001). Unreviewed jury verdicts are not relevant. *See id.*

The First Department has specifically addressed the issue of what is an appropriate award for an unnecessary mastectomy in *Motichka v Cody*, 279 A.D.2d 310. In *Motichka*, exactly as in the instant case, the jury found defendant doctor liable for failing to obtain plaintiff's informed consent to an unnecessary mastectomy. The jury concluded that the doctor failed to inform plaintiff of other less invasive alternatives such as a lumpectomy. Because the jury found that a

reasonably prudent person in plaintiff's position would not have undergone the mastectomy and would have chosen a less invasive treatment had she been informed of such an option, the jury found for the plaintiff on her informed consent claim. The jury then awarded plaintiff \$2,250,000, which the motion court found excessive and ordered reduced to \$850,000. The appellate court upheld the motion court's reduction of the verdict, holding that \$2,250,000 deviated materially from reasonable compensation under the circumstances. *See* 279 A.D.2d 310. Similarly, in *King v Jordan*, the jury found the defendant doctor failed to inform plaintiff that she was a candidate for a lumpectomy. Instead, he only recommended a mastectomy, which plaintiff underwent. The jury awarded plaintiff \$800,000 (\$500,000 for past pain and suffering and \$300,000 for future pain and suffering), which was upheld by the appellate court. 265 A.D.2d 619 (3d Dept 1999).

Based on the foregoing, the court finds that the award of \$6,500,000 in the instant case is excessive. In *Motichka* and *King*, the court upheld awards of \$850,000 and \$800,000, respectively. However, as those cases were decided eight to ten years ago, the court finds that, in the instant case, an award of \$1,000,000 (\$600,000 for past pain and suffering and \$400,000 for future pain and suffering) is appropriate.

The cases cited by plaintiff are inapposite. The breast cases plaintiff cites are jury verdicts only and, as such, are not proper cases for comparison. *See Donlon*, 284 A.D.2d at 18. In addition, the cases cited by plaintiff regarding the periods of time that plaintiff suffered are also irrelevant as they do not involve unnecessary mastectomies or even breast surgery of any kind.

Accordingly, defendants' motion to set aside the jury's verdict as to liability is denied. Defendants' motion to set aside the jury's damages award is granted to the extent that this matter is set down for a new trial upon the issue of damages only unless, within 30 days of service of a copy of this order with notice of entry, plaintiff stipulates to reduce the award to \$1,000,000 (\$600,000 for past pain and suffering and \$400,000 for future pain and suffering). This constitutes the decision and order of the court.

Dated: 2/4/09

Enter: EK

J.S.C.

Cynthia S. Kern