SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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CARIDAD CUEVAS and ROBERT CUEVAS, : Index No. 107857/06

Plaintiffs, :

- against - :

ST. LUKE'S ROOSEVELT HOSPITAL CENTER, :

Defendant. :

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CAROL E. HUFF, J.:

Following trial and a jury verdict against it, defendant St. Luke's Roosevelt Hospital Center moves for: 1) judgment notwithstanding the verdict on the ground that the evidence was legally insufficient; 2) a new trial on the ground that the verdict was against the weight of the evidence; 3) a new trial on the ground that two of the Court's evidentiary rulings were prejudicial; 4) a new trial as to damages on the ground that the award differs from what would be reasonable compensation (CPLR 5501); and 5) a hearing to determine the discount rate to be applied to future damages (CPLR 5031[e]).

This medical malpractice action arose from surgery performed on plaintiff Caridad Cuevas to remove a stone in her salivary gland. Cuevas contends that improper intubation during the surgery resulted in temporomandibular joint dysfunction ("TMJ"). The jury found for her and awarded her $250,000 for past pain and suffering and $1,000,000 for future pain and suffering. The jury awarded Cuevas's husband, plaintiff Robert Cuevas, $50,000 for past loss of services and $200,000 for future loss of services.

With respect to the relief sought in connection with the sufficiency and weight of the

evidence, the Court's ability to reach a determination is thwarted by St. Luke's failure to provide a transcript of the proceedings. See McCarthy v 390 Tower Assocs., 9 Misc3d 219 (Sup Ct NY Cty 2005) (failure to submit relevant transcript sections rendered motion to set aside verdict defective). In considering whether to set aside the jury's verdict, the test to be applied is whether "by no rational process could the trier of the facts base a finding in favor of the [plaintiff] upon the evidence . . . presented." Dinardo v City of New York, 57 AD3d 373 (1st Dept 2008), quoting Lipsius v White, 91 AD2d 271, 276-277 (2d Dept 1983). Based upon the parties' selective quotes from the transcript, it cannot be said that no rational jury can have found in favor of the plaintiffs.

The lack of a transcript also hinders St. Luke's arguments concerning the evidentiary rulings. In any event, there was no need to give a missing witness charge with respect to Cuevas's employer, a physician whose office notes were entered into evidence. His testimony would have been cumulative (see Medina v Chownwai, 211 AD2d 526 [1st Dept 1995]), entries concerning causation were redacted, and St. Luke's failed to subpoena the employer. In addition, plaintiffs' counsel's suggestion during trial that a text contained material adverse to the testifying expert's opinion, if error at all, was harmless.

St. Luke's further contends that the award "deviates materially from what would be reasonable compensation." CPLR 5501(c).

Cuevas presented evidence that, as a result of her injury, she cannot open her mouth more than one-half inch, and thus cannot yawn, laugh, shout, eat comfortably, or engage in forms of intimacy with her husband. She has a life expectancy of fifty-five more years.

With respect to past pain and suffering for Caridad Cuevas, in the case Mancusi v Miller

Brewing Co., 251 AD2d 265 (1st Dept 1998), a jury award $200,000 for past pain and suffering for TMJ was upheld. That is not materially different from the award in this case.

With respect to future pain and suffering, there are few cases that allow direct comparison. Most involve injuries in addition to TMJ and perhaps less severe than Cuevas's TMJ. However, in the relevant cases the award was materially lower than that given by the jury here. For example, in Beauvais v City of New York, 21 Misc3d 127 (App Term 1st Dept 2008), the 62-year-old plaintiff "suffered multiple cervical and lumber disc bulges which progressed to herniated discs, and . . .TMJ." Finding the aggregated $2 million award excessive, the court directed a new trial on damages unless the parties stipulated to an award of $200,000 for past damages and $300,000 for future damages. In Osiecki v Olympic Regional Dev. Auth., 256 AD2d 998, 999 (3d Dept 1998), one of the plaintiffs with a life expectancy of 38.7 more years suffered injuries including TMJ. The court stated that his "prognosis was poor and that he could expect to continue experiencing pain with intermittent acute exacerbations and remissions in the future [and] would be limited in his employment opportunities, recreational activities and ability to play musical instruments." His award of $306,000 for future pain and suffering was reduced to $145,000.

Balancing these cases with the instant facts, the award in this case for future pain and suffering should be reduced, to $500,000. For the same reasons, the award on the derivative cause of action should be reduced as well, to $100,000.

St. Luke's contentions that the award should be further reduced in consideration of plaintiff's pre-existing illnesses and her failure to mitigate are without merit.

Finally, St. Luke's motion for a hearing to determine the discount rate applicable to the

award for future damages is denied. CPLR 5031(e) provides specific formulations for determining that rate.

Accordingly, it is

ORDERED that defendant's motion for a new trial as to damages on the ground that the award differs from what would be reasonable compensation is granted, unless the parties stipulate to a reduction of the award for future pain and suffering to $500,000 and for future loss of services to $100,000, and to entry of an amended judgment accordingly; and it is further

ORDERED that the motion is denied in all other respects.

Dated: OCT 04 2010

CAROL E. HUFF
J.S.C.

FILED
OCT 12 2010
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