Scan

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

CINDY SINGER MARRA,

Plaintiff,

-against-

GEETA NARULA, M.D. and NASSAU OB/GYN ASSOCIATES LLP,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 9799-07

MOTION SUBMISSION
DATE: 3-21-12

MOTION SEQUENCE
NO. 003

The following papers read on this motion:

Amended Notice of Motion and Affirmation in Support	X
Affirmation in Opposition	X
Reply Affirmation	X

Defendants move for post-trial relief pursuant to CPLR 4401, 4404, and 5501. Plaintiff opposes all such relief.

This medical malpractice action proceeded to trial before the Court and a jury from October 26, 2011 through November 4, 2011. The jury found that defendant Dr. GEETA NARULA was negligent in delaying treatment of plaintiff CINDY SINGER MARRA's ruptured left ectopic pregnancy (resulting in removal of her left fallopian tube during surgery on May 26, 2006) and in improperly removing plaintiff's right fallopian tube during the same surgery on May 26, 2006. The jury awarded damages to plaintiff of $1 million for past pain and suffering and $3.6 million for future pain and suffering for a period of 36 years.

On May 2, 2006, plaintiff MARRA saw her ob/gyn, defendant NARULA, advising her that she had missed a period. NARULA did a physical exam on that date and suspected MARRA might be pregnant.

Plaintiff returned on May 12, 2006 with complaints of spotting, on and off, for two weeks and without cramps. A vaginal sonogram was done showing an endometrial reaction with no fetal sac. NARULA's diagnosis was possible early pregnancy or possible missed abortion.

On May 17, 2006, plaintiff returned and a blood test (Beta HCG) was done. NARULA noted the bleeding had decreased and there were no cramps.

On May 19, 2006, plaintiff returned and NARULA noted there was no bleeding or pain. NARULA noted that she could not "rule out" an ectopic pregnancy.

On the evening of May 21, 2006, plaintiff MARRA called NARULA and reported abdominal pains. NARULA told her to go to Winthrop University Hospital. Upon examination, it was determined she had a left side ectopic pregnancy and medication (methotrexate) was given to induce termination of the ectopic pregnancy.

MARRA saw NARULA, as instructed, on May 24, 2006. Blood was drawn for testing and MARRA was to return on May 26, 2006.

However, on May 25, 2006, plaintiff MARRA went to Winthrop where it was determined that the ectopic pregnancy had ruptured. NARULA performed the surgery early morning on May 26, 2006, removing the left fallopian tube. During the surgery, NARULA also removed the right fallopian tube because, according to NARULA, it was bleeding and dilated.

Plaintiff's expert, Dr. Richard Luciani examined the photographs (Plaintiff's Exhibits 12 and 13) of Plaintiff's fallopian tubes that were removed by Defendant NARULA. The left fallopian tube was markedly swollen and distorted where the actual ectopic pregnancy was. The right fallopian tube, was "totally different" and "looks very normal". The slight swelling in the right tube was a normal consequence of pregnancy and there was no ectopic pregnancy in the right tube.

Dr. Luciani testified that there are two methods of treating an ectopic pregnancy exist. The first is to treat it with chemotherapy in the form of the drug methotrexate. This method is used when the ectopic pregnancy is "very small" and the patient is clincially stable, with no internal bleeding, and hormone levels at a reasonable level. The methotrexate kills pregnancy cells (as it kills cancer cells) and eventually dissolves the pregnancy.

The other option is surgery, which is usually done laparoscopically (minimally invasive). A small incision is made in the tube and the ectopic pregnancy is pulled out of the tube and out through the laparoscope. The bleeding is cauterized and the tube is left to heal. However, if the tube ruptures and there is "a lot of bleeding" a surgeon cannot use laparoscopic surgery and opt instead to open the patient up.

Dr. Luciani testified as to the general guidelines for using methotrexate treatment, including being certain the pregnancy is outside the uterus and not using methotrexate if the ectopic pregnancy is greater than 3 ½ centimeters. He also stated methotrexate is not used if the mother is not clinically stable or if the doctor suspects a rupture. Additionally, blood tests for beta HCG levels must be done to confirm a pregnancy.

A beta HCG level between 5,000 and 15,000 was a "gray zone", according to plaintiff's expert, where the doctor must evaluate the use of methotrexate. Dr. Luciani testified that a beta HCG level over 5,000 has a higher risk of methotrexate not working and a tube rupturing during the treatment. According to the witness, plaintiff's level on May 19, 2006 was 6,055 and was certainly higher on May 22nd when methotrexate was administered.

Dr. Luciani's opinion was the institution of medical therapy on May 22 was not timely and was both a departure from good and accepted medical practice and a substantial factor in Plaintiff losing both fallopian tubes.

With respect to the removal of Plaintiff's right fallopian tube, Dr. Luciani's opinion was that "It was a total departure from any accepted practice to remove the right fallopian tube". Moreover, even if there was a suspicion of an ectopic in the right, un-ruptured tube, the proper treatment would have been to make a small incision to remove the ectopic. In either case, "the patient leaves the OR with her right fallopian tube intact".

Defendant's expert, Dr. Joel Cooper testified that prior to May 19, 2006 there were no signs or symptoms of an ectopic pregnancy and no reason to perform a repeat sonogram at that time. He also testified that on May 19th it was appropriate to repeat the beta HCG and not do a sonogram although an ectopic could not be ruled out on that date.

It was Dr. Cooper's opinion that plaintiff's sign and symptoms changed on or about May 21st and that her care and treatment at the Hospital, including the administration of the methotrexate was appropriate. It was Dr. Cooper's opinion that her

condition changed after the May 24th office visit when her condition worsened, indicating a rupture of the fallopian tube. He testified that the removal of the ruptured left tube was appropriate and that removal of the right fallopian tube was appropriate since it was dilated, bleeding, and had clotting.

Dr. Cooper conceded that timing is essential in the diagnosis and treatment of an ectopic pregnancy since a delayed diagnosis could have adverse consequences if there is a rupture. Dr. Cooper conceded that in other cases in which he has testified, he stated that a mere two-day delay in diagnosing an ectopic pregnancy had such consequences. And, Dr. Cooper admitted that the loss of both fallopian tubes is much more serious.

Additionally, Dr. Cooper testified as following concerning the pain experienced during a rupturing ectopic pregnancy: "She started complaining of more pain and she started to have signs and symptoms of the continued growth and rupture of an ectopic....the pregnancy continues to grow somewhat through the tube and once it reaches the surface of the tube that is considered a rupture and then she starts to bleed internally."

"Ultimately it keeps growing and growing and growing....this is like a cancer, by the way, it just keeps growing. It secretes a certain substance and that substance will melt away all the tissue around it."

"...[I]t just keeps growing. Once it reaches the surface it will start to bleed...this is where the patient starts to experience pain. It comes through and ultimately keeps bleeding out and starts to bleed and that is called a ruptured ectopic."

Plaintiff Marra offered testimony that upon being told that both of her fallopian tubes had been removed: "I was devastated. I was crying. You feel like you're in an outer (sic) body experience. I just couldn't believe that this happened, it was me and I couldn't have children."

She continued by stating: "Well, by having both fallopian tubes taken, if I can't have anymore children naturally, I feel like pieces of my - - of my - - well, they are my female anatomy is gone. I don't feel like a total woman....It's very hard. It's very devastating. It's been very depressing."

Plaintiff's sexual activity has been affected since, "I don't feel like a whole woman. I don't feel like I would be desirable in the sense that I'm - - I just not - - I don't have everything here. All my parts are gone. Just - - it's very hard. It's very depressing. It's just - - I mean in the beginning it was just really tough. Really tough. I just - - it's just very hard."

Plaintiff further described how the loss of her fallopian tubes has affected her: "I don't feel complete." Because she was able to have children "I was lucky. I was blessed...I don't feel blessed anymore in that sense."

"I'm not the same. I don't feel 100 percent whole. It's very depressing. It's just the thought of my whole life got changed and I just couldn't do what I wanted, you know with my life."

Defendants raise three (3) issues on this motion:

1. Did plaintiff fail to prove a prima facie case in the absence of expert testimony as to her injuries?

2. Was the award for damages against the weight of the evidence or improper as a matter of law?

3. Were the damages awarded excessive?

Defendants' first claim for dismissal due to failure to establish a prima facie case on her direct case is based on the argument that plaintiff's testimony is the only proof of her injuries, both physical and emotional. Defendant claims her testimony solely concerned emotional injuries which were unsubstantiated by medical evidence. Lyons v. McCauley, 252 AD2d 516 (2nd Dept. 1998); Iannotti v. City of Amsterdam, 225 AD2d 990 (3rd Dept. 1996). See also, Johnson v. State, 37 NY2d 378, 383-384 (1975); Zak v. Brookhaven Mem. Hosp., 54 AD3d 852 (2nd Dept. 2008).

Plaintiff argues that the testimony, which the jury apparently credited, set forth the following injuries as a result of defendant's malpractice:

- Pain and suffering associated with bursting ectopic pregnancy.
- Unnecessary laparotomy occasioned by Defendant's malpractice.
- Removal of left fallopian tube that could have been saved but for Defendant's malpractice.
- Removal of healthy right fallopian tube as a direct result of Defendant's additional malpractice.
- Past and future emotion distress attributable to Defendant's acts of malpractice.

Further, plaintiff contends that her emotional injuries were intertwined with her physical injuries set forth above. Plaintiff argues that pursuant to Ferreira v. Wyckoff Heights Medical Center, 81 AD3d 587(2nd Dept. 2011) no physical injury need be suffered when the malpractice itself produces a psychological trauma.

> In determining a motion to dismiss an action for failure to make out a prima facie case, the plaintiff's evidence must be accepted as true and given the benefit of every reasonable inference which can reasonably be drawn from that

> evidence. The motion should only be granted if there is no rational process by which a fact-finder could find for the plaintiff as against the moving defendant *(see, Bodeanu v Bertorelli,* 170 AD2d 424; *Secof v Greens Condominium,* 158 AD2d 591, 593).

Chan v Chan, 193 AD2d 575, 576 (2d Dept 1993); see also, Farrukh v. Board of Education of City of New York, 227 AD2d 440, 441 (2nd Dept. 1996); Kahn v. Gates Construction Corp., 103 AD2d 438 (2nd Dept. 1984); McArdle v. M&M Farms of New City, Inc., 90 AD2d 538 (2nd Dept. 1982).

Based upon a review of the evidence adduced at trial by plaintiff, which must be accepted as true upon the first branch of defendant's motion, the jury could have found that Defendant Narula was both negligent and committed acts of malpractice that were a proximate cause and substantial factor in causing Plaintiff's physical and emotional injuries. There was sufficient evidence for the jury to have found plaintiff suffered both physical and emotional injuries as a result of defendant's malpractice, including the testimony of both experts. Accordingly, that portion of the motion is denied.

Defendants' second argument is that the emotional distress claimed by plaintiff- that she cannot have any more children by natural means- is not compensable under New York law. "The effect in depriving the mother of offspring cannot be taken into account as an element of damage at all". Endresz v. Freidberg, 24 NY2d 478, 488 (1969); see also, Hahn v. Teafi, 115 AD2d 946 (4th Dept. 1985); Greco v. Saldanha, 258 AD2d 950 (4th Dept. 1999). Defendants argue, therefore, that the verdict be set aside as against the weight of the evidence and the action dismissed.

Plaintiff opposes this claim on both the law and the facts. As to the latter, plaintiff argues that not only does the evidence support the amount of the award, but that the emotional distress claimed is not limited to the loss of having children.

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence. Nicastro v. Park, 113 AD2d 129, 134 (2nd Dept. 1985); Abrahams v. King Street Nursing Home, 245 AD2d 251 (2nd Dept. 1997); Otero v. Hyatt, 235 AD2d 407 (2nd Dept. 1997).

It appears to the Court, upon its review of the testimony as to damages, that plaintiff's emotional reactions were linked to or interwoven with her physical injuries, and that the jury found these both to be real and substantial. Moreover, as in Ferreira v. Wyckoff Heights Medical Center, 81 AD3d 587 (2nd Dept. 2011), no physical injury need be suffered where the malpractice itself produces a psychological or emotional trauma.

While the defense correctly cites Greco v. Saldanha, 258 AD2d 950 (4th Dept. 1999) for the proposition that the "loss of offspring" is not compensable, that Court also stated as follows:

> "Recovery may be had, however, for physical and mental injuries, including emotional distress, suffered by plaintiff as a consequence of defendants' breach of duty" (Villa v. Marcian, supra, at 829; see Tebbutt v. Virostek, 65 NY2d 931; Hahn v. Taefi, supra, at 947). **"Consequently, if plaintiff's alleged sterile condition resulted from injuries that she suffered as a consequence of defendant's malpractice, she may recover not only for the physical injuries inflicted but also for the mental and emotional distress attending those injuries" (Villa v. Marciano, supra, at 829; see Hahn v. Taefi, supra, at 947).**

250 AD2d at 950.(emphasis added).

The jury's resolution of conflicting expert testimony, as well as the jury's acceptance of plaintiff's testimony as to her injuries, is entitled to great weight upon review by this Court. There is no basis for this Court to disturb the jury's determination. Ferreira v Wyckoff Hgts. Med. Ctr., 81 AD3d 587, 588-89 (2d Dept 2011).

> Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors (cits. omitted). It is for the jury to make determinations as to the credibility of the witnesses, and it is accorded great deference as it had the opportunity to see and hear the witnesses (cit. omitted). Under the circumstances, the jury's determination was supported by a fair interpretation of the evidence....

Davison v NYCTA, 63 AD3d 871 (2d Dept. 2009). Accordingly, the second portion of defendant's motion is denied.

Defendants' final argument is that the damages awarded are excessive by any reasonable measure. CPLR 5501(c); Iovine v. City of New York, 286 AD2d 372 (2nd Dept. 2001). This statute, while directed to appellate courts, also applies to a trial court. See, Weigl v. Quincy Specialties Co., 190 Misc.2d 1 (NY Sup Ct. 2001).

Defendants contend that the award is excessive, even in the light most favorable to plaintiff, since her damages are "essentially emotional". Defendants contend that plaintiff's damages unreasonably exceed the awards in similar cases such as Norton v. Nguyen, 40 AD3d 927 (3rd Dept. 2008), Timal v. Kiamzon, 228 AD2d 577 (2nd Dept. 1996); McMurray v. Staten Is. Univ. Hosp., 7 AD3d 764 (2nd Dept. 2004), and Stewart v. NYC Health & Hospitals Corp., 207 AD2d 703 (1st Dept. 1994).

Pursuant to CPLR 5501(c),

> ...the amount of damages to be awarded to the plaintiffs for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what is reasonable compensation (*see,* CPLR 5501[c]).

Sescila v. Garine, 225 AD2d 684, 639 NYS2d 830. Thus, the question of damages is initially for the jury to determine. "There is no magic or precise mathematical formula for computing damages in a case of this kind" (Rinaldi v. State, 49 AD2d 361 [3rd Dept. 1975]) and "no slide rule is available to accurately gauge" the "extent of pain and losses consequent upon personal injury" (Cole v. Long Island Lighting Co., 24 Misc.2d 221, 229 [Sup. Ct. 1959]).

In evaluating the amount of pain and suffering awards, courts often struggle because such awards are not subject to precise quantification and there are often cases cited with a wide range of awards made for arguably similar injuries. Moreover, in most cases involving significant pain and suffering, the injured party is often the only witness with relevant, albeit subjective, testimony and, thus, her testimony must be relied upon by courts in evaluating such awards. Both Plaintiff and Defendant have cited numerous cases in support of their respective positions, which the Court has reviewed.

Plaintiff's testimony sets forth both the physical and emotional (psychological) components for the award, but without corroborating expert testimony. Plaintiff relies on the Second Department's holding in Ferreira v. Wyckoff Heights Med. Ctr., 81 AD3d 587 (2nd Dept. 2011), affirming an award of $1,000,000 to a mother for past pain and suffering who witnessed the birth of her stillborn infant and did not claim any physical

injury. However, as defendants note, expert testimony on damages was presented in Ferreira.

The Court may evaluate a damages award and set it aside if it deviates from what constitutes reasonable compensation in light of the circumstances. CPLR §§4404 and 5501(c). A jury verdict may be set aside and a new trial ordered if the verdict is contrary to the evidence or if for some other reason it appears that substantial justice has not been achieved. Nicastro v. Park, 113 AD2d 129, 131 (2nd Dept. 1985); CPLR 4404(a). However, the Court must exercise considerable caution in using its discretion to set aside a jury verdict and order a new trial. Nicastro v. Park at 133.

When analyzing the adequacy of injuries and their corresponding awards, the Court must assess the quantity and quality of the evidence presented not only as to the type of injury and level of pain, but also the period of time for which that pain is to be calculated as well the extent and duration of a plaintiff's past pain and suffering. See, Garcia v. Queens Surface Corp., 271 AD2d 277 (1st Dept. 2000); Linzer v. Town of Oyster Bay, 2009 NY Slip Op 30355 (Sup. Ct. Nassau Co. 2009). Based on such a review, the final portion of defendant's motion is granted as set forth below.

Based on the above, the Court determines defendants' motion as follows:

1. The request for judgment for failure to state a prima facie case is denied.
2. The request to set aside the verdict as against the weight of the evidence is denied.
3. The request to set aside the verdict as excessive is granted only to the extent that a new trial on the issue of damages is granted unless within 30 days after service upon the plaintiff of a copy of this decision and order,

the plaintiff shall serve and file in the office of the Clerk of this Court a written stipulation consenting to decrease the verdict as to damages for past pain and suffering to the amount of $350,000 and as to damages for future pain and suffering to the amount of $700,000; in the event the plaintiff so stipulates, then the motion for a new trial is denied.

All other requests for relief are denied.

This constitutes the Decision and Order of the Court.

Dated: April 24, 2012

STEVEN M. JAEGER, A.J.S.C.

NASSAU INDEX #

ENTERED

APR 30 2012

COUNTY CLERK OF
NASSAU COUNTY
COUNTY CLERK'S OFFICE