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SHORT FORM ORDER

INDEX NO. 17904/2003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
Supreme Court Justice

SHANNON REILLY, An Infant by her Parents and Natural Guardians, DANI ANN REILLY and FRANK REILLY,

Plaintiffs,

-against-

ST. CHARLES HOSPITAL AND REHABILITATION CENTER,

Defendant.

ORIG. RETURN DATE: 5/15/2013
FINAL SUBMISSION DATE: 8/28/2013
MTN. SEQ. #005
MOTION: MOTNDECD

PLAINTIFFS' ATTORNEY:
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The Defendant, St. Charles Hospital and Rehabilitation Center (Hospital), petitions the Court post trial for an order pursuant to Civil Practice Law and Rules § 4404 setting aside the Jury's verdict and dismissing the Complaint; setting aside the Jury's verdict and directing a new trial on all liability and damages issues; setting aside the Jury's verdict alleging Plaintiff's counsel engaged in inappropriate, inflammatory conduct throughout the trial, acted as an unsworn witness, improperly attacked the integrity of Defendant's witnesses; and setting aside the Jury's verdict on the basis of allowing an undisclosed witness to offer expert testimony. In the alternative, the hospital seeks an order pursuant to CPLR § 4404(c) reducing the verdict for pain and suffering and pursuant to CPLR § 4546 holding a hearing prior to the entry of judgment to reduce the damages awarded for loss of earnings and/or impairment of loss of earnings ability based upon the federal, state and local personal income taxes which Plaintiff will be obligated by law to pay; and pursuant to CPLR Article 50-A, conducting a hearing prior to the entry of judgment to structure future damages, and pursuant to CPLR § 4545, conducting a hearing prior to entry of judgment to reduce the damages

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awarded for the cost of medical care, custodial care, rehabilitation services/therapies, loss of earnings and other economic loss and reducing the amount of the Jury's award by the cost or expenses that were or will, with reasonable certainty, be replaced or indemnified from collateral sources; and an order allowing a hearing addressed to tax rates and discount rates. Lastly, the hospital seeks a ruling by this Court that the Medical Indemnity Fund applies to this case and will cover Plaintiff's future medical expenses and Plaintiff's attorney's fees on future medical expenses.

The Plaintiff opposes the application in most respects. She concurs in Defendant's petition, to a degree, as to reduction of certain portions of the award and to her status as an eligible participant in the Medical Indemnity Fund.

The matter before the Court has traveled long and hard through three trials and one appeal. The action is brought on behalf of the infant Plaintiff, Shannon Reilly, to recover damages for medical malpractice. The first trial ended in a defense verdict in favor of the Defendants. Plaintiff's motions pursuant to CPLR § 4404(a) to set aside the verdict as contrary to the weight of the credible evidence and for a new trial were denied by the Trial Court (Justice Whelan). The matter was appealed.

Thereafter, the Appellate Division at 81 A.D.3d 918 ordered that the judgment be modified on the law and the facts, by deleting the provision thereof dismissing the Complaint insofar as asserted against the Defendant, St. Charles Hospital and Rehabilitation Center.

The Appellate Division found:

> that the trial court correctly denied that branch of the plaintiff's motion pursuant to CPLR § 4404(a) which was to set aside the jury's verdict in favor of the Defendants Jerry G. Ninia and Dr. Jerry Ninia OB-GYN, PLLC, doing business as Island Obstetrics and Gynecology Center.

In substance the Court found that the jury could have reached its verdict in favor of Dr. Ninia and his group based on a fair interpretation of the evidence. The Appellate Division went on to rule that the trial court erred in denying that branch of the plaintiff's motion pursuant to CPLR § 4404 (a) which was to set aside the jury's verdict in favor of the defendant St. Charles Hospital and Rehabilitation Center as the verdict in favor of the hospital was contrary to the weight of the evidence.

In so doing, it appears to this Court that the Appellate Division provided the Plaintiff

and Defendant a blueprint for the retrial. The same was found in the following language of the Appellate Division:

> In the case at bar, the plaintiffs' expert testified, among other things, that the labor and delivery nurse employed by the hospital departed from good and accepted obstetrical practice in seven different ways: she failed to (1) notify Ninia that an intrauterine pressure catheter (hereinafter IUPC) was not working from approximately 8:00 p.m. until 8:27 p.m., on November 1, 2002, the date Shannon Reilly was born, (2) notify Ninia of decelerations in the fetal heart rate which were "non reassuring," which occurred between 8:04 p.m. and approximately 8:45 p.m., (3) reapply an external monitor on Dani Ann Reilly's abdomen when the IUPC stopped working, (4) reposition Dani Ann Reilly onto her left side at any time after approximately 8:05 p.m., (5) timely provide oxygen to Dani Ann Reilly commencing at approximately 8:05 p.m., (6) provide Dani Ann Reilly with extra fluids commencing at approximately 8:05 p.m., and (7) timely discontinue the drug Pitocin, which is used to induce and enhance labor, commencing shortly after 8:00 p.m. It is undisputed that Dani Ann Reilly sustained a uterine rupture and that Shannon Reilly was born with cerebral palsy.

The Appellate Division further noted

> Ninia agreed that the labor and delivery nurse departed from accepted practice by failing to notice [herself] that the IUPC had stopped working and failing to notify him the IUPC had stopped working. He further testified that the nurse should have notified him of a deceleration of the fetal heart rate occurring at approximately 8:20 p.m. that lasted for approximately three minutes, even if the nurse believed that the tracings printed from the fetal heart rate monitor were ambiguous. Thus, Ninia, who at the time of the trial was the hospital's director of obstetrics and gynecology, conceded that the nurse had departed from good and accepted practice and, thus, credibly testified against the interest of his own hospital (*cf. Cicione v. Meyer*, 33 AD3d 646 [2006]).

Be that as it may, the Appellate Division articulated seven topics concerning the nurse's alleged departures which were, in fact, revisited through the subsequent retrials.

In December of 2012 at the retrial, the jury was unable to reach a verdict and a mistrial was granted upon the joint application of the parties. Thereafter, the matter was retried during March and April of 2013. Summarizing the trial history, the first trial occurred in May and June of 2009, the second trial occurred during November and December of 2012 and as noted immediately hereinabove, the third trial was held in March and April of 2013.

As the Appellate Division articulated seven (7) potential allegations of departure from accepted standards of care, the jury in the instant trial was provided a verdict sheet that adopted the allegations remaining as a result of the Appellate Division decision subsequent to the first trial. The Court presiding during the third trial allowed the jury to consider the areas of departure as against the hospital and only the hospital as articulated by the Appellate Division. This Court finding that the jury upon submission of all testimony and evidence could, upon a reasonable interpretation of all the evidence, find that there were departures. The jury was instructed on numerous occasions that Dr. Ninia was not a party to the case and could not be found liable. The jury was aware of the two previous trials and instructed on several occasions that they could not find and/or infer fault upon Dr. Ninia.

The approach taken by the Court, as concerns the questions of departure, was that upon submission of material, relevant and competent proof it allowed the jury to determine those departure issues as articulated by the Appellate Division and further consider the "substantial factor" issues, if necessary.

The Court is mindful that a trial court's discretionary power to set aside a jury verdict should be undertaken with considerable caution and only where the jury could not have reached a verdict on any fair interpretation of the evidence. *Higbie Construction Ltd. v. IPI Industries*, 159 A.D.2d 558, 559 [1990]; *Lolik v. Big V Super Markets*, 86 N.Y.2d 744, 745-746 [1995]). As noted by the Court of Appeals in *Cohen v. Hallmark Cards*, (45 N.Y.2d 493, 498 [1978]) a court must "first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*also see Vecchione v. Amica Mutual Insurance Co.*, 96 N.Y.2d 708 [2001]). In other words, the Court must determine whether or not there was ample evidence that, if believed, provided a valid line of reasoning that on various occasions, the acts and/or omissions of Defendant's staff were departures from good and accepted standards of medical practice, and that these acts or omissions were substantial factors in causing the condition of Shannon Reilly. (*See Lovett v. Interfaith Medical Center*, 13 Misc.3d 1235(A), 831 N.Y.S.2d 354).

The Court rejects the Defendant's contention, inferring that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by this jury at this trial. The Court will not disturb the findings of fact by the finders of fact.

Defendant's arguments as to the lack of proof of causation based upon the findings of the jury from the first trial are rejected. The Defendant seeks to persuade the Court that the verdict cannot stand as a dismissal in the present trial is mandated since the jury findings in this, the third trial, are inconsistent with the jury's findings in favor of Dr. Ninia in the first trial, which were reduced to a judgment in favor of Dr. Ninia and affirmed on appeal. Counsel notes, "as presented to the instant jury, the Plaintiff's case rests upon a presumption that the fetal tracing were non reassuring and a caesarean section should have been performed sooner. However, the jury's necessary findings in the first trial, in favor of Dr. Ninia, and affirmed on appeal, rejected those presumptions, thereby requiring dismissal of the instant case." Defendant's argument is made in good faith. However, if adopted, it leaves open a question as to what the Appellate Division or why the Appellate Division remanded the matter for re-trial. It goes without saying that the Appellate Division affirmed the verdict reached at the first trial finding no liability attaching to Dr. Ninia. Query: If the Appellate Division's affirmance concerning Dr. Ninia is wholly dispositive, why send the case back for a re-trial? This Court interpreted the Appellate Division decision to mean that plaintiff could pursue the seven articulated areas of departure as against the hospital, and if a jury found for the plaintiff concerning each departure it could next consider the causation questions. At various times during the trial the defendant articulated, by way of application to dismiss, that once Dr. Ninia testifies that in spite of the Hospital's departures he'd have acted and reacted as he did, causation was in impossibility. The Court ruled that while preserving Dr. Ninia's stature as a non-responsible party, the jury could reject that assertion based upon other expert testimony. Therefore, those aspects of the Defendant's petition seeking dismissal of the Complaint on doctrines of issue preclusion and/or failure of proof of causation are ***DENIED***.

Additionally, Defendant contends:

1. that the jury findings from the first trial should have severely limited Plaintiff's malpractice theory;
2. that the introduction of claims surrounding timing of the caesarean section and purported delay should have been barred by issue preclusion and severely prejudiced the Defendant;
3. that the Court improperly allowed Plaintiff to make an issue of the standard of care of Dr. Ninia.

As to those claims, the Court finds the same unavailing. The jury's finding in the first trial did limit the Plaintiff's malpractice theory in the sense that only the hospital's acts and/or omissions were at issue. As noted hereinabove, Plaintiff's claims were limited to alleged malpractice by the hospital and only the hospital. The introduction of claims surrounding timing of the caesarean section and purported delay could not be barred by issue preclusion as the jury was free to determine that "but for" the departures of the nurse and staff an earlier delivery was the standard of care. A standard never to be considered but for the acts and/or omissions of the hospital.

No one claimed, nor would the Court allow anyone to claim, that it was Dr. Ninia's alleged delay and/or purported delay that were the departures or causative events. Additionally, Defendant's claim that the Court allowed the Plaintiff to make an issue of the standard of care of Dr. Ninia was equally unavailing. Unfortunately, it was a Defendant's witness (Dr. Roberts) that perhaps inadvertently, on direct examination, inferred negative elements to the conduct of Dr. Ninia. Logic aside for a moment... plaintiff ferociously, *in limine*, propounded against anyone placing responsibility on Dr. Ninia. For plaintiff to do so would have provided the Defendant, an "empty chair" at which to point the finger of liability.

The issue of inflammatory and improper comments by Plaintiff's counsel throughout the trial, to the extent of mandating the Court to set aside the jury's verdict is rejected by the Court. At every juncture of the trial, improper comments by counsel of either side were immediately followed by a curative instruction directed to the jury by the Court. In sum and substance as the jurors were instructed that as to issues of fact and credibility they are the judge. Whatever comments that were ruled inappropriate were quickly and expeditiously the subject of an instruction. The jury was told often, that as to the facts and credibility, they were the supreme body and lawyers comments were not evidence or dispositive. In short, the jury was told to ignore all ill-advised comments.

The New York Medical Indemnity Fund is administered by the New York Department of Financial Services and defines a birth related neurological injury as follows:

> an injury to the brain or spinal cord of a live infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during delivery admission that rendered the infant with a permanent and substantial motor impairment or with a developmental disability or both. This definition shall apply to live births only.

This is indeed an indemnity fund case as Shannon Reilly is a qualified participant as the same is defined at Public Health Law §2999-h(1). All parties concur and the Court so ***ORDERS***.

The jury made the following determinations as concerns elements of damages: (A) future cost of medical care Three Hundred Eighty Two Thousand Three Hundred Seventy One Dollars ($382,371.00) finding a fifty-five (55) year life expectancy; (B) Medication expenses to be incurred in the future-Two Million Two Hundred Seventy Nine Thousand One Hundred Eighty Five dollars ($2,279,185.00) finding a fifty-five (55) year life expectancy; (C) Physical Therapy and Occupational Therapy to age twenty-one (21) Six Hundred Forty Eight Thousand Eight Hundred Forty Five Dollars ($648,845.00); (D) Speech Therapy to age twenty-one (21) Two Hundred Forty Three Thousand Three Hundred Seventeen Dollars ($243,317.00); (E) Physical Therapy and Occupational Therapy from age twenty-one (21)Three Million Five Hundred Sixty Six Thousand Five Hundred Ninety Nine Dollars ($3,566,599.00); (F) Speech Therapy from age twenty-one (21)One Million One Hundred Eighty Eight Thousand Eight Hundred Sixty Four Dollars ($1,188,864.00); (G) Home health aids to age twenty-one (21)Five Hundred Forty Six Thousand Five Hundred Twenty Seven Dollars ($546,527.00); (H) Home health aides from age twenty-one (21) to end of mother's life expectancy Five Million Two Hundred Forty Six Thousand Nine Hundred Fifty Dollars ($5,246,950.00) during a twenty-three (23) period; (I) Supervised living center- Fifteen Million Six Hundred Sixty Eight Thousand Two Hundred Seventy Two Dollars ($15,668,272.00) during twenty-one (21) years. (J) Medical equipment-One Million One Hundred Fourteen Thousand Eighty Two Dollars ($1,114,082.00) finding a fifty-five (55) year life expectancy; (K) Medical supplies-Eight Hundred Twenty Six Thousand Six Hundred Eighty Four Dollars ($826,684.00) incurred over fifty-five (55) years; (L) Loss of earnings capacity Five Million Four Hundred Sixty Two Thousand Three Hundred Thirty Dollars ($5,462,330.00) incurred over thirty nine (39) years.

The jury awarded Shannon Reilly pain and suffering, including loss of enjoyment of life to the present, Ten Million Dollars ($10,000,000.00). Further, the jury awarded Shannon Reilly pain and suffering, including loss of enjoyment of life in the future, Eighty Two Million Five Hundred Thousand Dollars ($82,500,000.00) enduring fifty-five (55) years.

The Defendant petitions, in part, for reversal and new trial on the issue of damages suggesting the jury applied a "time unit" method of calculating future damages and; as such, seeks a new trial limited to damages. The record will reflect that upon announcing it reached a verdict the "Verdict Sheet" was delivered to the Court. Upon inspection, the Court convened in chambers with counsel. The Court suggested that a review of the damages portion of the verdict sheet was indicative of confusion and/or non-comprehension of the

instruction and relationship between dollar amounts and the years during which the expenses would endure. For instance: Medical Care = $2,000, years = 55; or $36.30 per year. The record reflects counsels' concurrence with the Court's suspicion. An instruction was crafted with counsel, read to the jury and thereafter they were directed to continue deliberations. A verdict was returned thereafter. The verdict sheet reflects the Jury's recalculations as the incorrect dollar figures are crossed over and the verdict figures, post instruction, are provided. Other than suspicion, there is no indication that the jury applied the "time unit" measure.

As noted above, the liability verdict was not against the weight of the evidence. Where both Plaintiff and Defendant presented party eye witness and expert testimony in support of their respective positions, it was the province of the jury to determine the credibility of those witnesses (*see Barthelemy v. The Spivack*, 41 A.D.3d 398 [2007], *Texter v. Middletown Dialysis Center, Inc.*, 22 A.D.3d at 832). However, the jury verdict on the issues of future pain and suffering, past pain and suffering, future nursing, therapy, and personal care and future loss of earnings deviated materially from what would be reasonable compensation and is excessive. Although the amount of damages to be awarded for personal injuries is generally a question for the jury, where an award is contrary to the weight of the evidence or excessive, the reviewing court is vested with the power and the duty to set it aside. *Senko v. Fonda*, 53 A.D.2d 638, 639 (2nd Dept. 1976). CPLR § 5501(c) mandates that upon review of an award of damages, the court shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation. The Court concurs that various elements of the award are excessive and/or duplicative.

On the issue of remittitur, both parties cite *Flaherty v. Fromberg*, 46 A.D.3d 743, 849 N.Y.S.2d 278. *Flaherty* was decided in December of 2007 and is cited frequently in connection with remittitur. The Defendant, relying on *Flaherty*, suggests the upper limit (pain and suffering) in cases of the Reilly genre is Four Million Two Hundred Fifty Thousand Dollars ($4,250,000.00). The Plaintiff suggests the Second Department has since *Flaherty* (2007) moved toward a more "enlightened" place as concerns ceilings on damages verdicts. Virtually all of the cases cited by Plaintiff in support of higher sustained awards deal with cases not involving birth related, brain damaged children. There is one exception. *Maing v. Fong*, 71 A.D.3d 1077 (2nd Dept. 2010) involving injuries not as compelling and/or severe as Shannon Reilly's. In *Fong, infra.*, the infant plaintiff suffered left-side hemiparesis, mild cerebral palsy and attention deficit disorder. On appeal, the Appellate Division allowed Four Million Dollars ($4,000,000.00) for the future pain and suffering and let stand a jury determination of One Hundred Fifty Thousand Dollars ($150,000.00) for past pain and suffering. It is apparent that *Fong* does modify the suggested *Flaherty* ceiling.

The Court pursuant to CPLR § 5501(c) will allow remittitur of the pain and suffering verdicts in the following respects:

1. The award of Ten Million Dollars ($10,000,000.00) for past pain and suffering shall be reduced to Four Hundred Thousand Dollars ($400,000.00) past pain and suffering.
2. The award of Eighty Two Million Five Hundred Thousand Dollars ($82,500,000.00) representing future pain and suffering shall be reduced to the sum of Six Million Five Hundred Thousand Dollars ($6,500,000.00).
3. Unlike pain and suffering there is science involved in the calculation of projected lost earnings. An economist testified on behalf of the infant plaintiff. Sound assumptions were made based upon many factors, including the familial history. Upon the evidence the economist calculated lost earnings to be the sum of Five Million Four Hundred Sixty Two Thousand Five Hundred Sixty Nine Dollars ($5,462,569.00). The jury returned a verdict in the sum of Five Million Four Hundred Sixty Two Thousand Three Hundred Thirty Dollars ($5,462,330.00). Although the economist's testimony was not disputed, the Court will allow a reduction adopting in part, comparisons with the factual predicates of *Flaherty* (infra.). The loss of earnings is hereby reduced from the sum of Five Million Four Hundred Sixty Two Thousand Three Hundred Thirty Dollars ($5,462,330.00) to the sum of Four Million Four Hundred Thousand Dollars ($4,400,000.00).

Medical Indemnity Fund settlements or judgments require that damages be allocated between fund damages (future medical expenses) and non-fund damages (damages other than future medical expenses). This allocation determines how much lump sum cash the Plaintiff receives and how much an insurer or self-insured medical provider saves because of the funds obligation to assume the future medical expense component of the award. Typically jury verdicts take the form of answers to special interrogatories. The special verdict assigns dollar amounts to various categories of damages. Hence, fund and non-fund damages are readily ascertainable (even if modified by post-trial motion or appeal). *Mendez v. The New York and Presbyterian Hospital*, 34 Misc.3d 735, 934 N.Y.S.2d 662.

The jury awarded Plaintiff Fifteen Million Six Hundred Sixty Eight Thousand Two Hundred Seventy Two Dollars ($15,668,272.00) representing twenty-one (21) years of care in a supervised living center. Defendant claims that award "is duplicative of the jury's awards for future medical care, medications, therapies, medical equipment and medical supplies during the twenty-one (21) years it is anticipated Shannon will spend in a supervised living center. Defendant cites *Eccleston v. New York City Health and Hospital Corp.*, 266

A.D.2d 426 [2nd Dept. 1999] as authority, to wit:

> Specifically, the award for future costs of therapies after age twenty-one (21) is duplicative of the award for residential care after the age of twenty-one (21), which would include therapy. We therefore delete the award for future costs of therapies after twenty-one (21)... Moreover, the award for future medical expenses and the future cost of special equipment after age twenty-one (21) are duplicative of the award for future residential care, since after the infant plaintiff reaches age twenty-one (21), those costs will be subsumed by the cost of residential care (citations omitted).

The jury awarded Plaintiff Three Hundred Eighty Two Thousand Three Hundred Seventy One Dollars ($382,371.00) for medical care costs for the balance of her projected life (55 years). It found that the Plaintiff will spend the last twenty-one (21) years of her life in a supervised living center. Those twenty-one (21) years of medical care costs while at a supervised living center are duplicative. The Court grants the Defendant's application to the extent that the cost of medical care is reduced to Two Hundred Thirty Six Three Hundred Seventy Four Dollars and Eighty Cents ($236,374.80). In the same vein, the cost of medications is reduced to One Million Four Hundred Eight Thousand Nine Hundred Fifty Dollars and Eighty Cents (1,408,950.80). The award for occupational therapy is reduced to One Million Eight Hundred Sixty Four Three Hundred Fifty Eight Dollard and Sixty Cents (1,864,358.60). The award for speech therapy is reduced to Six Hundred Twenty One Thousand Four Hundred Fifty One Dollars and Seventy Cents ($621,450.70). The award for medical equipment is reduced to Six Hundred Eighty Eight Thousand Seven Hundred Five Dollars and Thirty Cents ($688,705.30). The award for medical supplies is reduced to Five Hundred Eleven Thousand Forty One Dollars and Three Cents ($511,041.03).

Pursuant to Public Health Law § 2999-j(6)(b), Defendant's application that the judgment provide that in lieu of that portion of the award that provides for the payment of future medical expenses, the future medical expenses of the Plaintiff shall be paid out of the Medical Indemnity Fund is ***GRANTED***. The Court finding that the applicant has made a *prima facie* showing that the Plaintiff is a qualified participant. Judgment shall so provide.

Further, in the event the parties cannot agree on the structure of the judgment herein and in accordance with CPLR Article 50-A, the Medical Indemnity Fund and CPLR § 4546 the Court will conduct a hearing for purposes of structuring the applicable portions of funds

and to determine set offs, including collateral source reimbursements. In the event an accord cannot be arranged, Plaintiff shall update and provide current disclosure of all collateral source reimbursements.

The Defendant, pursuant to CPLR § 4546, may set off from the award of lost earnings, the amount of federal, state and local income taxes that the Plaintiff would have been obligated by law to pay. In the event the parties cannot resolve these elements of adjustment, the Court will allow a hearing (CPLR § 4546).

Any applications not specifically addressed are ***DENIED***.

The foregoing constitutes the decision and Order of this Court.

Dated: September 13, 2013

HON. JERRY GARGUILO, JSC