

To commence the statutory time period for appeals as of right (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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X
MARTHA FLORES,

Plaintiff,

– against –

Index No. 58545/2015

ST. JOHN'S RIVERSIDE HOSPITAL,

Defendant.

**POST TRIAL
DECISION & ORDER**

----- X

In an action to recover damages for medical malpractice, the defendant moves, pursuant to CPLR 4404, 5031, and 5501, to set aside the jury verdict on the issue of liability and for judgment as a matter of law or, in the alternative, to set aside the jury verdict on the issue of liability as contrary to the weight of the evidence and for a new trial, or in the alternative, to set aside so much of the verdict as awarded damages for past and future pain and suffering; and the plaintiff cross-moves, pursuant to CPLR 4404, to set aside so much of the jury verdict as awarded damages for future pain and suffering or ordering a new trial:

Papers Considered

1. Notice of Motion/Affirmation of Daniel S. Ratner, Esq./Exhibits A-C;
2. Notice of Cross Motion/Affirmation of Thomas P. Giuffra, Esq.;
3. Affirmation of Daniel S. Ratner, Esq. in Reply and in Opposition to Cross Motion/Exhibits A-B.

Factual and Procedural Background

Plaintiff alleges that she was injured on September 19, 2014, when a technician employed by defendant negligently prepared her skin with alcohol and sandpaper for the placement of a holter monitor. Plaintiff alleges that the technician used excessive force in placement of the monitor which caused permanent and visible scars on her chest after the leads for the monitor were removed.

A jury trial was held before this Court between June 7, 2017, and June 12, 2017. The jury returned a verdict finding that the technician departed from good and accepted practice in using excessive force in the placement of the holter monitor and that such departure was a substantial factor in causing plaintiff's injuries. The jury awarded plaintiff

\$300,000 for past pain and suffering and \$150,000 over 36 years for future pain and suffering.

Defendant moves to set aside the verdict and for judgment as a matter of law or, alternatively, for an order directing a new trial on the grounds that the verdict is against the weight of the evidence and the testimony of plaintiff's holter technician expert, Roseanne Pellegrino, should have been precluded. The defendant also moves to set aside the damages award as excessive.

Plaintiff opposes defendant's motion arguing that the verdict was supported by the evidence at trial. The plaintiff cross-moves to set aside the damages awarded for future pain and suffering as inadequate.

Discussion

Pursuant to CPLR 4404(a), a court may set aside a jury verdict and either direct that judgment be entered in favor of a party entitled to judgment as a matter of law or order a new trial where the verdict is contrary to the weight of the evidence (see *Seong Yim Kim v New York City Tr. Auth.*, 87 AD3d 531 [2d Dept 2011]).

"A motion for judgment as a matter of law pursuant to CPLR . . . 4404 may be granted only when the trial court determines that, upon the evidence presented, there is no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury upon the evidence presented at trial, and no rational process by which the jury could find in favor of the nonmoving party" (*Ryan v City of New York*, 84 AD3d 926, 926-927 [2d Dept 2011], quoting *Tapia v Dattco, Inc.*, 32 AD3d 842, 844 [2d Dept 2006]; see *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

A jury verdict should not be set aside as contrary to the weight of the evidence unless the evidence so preponderates in favor of the moving party that the jury could not have reached its verdict by any fair interpretation of the evidence (see *Lolik v Big v Supermarkets*, 86 NY2d 744, 746 [1995]; *Seong Yim Kim v New York City Tr. Auth.*, 87 AD3d 531, 532 [2d Dept 2011]; *Nicastro v Park*, 113 AD2d 129, 133-134 [2d Dept 1985]). "It is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*Palermo v Original California Taqueria, Inc.*, 72 AD3d 917, 918 [2d Dept 2010]).

The trial evidence demonstrates that defendant's EKG technician prepped the plaintiff's skin using alcohol and sandpaper tape for the holter monitor leads. Plaintiff experienced pain when the leads were applied and when they were removed the next day. After removal, the leads left circular marks on plaintiff's body. When the wounds healed, plaintiff was left with marks on her chest.

The Court finds sufficient evidence in the record to support the jury's findings that the defendant's EKG technician departed from good and accepted practice in using excessive force on the plaintiff's skin in the placement of the holter monitor. The evidence was legally sufficient to support the jury's findings that this departure was a substantial

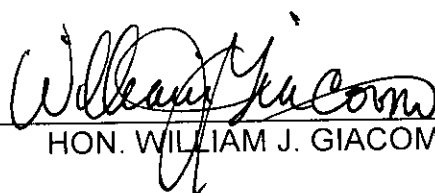
factor in causing plaintiff's injuries (see *Cohen v Hallmark Cards*, 45 NY2d at 499; *Semel v Guzman*, 84 AD3d 1054, 1056 [2d Dept 2011]; *Nicastro v Park*, 113 AD2d 129, 132). Defendant's argument that the expert testimony of plaintiff's holter technician expert, Roseanne Pellegrino, should have been precluded is without merit. Defendant argues that Ms. Pellegrino had no experience with the sandpaper tape used on plaintiff. Ms. Pellegrino did indeed testify that she was familiar with the use of sandpaper tape as part of holter monitor preparation, however, she chose not to use it in her own practice. She testified that the technician deviated from good and accepted practice by damaging plaintiff's skin with the sandpaper tape.

Moreover, the jury's findings were based on a fair interpretation of the evidence and, therefore, were not contrary to the weight of the evidence (see *Giammarino v Carlo*, 144 AD3d 1086, 1086-1087 [2d Dept 2016]). Since the plaintiff and the defendant both presented expert testimony at trial, it was within the province of the jury to determine the experts' credibility (see *Cohen v Hallmark Cards*, 45 NY2d at 498-499; *Giammarino v Carlo*, 144 AD3d at 1087; *Semel v Guzman*, 84 AD3d at 1056), and the Court finds no reason to disturb the jury's credibility determinations.

The amount of damages awarded is primarily a question for the jury, whose determination is entitled to great deference (see *Rose v Zinberg*, 128 AD3d 940, 941 [2d Dept 2015]; *Fryer v Maimonides Med. Ctr.*, 31 AD3d 604, 605 [2d Dept 2006]). Here, the amount of damages awarded by the jury for plaintiff's past and future pain and suffering does not materially deviate from what would be reasonable compensation (see CPLR 5501[c]; *Colclough v Interfaith Med. Ctr.*, 256 AD2d 497 [2d Dept 1998]).

Accordingly, defendant's motion is DENIED and plaintiff's cross motion is DENIED.

Dated: White Plains, New York
January 2, 2018



HON. WILLIAM J. GIACOMO, J.S.C.