To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

C L C Jr. an Infant by his Mother and Natural Guardian SYLVIA GREEN,

Plaintiff,

-against-

WESTCHESTER MEDICAL CENTER, MICHAEL KESSLER MD, GEETHA RAJENDRAN MD, ADVANCED OB/GYN ASSOCIATES,

Defendants.

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Index No. 51356/14
Motion Seq. Nos. 008, 009
Decision and Order

EVERETT, J.

The following papers were read on the motions:
Notice of Motion/Affirmation in Support/Exhibits A-C (docs 261- 265)
Reply Affirmation/Exhibit D (docs 281-282)

Notice of Motion/Affirmation in Support/Exhibit A (docs 268-270)
Reply Affirmation/Exhibit A (docs 279-280)

Affirmation in Opp (doc 276)

In this action sounding in medical malpractice, defendant Westchester Medical Center (WMC) moves, under motion sequence number 008, for an order, pursuant to CPLR 4404 (a), granting the following relief: (1) setting aside the jury's verdict in favor of plaintiff and directing judgment in favor of WMC; or (2) setting aside the jury's verdict in favor of plaintiff and directing a new trial on all issues; (3) setting aside the jury's verdict in favor of plaintiff and directing a new trial on the issue of damages, unless plaintiff stipulates to a substantial reduction of the jury's awards; and (4) granting a hearing, pursuant to CPLR 4545, 4546 and 50-A, for the purpose of identifying collateral sources and structuring a judgment; and (5) declaring that any

judgment entered reflect that portion of the award that provides for future medical expenses to be paid in accordance with Public Health Law §§ 2999-g through 2999-j. Defendants Michael Kessler, M.D. (Kessler), Geetha Rajendran, M.D. (Rajendran) and Advanced Ob/Gyn Associates (Advanced Ob/Gyn) jointly move, under motion sequence number 009, for orders, pursuant to CPLR 4404 (a), 5031 and 5501, granting the following relief: (1) setting aside the jury's verdict and awarding judgment to defendants as a matter of law, or directing a new trial on the ground that the verdict was not based on a rational view of the evidence, or was contrary to the weight of the evidence; or (2) setting aside the jury's verdict and directing a new trial; or (3) conditionally reducing the awards for past and future pain and suffering because they deviate materially from what would be reasonable compensation; and (4) granting a hearing, pursuant to CPLR 4545, 4546 and 50-A, for the purpose of identifying collateral sources and structuring a judgment; (5) declaring that any judgment entered reflect that portion of the award that provides for future medical expenses to be paid in accordance with Public Health Law §§ 2999-g through 2999-j; and (6) staying the entry of judgment pending a decision on this motion and a hearing to determine the proper calculation of the judgment under CPLR 5031. The motions, under motion sequence numbers 008 and 009, are consolidated for disposition and upon the foregoing papers, the motions are decided as set forth below.

The theory of plaintiff's case is that the proximate cause of her son's preterm delivery and permanent preterm birth related injuries and deficits were Kessler and/or Rajendran's respective departures from accepted medical practice by their failures to offer a cerclage to address her cervical insufficiency during any of her three hospital visits and/or admissions in July 2010.

Plaintiff seeks to hold WMC vicariously liable for the negligent acts and/or omissions of the defendant physicians.

The case was tried before a jury. During the course of the trial, the parties produced evidence relating to the central issues of: (1) whether Rajendran departed from accepted medical practice by failing to offer plaintiff Sylvia Green (Green) a cerclage during the July 9-10 admission; (2) whether Kessler departed from accepted medical practice by failing to timely obtain a maternal fetal medicine (MFM) consult during the July 13-14 admission and during the July 15-16 admission; (3) whether such departures were the proximate cause of the preterm delivery of plaintiff's son at 24 weeks gestation, and his related injuries and deficits; and (4) whether Green reasonably believed, based on the words or conduct of WMC, that Rajendran and Kessler were employees/agents of WMC, and accepted their services in reliance on the perceived relationship, and not in reliance upon the skill of Rajendran and Kessler. The jury's verdict, as recorded in the extract of May 17, 2018, provides in relevant part:

> - Rajendran departed from accepted practice by not offering Green a cerclage during her July 9-10, 2010 admission, and that such departure was a proximate cause of the infant plaintiff's injuries.
>
> - Kessler departed from accepted practice by failing to timely obtain a MFM consult during Green's July 13-14, and 15-16, 2010 admissions, and that such departure was a proximate cause of the infant plaintiff's injuries.
>
> The jury apportioned fault to Rajendran and Kessler equally.
>
> - Green reasonably believed, based on the words or conduct of WMC, that Rajendran and Kessler were employees or agents of WMC, and that she accepted their services in reliance upon the perceived relationship between these physicians and WMC, and not in reliance upon their skills as physicians.

The jury awarded:

> $5 million for past pain and suffering;
>
> $15 million for future pain and suffering for 69 years;
>
> Future lost earnings in an annual amount of $113,000 for 39 years commencing on July 1, 2032;
>
> Home care (until age 21) in the annual amount of $54,000 for 13.17 years;
>
> Residential/Home care (starting at age 21) in the annual amount of $163,199 for 56 years;
>
> Physical therapy in the annual amount of $13,104 for 13.17 years;
>
> Occupational therapy in the annual amount of $17,004 for 13.17 years;
>
> Speech therapy in the annual amount of $17,784 for 13.17 years.

As to defendants' contentions that the verdict should be set aside because it was not based on a rational view of the evidence, or was contrary to the weight of the evidence, it is well settled that: "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" (*Victoria H. v Board of Educ. of City of N.Y.*, 129 AD3d 912, 912 [2d Dept 2015] [internal quotation marks and citations omitted]). Furthermore:

> "[f]or a court to conclude as a matter of law that a jury verdict is not supported by sufficient evidence . . . [it must] first conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial. The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict. It is a basic principle of our law that it cannot be correctly said in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, that the court may properly direct a verdict. Similarly, in any case in which it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has

> determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence"

(*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978] [internal quotation marks and citations omitted]).

Having presided at the trial, and upon review of the evidence in conjunction with the instant motions, the Court finds that the jury's verdict on liability was neither against the weight of the evidence, nor was it inconsistent with a fair interpretation of the evidence. In circumstances such as this, "[w]here . . . conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert" (*Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587, 588 [2d Dept 2011]). To find, as defendants ask, that the jury's verdict was unsupported or against the weight of the evidence presented, would require the Court to find that plaintiff's experts were not worthy of belief. This Court, having heard the evidence, is not willing to make that finding (*see Loughman v Flint Co.*, 132 AD2d 507, 510 [1s Dept 1987]).

As to those aspects of the consolidated motions which seek a reduction of the jury's awards on the ground that the awards for past pain and suffering ($5 million), future pain and suffering ($15 million over 69 years), lost earnings ($113,000 for 39 years) and future medical expenses (as broken down above) are excessive, the motion is resolved as follows.

In New York, "[t]he amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation" (*Peterson v MTA*, 155 AD3d 795, 798 [2nd Dept 2017]), and "[t]he reasonableness of compensation must be measured against relevant

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