SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 603688-2019

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JAMIE HAWKINS and MATTHEW HAWKINS,

Plaintiffs,

-against-

NEW YORK DERMATOLOGY & MOHS SURGERY GROUP, PLLC, MDCS LLC, KIMBERLY L. GERIN, PA-C, REGINA YAVEL, M.D. and SAMANTHA ANN WALTHER, PA-C,

Defendants.

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MOTION DATE:	12/08/22
SUBMITTED:	01/25/23
MOTION SEQ. NO.:	5
MOTION:	MD

Upon the reading and filing of the following papers in this matter: (1) Defendants' Notice of Motion dated December 8, 2022 and supporting papers; (2) Plaintiffs' Affirmation in Opposition dated December 23, 2022 and supporting papers; (3) Defendants' Affirmation in Reply dated January 10, 2023 and supporting papers; and (4) Plaintiffs' Sur-Reply Affirmation dated January 17, 2023 and supporting papers (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants application for an Order pursuant to CPLR 4404(a), setting aside the jury's verdict on the issue of damages, or setting aside the verdict as against the weight of the evidence and remanding the matter for a new trial is determined as follows.

Plaintiffs commenced this action seeking money damages for personal injuries allegedly sustained due to the medical malpractice of defendants in failing to properly and timely diagnose melanoma on the scalp of plaintiff Jamie Hawkins. Plaintiff Matthew Hawkins commenced a derivative suit for loss of services. A unified trial of this action was conducted over the course of seven days before the undersigned. Upon verdict the jury awarded Jamie Hawkins $1,000,000 for past pain and suffering and $300,000 for future pain and suffering. The jury also awarded Matthew

Hawkins $100,000 for loss of his wife's services.

Defendants now move for an Order setting aside the jury verdict as excessive and granting a new trial on these components, or in the alternative, setting aside the verdict based on the alleged improper comments made during plaintiffs' counsel's summation. In sum and substance, defendants argue that the trial evidence focused primarily on the future consequences of the late diagnosis of the melanoma occasioned by defendants' negligence and that little proof was offered with respect to those damages related to past pain and suffering or diminished outcome in the five years and five months between diagnosis and trial. Defendants maintain that Jamie Hawkins' claim that she lost the benefit of a "better outcome" had she been timely diagnosed was not supported by her at trial as she failed to provide evidence in the form of testimony as to how her outcome could have been better under the circumstances. Defendants contend that her own medical expert, Dr. Richard Hirschman, testified that, besides a larger incision necessary during surgery and the performance of a lymph node biopsy, Jamie Hawkins' result was as good as could be hoped for "to date." Defendants further aver that Dr. Hirschman did not question the larger incision necessary at surgery or the lymph node biopsy. Rather, defendants claim that the majority of the evidence was directed towards plaintiffs' claim of a diminution of the chance of an ultimate cure, or better outcome, which was quantified at trial as going from 98% to 88%. Regardless, defendants argue, this measure of damages should have been directed towards future pain and suffering, not past pain and suffering as the jury seemingly determined.

In addition to the foregoing, defendants contend that plaintiffs' counsel's comments during summation were improper as he attempted to anchor his clients' monetary injuries by stating that, in context, to "a world where a baseball player makes ten million dollars a year or a movie actor in a single movie may make, I don't know, $20 million" a request for damages in the amount of $2,000,000 would not be unfair, unjust or outrageous. In addition, defendants argue that plaintiffs' counsel's comments that the jury should "tell [defendants] that you vote to uphold patient's safety standards" and "to put the patient first over the business of medicine" were inflammatory and patently improper for summation and, because no curative instruction was provided, the Court should order a new trial.

Finally, defendants contend that there was no evidence offered at trial which could substantiate the award of $100,000 to Matthew Hawkins based on a claim of loss of services. Specifically, defendants maintain that there was no evidence offered of any additional services that Matthew Hawkins was required to provide to his wife, nor any evidence how the negligence negatively affected the relationship between the plaintiffs.

Plaintiffs have submitted opposition to the motion wherein they argue that the motion is procedurally defective inasmuch as the trial transcripts relied upon by defense counsel are not attached as exhibits to the application. Further, plaintiffs contend that the jury award falls comfortably within the bandwidth of awards in similar cases. Finally, plaintiffs maintain that the comments made in summation at issue were simply advanced to provide an analogy as to the value of money in present day circumstances and, if improper, were merely isolated comments and not part

of a larger body of impermissible conduct which so tainted the jury verdict. The motion is determined as follows.

CPLR 4404(a) provides, in pertinent part, that

> After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon 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 of a cause of action or separable issue where the verdict is contrary to the weight of the evidence [or] in the interest of justice.

A jury verdict should not be set aside as contrary to the weight of the evidence pursuant to CPLR 4404(a) unless the jury could not have reached the verdict by any fair interpretation of the evidence (***Kun Sik Sim v State St. Hospitality, LLC,*** 121 AD3d 760, 994 NYS2d 617 [2d Dept 2014]). "The amount of damages awarded for personal injuries is primarily of question of fact for the jury" (***Batchu v 5817 Food Corp.,*** 56 AD3d 402, 403, 866 NYS2d 755 [2d Dept 2008], quoting ***Vaval v NYRAC, Inc.,*** 31 AD3d 438, 818 NYS2d 237 [2006]) and "may be set aside as against the weight of the evidence only if the evidence on that issue so preponderated in favor of the party that the jury could not have reached its determination on any fair interpretation of the evidence" (***Curry v Hudson Val. Hosp. Ctr.***, 104 AD3d 898, 961 NYS2d 563 [2013], quoting ***Carter v New York City Health & Hosps. Corp.***, 47 AD3d 661, 851 NYS2d 588 [2008]). Moreover, in deciding whether to set aside the verdict, the court should accord considerable deference to the jury's findings of fact (*see generally* ***Evers v Carroll***, 17 AD3d 629, 794 NYS2d 398 [2d Dept 2005]).

Initially, with respect to defendants' contentions that plaintiffs' counsel's comments regarding baseball players and movie stars were improper, the Court notes that these objections were properly preserved during the trial and must be addressed herein (*compare* ***Lucian v Schwartz***, 55 AD3d 687, 865 NYS2d 643 [2d Dept 2008]). That being said, the Court finds that these isolated comments, when viewed against the totality of counsel's summation, do not rise to the level requiring the verdict to be set aside. While perhaps not best practice, the Court notes that these comments were not wholly irrelevant or repeated and were not made to incite the passion and sympathy of the jury to the extent that a new trial is warranted (*see* ***Njinja v Alexaides***, 2020 Misc.LEXIS 3258 [Sup Ct. NY County 2020]; *see generally* ***Murray v Robin***, 108 AD2d 903, 485 NYS2d 788 [2d Dept 1985]).

Turning to the issue of damages, defendants argue that similar trials have resulted in far lower verdicts and this Court should exercise its discretion under CPLR 5501[c] by reducing the jury award, or in the alternative granting a new trial on the issue. Defendants cite the following cases in support: ***Flowers v Southampton Hosp.*** (215 AD2d 723, 627 NYS2d 81 [2d Dept 1995]) [$210,000 for failure to timely diagnose and treat breast lesion leading to progression of breast cancer from Stage 1 to Stage 2]; ***Motichka v Cody*** (279 AD2d 310, 720 NYS2d 9 [2d Dept 2001]]) [Court granted new trial of action unless plaintiff stipulated to reduction of award from $2,250,000 for pain

and suffering to $850,000 for failure to obtain plaintiff's informed consent to radical mastectomy]; and ***Simmons v East Nassau Med. Group, P.C.*** (260 AD2d 463, 688 NYS2d 209 [2d Dept 1999]) [Court ordered new trial unless plaintiff stipulated to reduction of award for pain and suffering from $800,000 to $450,000 for failure to timely diagnose breast cancer].[1]

Plaintiffs, for their part, have cited several cases where settlements have resulted in awards comparable to those here. "Because pain and suffering awards are not subject to precise quantification, examination of comparable cases is necessary to determine whether the award materially deviated from reasonable compensation' " (***Acton v Nalley***, 38 AD3d 973, 831 NYS2d 277 [3d Dept 2007], quoting ***Osiecki v Olympic Regional Dev. Auth.***, 256 AD2d 998, 682 NYS2d 312 [3d Dept 1998]). Moreover, factors to be considered in evaluating such awards include the nature, extent and permanency of the injuries, the extent of past, present and future pain and the long-term effects of the injury (see ***Riddle v Memorial Hosp.***, 43 AD2d 750, 349 NYS2d 855 [3d Dept 1973]).

Here, plaintiff Jamie Hawkins testified that she was 37 years old, married and the mother of one eight-year-old child. She is trained as a social worker and is employed in that field, most recently with military veterans. She testified that she was diagnosed with melanoma in May 2017 and commenced treatment immediately at Memorial Sloane Kettering Hospital. Plaintiff had surgery to remove the melanoma from her scalp and closed the incision site using skin grafted from her thigh. Following the surgery plaintiff Jamie Hawkins returned to her home and was seen by home care nurses to do wound care and monitor for infection. The home care nurses also instructed plaintiff Matthew Hawkins on the proper method of wound care.

In addition, following the surgery she was required to visit several doctors associated with Memorial Sloane Kettering Hospital for the purpose of monitoring for the spread of cancer, including ultrasounds and x-rays of her lymph nodes, and further evaluation of her wound care sites. Jamie Hawkins testified that the frequency of these medical appointments lessened when she reached five years, however she is still subjected to biopsies of her lymph nodes which creates fear and anxiety. For example, she testified that on at least three occasions she had to undergo additional testing due to abnormal biopsy reports. One such occasion necessitated a brain MRI, one required multiple excisions to her arm and one demanded excisions on her stomach area. Plaintiff testified that her hair at the surgical site will not grow back and that she uses a hair clip to cover that wound which further aggravates her skin in that area.

On cross-examination Jamie Hawkins testified that she has not had to undergo chemotherapy or radiation as part of her healing process. She further testified that she left her employment with the VA and has secured a job working at Farmingdale College.

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[1]Defendants cited to another case entitled ***Abbatantuono v Boolbol*** from the Appellate Division, Third Department but did not offer a full citation of that case. As such it was not considered as part of this determination.

Matthew Hawkins testified, in pertinent part, that he has been married to Jamie Hawkins since June, 2011. He stated that following the surgery he learned from the home nurses how to clean the surgical wounds and dress them properly. He assisted his wife with bathing as it was dangerous for the wounds to become wet and took over the daily chores of household life. Matthew Hawkins testified as to the office visits at Memorial Sloan Kettering Hospital and how these visits were occasioned by heightened anxiety on the plaintiffs' part.

Defendants called Dr. Philip Friedlander. He testified that the survival rate for a person with melanoma similar to Jamie Hawkins, or Stage 2A, has a ten-year specific survival rate of 88% and a five-year specific survival rate of 94% and that almost all reoccurrences of this type of melanoma occur within the first five years. On cross-examination the doctor did state that patients with Stage 2A melanoma could have reoccurrences ten or twenty years after initial diagnosis and that these patients, over the course of ten years, have a 12% chance of a melanoma related death and that those patients with Stage 1A melanoma had a 98% survival rate.

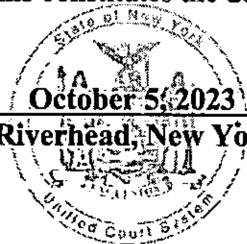
With respect to the instant application defendants, as noted earlier, seek an Order setting aside the jury awards for Jamie Hawkins past pain and suffering in the amount of $1,000,000 and future pain and suffering in the amount of $300,000, as well as the award to Matthew Hawkins in the amount of $100,000 as excessive. In support of that application defendants have submitted, ***inter alia***, three cases involving the untimely diagnoses of breast cancer. Of the three, two called for a reduction in the award for pain and suffering, one from $2,250,000 to $850,000 and the other from $800,000 to $450,000. Plaintiffs, for their part, have submitted cases also involving the mis-diagnosis of breast cancer where settlement resulted in awards comparable to those here and even a settlement which exceeded the total $1,400,000 verdict in this case.

Based upon this Court's review of the case law and of similar cases resulting in settlement (*see e.g.,* ***Muir v Rao***, 2007 WL 1039327 [Sup Ct. Kings Cty 2007]; ***Russano v Schulman***, 2001 WL 1703083 [Sup Ct. NY County 2001]), and recognizing the dearth of cases on point, the Court initially finds that defendants have failed to sufficiently demonstrate that the weight of the evidence so preponderated in their favor that the jury could not have rendered their verdict based on a fair interpretation of the evidence presented at trial. In addition, this Court will not disturb the jury's award to each of the plaintiffs as they had the opportunity to hear and see each of the plaintiffs testify and describe their damages and this Court finds that those awards cannot be deemed excessive given both the pre- and post-operative care and treatment endured by Jamie Hawkins and Matthew Hawkins as detailed above (*see generally* ***Olive v New York City Transit Auth.***, 197 AD3d 567, 152 NYS3d 711 [2d Dept 2021 .

Based on the sum of the foregoing, defendants' application pursuant to CPLR 4404(a) to set aside the jury verdict on damages in this case, or in the alternative, set aside the verdict based on the

alleged improper comments by plaintiffs' counsel during summation is denied in its entirety.

This constitutes the decision and Order of the Court.



Dated: **October 5, 2023**
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_X_ FINAL DISPOSITION _____ NON-FINAL DISPOSITION