SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CHRISTINE GAMBINO, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	**2016 CA 001884 M**
	:	**Judge Hiram E. Puig-Lugo**
MEDSTAR GEORGETOWN MEDICAL CENTER INC., d/b/a MEDSTAR GEORGETOWN UNIVERSITY HOSPITAL	:	
	:	
Defendant	:	

ORDER

The Defendant has filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial or Remittitur. The Plaintiffs has responded with an Opposition to Defendant's Motion for Judgment as a Matter of Law or New Trial or Remittitur. For the reasons discussed below, the motion is denied.

I

This case is about R.G., a five-year-old girl who was born prematurely and who suffered an IV infiltration to her right foot soon after birth.[1] At that time, she was receiving treatment at the MedStar Georgetown University Hospital Neonatal Intensive Care Unit (NICU). The infiltration released chemicals into her foot that burnt away muscle and fat tissue around her right ankle and lower calf. As a result, R.G. has undergone painful medical interventions that will continue throughout her adolescence and possibly into adulthood.

Today, R.G. has visible scar tissue wrapped tightly around her right ankle and lower calf, and skips lightly to hide her inability to place her right foot flat on the floor.[2] She has become aware of her condition as she grows. She is concerned that other children will notice her scar

[1] R.G. turned six years old about a couple of months after the trial and verdict.
[2] Dr. Richard Redett, Director of Pediatric Plastic Surgery at Johns Hopkins and R.G.'s pediatric plastic surgeon, described her scaring as the worst, largest and deepest he has seen during his career.

and be afraid of it. Thus, R.G. has begun to sit with legs crossed to hide the disfigurement. She also suffers from foot pain, tires easily and is unable to engage in strenuous activities with her peers beyond hip hop dancing and gymnastics.

On November 7, 2018, after deliberating for a day and a half, a trial jury found the hospital negligent in responding to the IV infiltration and awarded $3.6 million in damages to R.G. In reaching its decision on damages, the jury had been instructed to consider the extent and duration of any physical injuries to R.G., the effects of any injuries on R.G.'s physical and emotional well-being, any physical pain and emotional distress that R.G. has suffered in the past or may suffer in the future, any disfigurement or deformity as well as any humiliation or embarrassment associated with the disfigurement or deformity; and any inconvenience that R.G. has experienced in the past or may experience in the future. *See* Standardized Jury Instruction for the District of Columbia, No. 13.01. In addressing the issue of negligence, their guidance included instructions that health professionals are not negligent simply because efforts were not successful, and that an unsatisfactory result from treatment or care alone did not determine negligence. *See* Standardized Jury Instruction for the District of Columbia, No. 9.06.

II

"A judgment notwithstanding the verdict is appropriate only in 'extreme' cases, in which no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict for that party." *District of Columbia v. Wilson,* 721 A.2d 591, 596 (D.C. 1998) (quotations omitted). "In ruling on a motion for judgment n.o.v., the court must view the evidence as a whole, not in fragments." *Oxendine v. Merrell Dow Pharmaceuticals, Inc.,* 506 A.2d 1100, 1110 (D.C. 1986).

The Defendant makes two arguments to support is request for a JNOV. First, it argues that two witnesses for the Plaintiff were not qualified to testify as experts and failed to present a

national standard of care for responding to possible IV infiltrations. Neither argument supports the Defense request.

The expert witnesses were Sandra Gardner and Dr. Marcus Hermansen. Ms. Gardner worked as a NICU nurse in Kentucky and Colorado for 37 years. In addition to her nursing degree, she obtained a graduate degree specializing on care for mothers and children. She estimated that she had been seen some 11,000 IV infiltrates in her career. She was qualified as an expert witness in Neonatal Nursing and Neonatal IV infiltrates.

Ms. Gardner relied on various factors to identify a national standard of care for monitoring IV sites. She relied on her years of professional experience, her membership in the American Nurses Association and the National Neonatal Nurses Association, her attendance at national nursing conferences, her review of professional journals, and her role as editor of the Handbook for Neonatal Intensive Care.

Dr. Hermansen had been a neonatologist and pediatrician for over 35 years. At the time of trial, he served as Medical Director for a NICU in Nashua, N.H., that is affiliated with Massachusetts General Hospital. In that capacity, he oversaw care for about 500 premature children per year. Dr. Hermansen explained that he was certified in pediatrics and neonatology and had written about how to prevent complications from IV therapy. He described being familiar with procedures used for monitoring IV lines. He cautioned that IV sites must be checked hourly and that caretakers must take immediate action at the first sign of trouble. He reviewed the IV infiltrate policies used at the Medstar Georgetown NICU and found them to be "good" policies. Dr. Hermansen was qualified as an expert witness in Neonatology and Preventing IV Infiltrate Injuries.

Ms. Gardner and Dr. Hermansen both testified that the standard of care for IV therapy requires removal when signs of infiltration first manifest. Such signs include redness, swelling and puffiness at the site of the IV. They encapsulated the standard of care within the aphorism

"When in doubt, pull it out." The Defendant's own expert witness, Derenda Hodge, concurred with this standard but emphasized that whether or not to remove an IV was a matter of professional discretion. It totality, their testimony described a national standard of care for the jury to consider.

"In any medical malpractice case, the applicable national standard of care comes from the testimony of expert witnesses, and it is up to the jury to determine credibility and which expert's testimony will be given the most weight, and to resolve conflicts in testimony." *Pannu v. Jacobson,* 909 A.2d 178, 196 (D.C. 2006). "It is the court which bears the burdens of deciding which law to convey to the jury, and of formulating a neutral and objective manner in which to phrase the instruction." *Id.* at 198.

Second, the Defendant contends that the evidence at trial did not support including the optional portions of Standard Jury Instruction No. 9-2 in the final instructions to the jury. This optional language states as follows:

> A reasonable professional under the standard of care changes his or her conduct according to the danger he or she knows or should know, exists. Therefore, as the danger increases, a reasonable professional under the standard of care acts in accordance with the circumstances.

See Pannu v. Jacobson, 909 A.2d at 199.

In *Pannu*, the Court of Appeals emphasized the "contextual" nature of a standard of care, and noted that whether or not conduct is reasonable "depends on the dangerousness of the activity involved." 907 A.2d at 194. It noted that professionals must exercise greater care when events signal the presence of a greater danger. *Id.*

The evidence at trial justified including the optional language in the jury instructions. The expert witnesses testified that IV sites require hourly checks at a minimum to avoid the dangers of infiltration. They agreed that taking prompt action was critical in preventing the dangers and minimizing the damage that IV infiltrates create for premature children. It was for

the jury to decide whether the potential warning signs that preceded the infiltration represented a change in circumstances requiring a different reaction from NICU staff, or whether the steps they took comported with the applicable standard of care. The optional language from the instruction provided guidance on how to approach that decision. As a result, the Defendant's Motion for a JNOV is denied.

III

The Defendant contends that the jury verdict was so excessive in comparison with similar cases that a new trial should ensue or the damages awarded should be remitted. In advancing this position, the Defendant relies on a survey of verdicts in other IV infiltration cases from a variety of jurisdictions. The survey showed that damages ranged from $165,823.32 to $2,029,004.12 in 2018 dollars, with no verdict approaching the $3 million threshold.

The Court of Appeals has cautioned "that excessive verdicts should not be measured strictly on a comparative basis." *Capitol Hill Hosp. v. Jones,* 532 A.2d 89, 93 (D.C. 1987). Instead, trial courts must examine each case "on its own facts" to determine whether the verdict "was the result of passion, prejudice or mistake." *Id.* (quoting *May Department Stores v. Devercelli,* 314 A.2d 767, 775 (D.C. 1973). Ultimately, the decision "[w]hether to grant a new trial because of excessive damages is a matter within the discretion of the trial court." *Weinberg v. Johnson,* 518 A.2d 985, 994 (D.C. 1986). "Only where the verdict is so excessive as to shock the conscience will a substantial remittitur or new trial be warranted." *District of Columbia v. Hawkins,* 782 A.2d 293, 304 (D.C. 2001).

It is essential to consider the facts here when gauging the reasonableness of the jury verdict. R.G. was two weeks old when she suffered chemical burns to her right ankle and calf from the IV infiltration. She spent a total of six weeks in the critical area of the Georgetown NICU unit and was stepped down for two weeks prior to discharge. Her burn wounds were still open when she went home. After her discharge, R.G.'s parents consulted with four plastic

surgeons who individually agreed that R.G. would need physical therapy, surgery and skin grafting to treat her injuries.

In her young life, R.G. has received physical therapy on a consistent basis. She also underwent a "serial casting" regimen to maintain her foot in a normal position and has endured multiple fractional laser surgeries to soften the scar tissue around her right ankle and lower calf. The growth process has limited the success of these therapeutic interventions, with her left tibia bone growing at a faster rate than her right tibia bone. This discrepancy has produced a pelvic imbalance that will get worse over time. She will eventually need a procedure to extend her right tibia bone and correct the discrepancy. R.G. will also require a capsule release to accommodate the growth process, a challenging procedure that will come with risks, in addition to surgery that will slow her growth. As a result of the burn injuries, R.G. will be shorter in stature than she otherwise would have been, her right heel will not reach the floor, the range of motion on her right foot will be compromised, and she will have visible scarring around her right ankle and lower calf. These are consequences that she will negotiate throughout her entire life.

In its motion, the Defendant takes issue with the suggestion from Plaintiffs' counsel that jurors reach an award in the "high-seven-digit" range. Yet, defense counsel remained silent and did not object when counsel for the Plaintiffs made the argument. Moreover, the Defendant did not insinuate a reasonable alternative figure for the jurors to consider in their deliberations. Instead, the Defendant's counsel took the "all-or-nothing" approach that MedStar had not been negligent and that IV infiltrations were simply part of NICU life. To the court, this tone-deaf strategy came across as calloused and insensitive to the challenges that R.G. has and will endure in her life.[3] In sum, the Defendant made several strategic decisions and must now reap the consequences of its choice.

[3] The same insensitivity appeared to manifest in the testimony of Dr. Siva Subramanian and Nurse Ellen Kim, the MedStar Georgetown staff who testified at trial.

IV

This court cannot find that the jury made its decision about professional negligence or damages based on passion, prejudice or mistake, or that the verdict shocks the conscience. The jury deliberated for a day and a half before it reached a unanimous verdict. The length of their deliberations is consistent with the jurors having grasped the seriousness of their responsibility to reach a fair verdict within the parameters of the law. Whether or not the parties agree with that decision, it reflects the collective judgment of community representatives. Our jury system presumes that regular members of the community possess the wisdom, knowledge and common sense to make important decisions, and to make them well. Based on the record here, there is no reason to second-guess or reconsider their wisdom. As a result, the motion for a new trial or remittitur is denied.

WHEREFORE, it is this 10th day of January 2019 hereby,

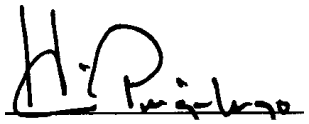
ORDERED, that Defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial or Remittitur is **DENIED**; and it is further,

ORDERED, that Plaintiff's Consent Motion for Leave to Exceed the Court's Page Limit for their Opposition to Defendant's Motion for Judgment as a Matter of Law or New Trial or Remittitur is **GRANTED**; and it is further

ORDERED, that Defendant's Consent Motion for Leave to Exceed the Court's Page Limit of Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Judgment as a Matter of Law or New Trial or Remittitur is **GRANTED**; and it is further

ORDERED, that Defendant's Motion to Stay Execution of Judgment[4], filed on November 21, 2018 is denied as **MOOT**.

IT IS SO ORDERED.



Judge Hiram E. Puig-Lugo
Signed in chambers

Copies via Case File Express to:

Daniel Scialpi, Esq.
Patrick Malone, Esq.
Andrew Spence, Esq.
Karen Cooke, Esq.
Michael Flynn, Esq.

[4] The Defense requested a stay pending resolution of post-trial motions. Those motions are now resolved.