

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

Index No.: 101545/09
Motion No.: 5 & 6

**DIANE ABBATANTUONO and
FRANK ABBATANTUONO,**

Plaintiffs

against

**SUSAN K. BOOLBOL, M.D. and
BETH ISRAEL MEDICAL CENTER,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of these motions to (1) set aside verdict and (2) trial de novo

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 3
Answering Affidavits	2
Exhibits	Attached to Papers

The defendants have moved (Motion No. 5) for an order setting aside the jury verdict and entering judgment in favor of the defendant as a matter of law pursuant to CPLR § 4404, and for such other and further relief as may seem just and proper in the premises.

The plaintiffs have also moved (Motion No. 6) pursuant to CPLR § 4404(a) for an Order increasing the jury's future pain and suffering award from zero dollars to seven hundred and fifth thousand (\$750,000) dollars because the jury's award is against the weight of the credible evidence, or in the alternative, granting a new trial on the issue of damages only and for such other and further relief as this court may deem just and proper.

The court having heard the arguments of counsel and having read the forgoing listed pleadings and exhibits concerning both motions, finds that there is no basis to set aside the unanimous jury verdict having found that the defendant, Dr. Susan K. Boolbol, M.D. deviated from good and accepted medical practice by not informing the patient (Diane Abbatantuono) that she needed chemotherapy and that deviation was a substantial factor in causing harm to Diane

Abbatantuono. Based upon the testimony of the parties and their expert witnesses and the documentary evidence presented at the trial, the conclusion and verdict of the jury was not against the weight of the credible evidence and was a verdict that a reasonably jury may have reached by a fair interpretation of the evidence. (Lucks v. Lakeside Mfg., Inc., 37 AD3d 666 [2d Dept, 2007]). Consequently, this court finds no reason to set aside the jury findings of liability.

The plaintiffs' motion to increase the jury verdict for failure to make an award for future damages is granted to the extent that a new trial on the issue of future damages will be ordered unless the defendants consent to an additur of five hundred thousand (\$500,000) dollars for future pain and suffering within 30 days of the date this order is entered and served upon opposing counsel.

This court finds that based on the jury's liability verdict, the defendant is liable for her failure to inform the plaintiff of the need for chemotherapy for her cancer, which turned metastatic and spread to her lung, which required a partial removal of her lung, resulting in extreme pain and knowledge that the cancer will return to the plaintiff who is in stage IV. No fair assessment of that evidence would result in the plaintiff not having future pain and suffering as a result of the need for future chemotherapy when the cancer inevitably returns to this stage IV plaintiff.

Consequently, the jury that awarded the plaintiff \$500,000 for past pain and suffering for the five years from 2007 to 2012 should have reasonably awarded her another \$500,000 for future pain and suffering based upon the testimony of the plaintiff as to the ordeal she sustained from the late administration of chemotherapy and the unrefuted testimony that the cancer, which metastasized, will inevitably return.

Accordingly, it is hereby:

ORDERED, that the defendants' motion to set aside the jury verdict is denied; and it is further

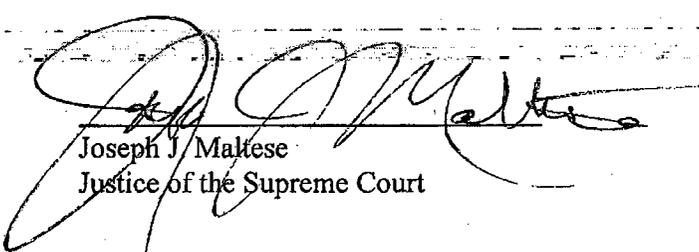
ORDERED, that the plaintiffs' motion to obtain a new trial on the issue of future damages is granted unless the defendants agree in writing to have an additur of \$500,000 for future pain and suffering added to the jury verdict within 30 days from the date this order is entered and served upon opposing counsel; and it is further

ORDERED, that all other applications are denied and that counsel for both parties shall report whether the additur is accepted or rejected in whole or in part, or whether a new trial should be scheduled, or whether appeals will be taken from this Order and subsequent Judgment.

Settle judgment on notice.

ENTER,

DATED: August 16, 2012



Joseph J. Maltese
Justice of the Supreme Court