

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ONONDAGA

DOROTHY G. MURPHY and DAVID MURPHY,

Plaintiffs,

vs.

BRETT B. GREENKY, M.D. and SYRACUSE
ORTHOPEDIC SPECIALISTS, P.C.

Defendants.

DECISION & ORDER

Index No.: 2016EF835

RJI #: 33-16-2626

HON. G. GILBERT, JSC

BACKGROUND

This medical malpractice action was commenced by Dorothy G. Murphy (Murphy) by the filing of a summons with notice on 3/4/16 followed by a complaint filed 5/23/16. The matter arises out of a total hip replacement surgery performed by Dr. Bret B. Greenky (Greenky) and follow up care by his medical office, Syracuse Orthopedic Specialists, P.C. (SOS). A trial note of issue was filed in the matter on 6/28/17 and an initial trial date of 1/14/19 was set. The matter was delayed for a number of motions which counsel later resolved and the jury trial was re-set and held starting on 6/24/19 and concluding on 7/2/19.

There was no issue taken with the jury charge or verdict sheets. The jury reached a unanimous verdict in the matter with a finding in favor of Murphy on the questions of liability for Greenky and SOS. Damages were awarded of \$1,250,000 to Mrs. Murphy for past pain and suffering; \$250,000 for future pain and suffering for the period of 20 years; \$400,000 for her husband's past loss of consortium and \$100,000 for future loss of consortium over 20 years. Following the verdict and upon the request of defense counsel, objections to the verdict were reserved for written motion submissions pursuant to CPLR §4404.

After extension by the Court, the motion was timely filed on 7/29/19 being

heard on September 19, 2019. A transcript of the argument is with references being designated [M - pg. L.]. Decision in the matter was reserved and the time for issuance of the decision was graciously extended on consent of counsel given the size of the record. As referenced herein, the trial transcript is designated [T - pg. L.].

MOTION

This motion made pursuant to CPLR §4404(a) by Greenky and SOS presents three challenges to the verdict (together with a claim that the verdict is excessive) as follows: (1) Plaintiff's counsel made prejudicial, consistent and pervasive use of the concept of "staggered" surgical scheduling and the alleged financial motivations for it which were not connected to proof of malpractice by expert testimony; (2) The verdict as to PA Lampert is not supported by proof showing a deviation from a PA standard of care and the failure to correctly read the 9/20/13 x-ray was not a proximate cause of injury; and (3) Dr. Hootnick's testimony should have been disregarded as a matter of law as being "incredible" or, even if considered, that the verdict is against the weight of evidence because his testimony was speculative, conclusory and contradicted by radiographic evidence.

STANDARD

As stated in Cohen v. Hallmark Cards, Inc., 45 NY2d 493 (1978), the question of whether a verdict is against the weight of the evidence is in large part a discretionary balancing of many factors. It is well settled that a motion under CPLR §4404(a) should not be granted unless the preponderance in favor of the defendant was so great that a finding in favor of the plaintiff could not have been reached upon any fair interpretation of the evidence. McDowell v. DiPronio, 52 AD2d 749 (4th Dept 1976); Pickman v. Musclow, 249 AD2d 958 (4th Dept 1998); Doolittle v. Nixon Peabody LLP, 155 AD3d 1652 (4th Dept 2017); Almuganahi v. Gonzales, 174 AD3d 1492 (4th Dept 2019).

A separate question is presented by the claim of misconduct. On such an issue, the Court is required to find that the plaintiff persisted in offering improper evidence and the Court must also be convinced that the conduct has improperly influenced the verdict. Stevens v. Atwal, 30 AD3d 993 (4th Dept 2006); Miller v. Galler, 45 AD3d 1325 (4th Dept 2007).

The issue raise with respect to PA Lambert requires examination of the jury charge as well as any exceptions taken to the charge. See, generally, Weinstein, Korn & Miller, New York Civil Practice §4404.18.

Assuming that the verdict is correct as to liability, the issue of whether the award of damages, or any part thereof challenged, is excessive requires a finding that the award deviates materially from what would be reasonable compensation under CPLR §5501. Queen v. Kogut, 173 AD3d 1796 (4th Dept 2019). The discretion of the Court to alter an award of damages should be exercised sparingly and must be based on careful consideration of the evidence presented to the trier of fact. Gardner v. State of New York, 134 AD3d 1563 (4th Dept 2015) leave to appeal denied 27 NY3d 905; Wolf v. Persaud, 130 AD3d 1523 (4th Dept 2015).

FACTS

Testimony on behalf of Murphy was heard over three consecutive days: 6/25/19, 6/26/19 and 6/27/19. The jury heard from Murphy, Murphy's husband, David Murphy (David), Dr. Michael Waters (Waters), Dr. Michael Clark (Clark), Murphy's sons, Nathan Murphy (Nathan) and Peter Murphy (Peter) and plaintiff's expert, Dr. David R. Hootnick (Hootnick). Greenky was also called and testified on plaintiff's direct case. Testimony on behalf of Greenky and SOS was presented on 6/28/19. The jury heard from defense expert, Dr. James Reeves (Reeves) and D.O. Edward Dupay (Dupay). Part of the deposition of Dr. Michael Waters (Waters) was read and Greenky was called back to testify in his own defense.

Greenky performed a right total hip arthroplasty and replacement on Murphy on 9/9/13. Greenky testified that when templating the surgery pre-operatively, he did not plan on cutting any of the lesser trochanter [T- pg. 186 L. 8-12]. Thereafter, he stated that the cut of the lesser trochanter was lower than planned [T - pg. 187 L. 20-23]. Greenky at first denied removing the medial calcar [T - pg. 186 L. 16-19]. He later admitted removing the majority of the medial calcar [T - pg. 630 L 22-25]. Reeves confirmed that the medial calcar had been removed [T - pg. 439 L. 25 to pg. 440 L. 3]. Greenky acknowledged that he removed almost all of the lesser trochanter [T - pg. 515 L. 2-4].

Reeves initially testified that the Greenky surgical report matched up with the intraoperative and postoperative x-rays [T - pg. 411 L. 14-25]. He had to admit that

the surgical report made no mention of amputating the lesser trochanter, no mention of the calcar or that both were removed on purpose [T - pg. 420 L. 13 to pg. 422 L. 1]. The surgical note made no mention of the location of the greater trochanter being “not exactly where it is typically” [T - pg. 423 L. 1-25].

The surgical report indicated cuts to the bone consisting of only two parallel subcapital osteotomies approximately one centimeter apart. The positioning of the osteotomies described by the surgical report was established with Reeves but there were three other osteotomies, one at the base of the neck, one intertrochantric and one subtrochantric [T - pg. 632 L. 16 to pg. 623 L. 21]. None of these three cuts were mentioned by the surgical report.

It is undisputed that Greenky used an anterior approach for Murphy’s hip replacement surgery. The approach was not something he frequently used and on deposition he testified this was because he only wanted to use it on “ideal” candidates [T - pg. 615 L. 20 to pg. 616 L. 3]. When asked if Murphy was an “ideal” candidate for the anterior approach, Greenky responded that she wasn’t a bad candidate or that she was a good candidate and then suggested that there was no difference from his use of the word “ideal” [T - pg. 616 L. 4-10].

Reeves agreed that the fracture of the greater trochanter was a risk of the anterior approach used but disagreed with Greenky’s deposition that the anterior approach had a heightened risk of fracture [T - pg. 414 L. 1-18]. The doctors were all in agreement that trochantric fracture was a risk of the total hip procedure.

As acknowledged by Greenky, the surgical report made no mention of removing all or most of the lesser trochanter or any portion of the greater trochanter [T - pg. 193 L. 19-25]. He also acknowledged that the surgical report described only the two parallel osteotomies or cuts of medial bone separated by one centimeter positioned below the trochanter subcapital and one distal [T - pg. 194 L. 4-9].

The surgical bone loss was much more extensive than reflected by Greenky’s surgical report. According to Greenky, the femoral neck was cut lower than anticipated [T - pg. 2014 L. 2-3]. Post-surgical radiology noted no evidence of the lesser trochanter or the medial calcar [Exhibits 11, 12 and 45].

Greenky acknowledged the concern that the lack of medial bone would not

allow the prosthesis to heal properly in place given that the proximal coated and non-cemented stem of the implant was intended to be fixed in place by the bone left after surgery growing into it [T - pg. 200 L. 18 to pg. 202 L. 22]. When asked for his opinion of whether the prosthesis was stable, he responded, "I guess I believe the implant remained stable..." [T - pg. 516 L. 19 to pg. 517 L. 2]. Reeves had previously conceded the possibility that the stem of the prosthesis was not stable given the lack of bone [T - pg. 448 L. 1-22].

A surgical screw was also unintentionally placed entirely through the acetabulum and near the iliac nerve bundle and iliac vein [T - pg. 205 L. 4-13]. Greenky acknowledged that the placement of the screw was causing issues and concerns [T - pg. 204 L. 4 to pg. 206 L. 5]. Mention of this issue is also absent from the surgical report.

There was no dispute that Murphy sustained a fracture of what was left of the right greater trochanter. Greenky stated that Murphy sustained a fracture of the greater trochanter as a complication of his surgery multiple times [T - pg. 206 L. 6 to pg. 208 L. 2]. He also used the term "perioperative" in his post-surgical notes but offered to the jury his unique definition of the term to disagree with the usage of the term in texts and journals to which he commonly referred as meaning during surgery [T - pg. 208 L. 3 to pg. 210 L. 12]. Having rejected the textbook definitions of perioperative, Greenky then denied having altered the definition of the term [T - pg. 210 L. 18-23]. He also freely admitted the possibility that the fracture of the greater trochanter occurred at the time of the surgery [T - pg. 545 L. 7-13].

It was undisputed that Murphy had a first post operative appointment at SOS on September 20, 2013 [T - pg. 211 L. 5-9]. At that time an x-ray was taken that showed the right hip fracture as confirmed by Greenky when later viewed on October 17, 2013 [T - pg. 211 L. 21 to pg. 212 L. 6]. The SOS x-ray report discloses neither the extensive bone loss from the surgery or the fracture [Exhibit 4; T - pg. 211 L. 17-20]. Greenky confirmed that SOS employee and physician assistant, Mary Ann Lampert failed to diagnose the fracture that was apparent on September 20, 2013 [T - pg. 212 L. 7-10].

When Greenky saw Murphy on 10/17/13 and reviewed the 9/20/13 x-rays, he described the condition as a "crack in the greater trochanter right hip" which he meant as a "fracture that is not displaced" [T - pg. 557 L. 2-14]. Moments earlier, and

pointing to the 9/20/13 x-ray, Greenky testified, “This is the greater trochanter here(indicating). This is the fracture line right down to there (indicating), so this part of the greater trochanter is not open and this part is not attached, loose” [T - pg. 551 L. 21-24]. Shortly after describing the fracture as a crack, Greenky again pointed it out for the jury describing how “it was not attached to the femur” [T - pg. 554 L. 17-18].

Greenky agreed that Murphy’s discomfort, pain, Trendelenburg gait, antalgia and weakness were due to the fracture of the hip [T - pg. 212 L. 11-19]. He also agreed that the fracture had not healed in the months that followed the surgery and up to the time of Murphy’s final visit with SOS [T - pg.213 L. 15-18]. He agreed that she was in bad enough shape in March 2014 that he was considering further hip surgery [T - pg. 650 L 4-10]. Later, Greenky testified that he did “not considering reoperating” [T - pg. 660 L. 23 to pg. 661 L. 4].

The jury heard Greenky testify that he did not limit Murphy’s weight bearing as tolerated at any time [T - pg. 213 L.19-24; pg. 214 L. 15-22]. It was not disputed that Greenky continued to send Murphy to physical therapy against the advice of his partner, Dr. Bogosian [T - pg. 609 L. 13 to pg. 610 L. 22]. The jury also heard Greenky claim to have told the therapist “to go slow on hip abduction” on the October 17, 2013 visit [T - pg. 214 L. 3-5]. Such a direction was never documented by Greenky in his notes [T - pg. 214 L. 23 to pg. 215 L. 3] or any other medical record [T - pg. 610 L. 23 to pg. 611 L. 6].

As to Dr. Bogosian, defense counsel told the jury on opening that Murphy had failed to keep two appointments to see Dr. Bogosian [T - pg. 67 L. 19 to pg. 68 L. 8]. Greenky was questioned on this point by counsel and claimed that he suggested that Murphy see Dr. Bogosian at the last two SOS visits [T - pg. 578 L. 22 to pg. 579 L. 2]. On cross examination, Greenky had to admit that an appointment with Dr. Bogosian was only mentioned once in his notes [T - pg. 610 L. 2 - 8]. He also had to reluctantly admit that SOS cancelled the appointment with Dr. Bogosian by letter [T - pg. 611 L. 7 to 613 L. 24; Exhibit 48].

Hootnik expressed that he was “horrified” by the “complete disassociation between the operative notes and what you see in the x-rays in this case” [T - pg. 267 L. 14-16]. He explained to the jury how the operative report [Exhibit 43] describes cutting out a piece of bone roughly half an inch thick with two cuts just below the

head of the femur in order to take the head out [T - pg. 271 L. 18 to pg. 272 L. 5].

Hootnick explained, using a model, how a canal for the prosthesis is created in the trochanter so that when driven home, the prosthesis is enveloped in bone and held in place by circumferential forces [T - pg. 272 L. 19 to pg. 273 L. 4]. Hootnick described how the femoral component of the prosthesis has a coating that heals into the bone and with the entire lesser trochanter being amputated, there was little compression or bone left to heal into it and for it to be stable [T - pg. 277 L. 1-11]. Using the intraoperative x-ray [Exhibit 2], Hootnik demonstrated that there was no calcar or lesser trochanter remaining with only the tip of the greater trochanter “way the heck up there” and stated that the prosthesis would not heal properly under these conditions [T - pg. 273 L. 4-23].

Using the 9/20/13 SOS x-ray [Exhibit 3A], Hootnik noted a comparison of the untreated left hip and postsurgical right hip. The entirety of the lesser trochanter was missing together with the calcar [T - pg. 275 L. 15 to pg. 276 L. 5]. He identified the “clearly evident” fracture through the tip of the greater trochanter which was displaced being rotated and elevated being seen as a fracture also in the intraoperative x-ray [T. - pg. 276 L. 5-16]. According to Hootnick, the “whole upper femur has been fractured” with part having been thrown away [T - pg. 276 L. 21-22]. Using the SOS x-ray of 10/22/13 [Exhibit 6A], he again described the fracture of the greater trochanter and identified a fragment of bone “floating up in the soft tissue” and “not attached to the femur” [T - pg. 277 L. 12-16].

According to Hootnick, the SOS x-ray from 11/22/13 [Exhibit 7] showed that the remaining greater trochanter had been pulled by the muscles and rotated around to the point where it wasn't touching the femoral compartment at all [T - pg. 277 L. 17-25]. Hootnick would later testify from the radiology [Exhibit 12B] that the remaining greater trochanter was not only fractured and displaced but comminuted into multiple fragments [T - pg. 291 L. 12 to pg. 292 L. 11].

Hootnick testified that the progression of the surgical injury is shown by a 5/6/15 CT scan with a widening of the space between the fragment of bone and what was left of the greater trochanter with the same being turned and lifted up as it was being pulled by the hip muscles [T - pg. 278 L. 6 to pg. 281 L. 4]. Referencing an x-ray dated 2/2/16 [Exhibit 14A], Hootnick explained that the injury was getting progressively worse with the bone fragment “flying up here (indicating) in the sky”

and the remainder of the trochanter being “turned and lifted up” being pulled by the abductor muscle [T - pg. 280 L. 20 to pg. 281 L. 2].

Hootnick rendered various opinions as follows:

1. The fracture shown on the SOS 9/30/13 x-ray was a “significant finding” that should have been reported [T - pg. 284 L. 6-20] and played a “small part” in causing Murphy permanent injury [T - pg. 284 L. 21 to pg. 285 L. 13].

2. The fracture of the greater trochanter during the surgery was “more subtle” by the x-ray evidence and became “obvious in retrospect” [T - pg. 286 L. 13 to pg. 287 L. 7]. However, there was no question that Greenky knew of the fracture [T - pg. 285 L. 21 to pg. 286 L. 18].

3. The amputation of the lesser trochanter demonstrated that it “had to have been fractured at the time of surgery” [T - pg. 286 L. 13 to pg. 287 L. 5].

4. The surgical x-rays show that “something went very wrong at the time of surgery [T - pg. 287 L. 23 to pg. 288 L. 4].

5. The fracture should have been repaired at the time of the surgery [T - pg. 302 L. 15 to pg. 304 L. 17]. It was negligence not to fix the things that were broken and this has caused permanent and incurable injury to Murphy [T - pg. 314 L. 8-24].

6. As shown by the surgical x-ray, the tip of the greater trochanter was positioned above the head of the femur and lifted up where it should have been in a level position and this was “very wrong” [T - pg. 288 L. 17 to pg. 289 L. 7].

7. The surgical report “does not accurately reflect what happened” and was “plain vanilla” saying nothing about what happened to the lesser trochanter or calcar [T - pg. 289 L. 8 to pg. 290 L. 5].

8. It was a deviation from the standard of care to send Murphy to physical therapy and have her weight bearing with a fractured hip and fragments of bone floating around [T - 290 L. 6-25; pg. 304 L. 18 to pg. 306 L. 23; pg. 305 L.24 to pg. 306 L. 6].

9. It remains uncertain if the implant has healed or whether it is loose [T - pg. 307 L. 6-17].

10. Placement of the screws through the bone and into the space containing the iliac vein and nerve bundle was “sloppy” and “dangerous” [T - pg. 312 L. 25 to pg. 313 L. 25].

Reeves denied any fracture on the C-arm x-ray taken during the surgery of 9/9/13 [T - pg. 371 L. 19 to pg. 373 L. 21]. He also testified that he saw no bone fragments [T - pg. 377 L.7-16]. The jury heard from Greenky that the x-ray “was taken during the preparation of the femur for implantation of the final implant and this is early. This is the first or second sized rasp that starts with either a minus or a zero, and the rasp sizes go up to 10 or 11” [T - pg. 537 L. 2 to pg. 539 L. 9]. Greenky acknowledged that the lesser trochanter had already been amputated at the time of the C-arm x-ray [T - pg. 540 L. 3-8].

Reeves later discussed the 9/9/13 postsurgical recovery room x-ray noting that the “indication” by the surgeon would require the quality of the study to be diagnostic for the purpose of determining the alignment of the prosthetic pieces [T - pg. 426 L. 7 to pg. 427 L. 2]. Greenky confirmed that the purpose of the x-ray was to show the position of the acetabular and the femoral compartment [T - pg. 541 L. 10-24]. Greenky also testified that the metal of the prosthesis would block the bone on an x-ray whether the bone was in front or behind it [T - pg. 637 L. 16 to pg. 638 L. 22].

Based on his opinion that neither the surgical or recovery room x-rays definitively showed fractures of the greater or lesser trochanter [T - pg. 379 L. 13-24], Reeves went on to deny any deviation from failure to properly report or repair the same [T - pg. 380 L. 5 to pg. 381 L. 3]. Assuming that a fracture did happen during the hip replacement, Reeves testified that the surgeon would use a saw or calcar plainer (sander) to smooth the bone and leave a nice clean line [T - pg. 472 L. 12 to pg. 473 L. 9]. The x-rays during and following the surgery show nice clean cut lines except for the bone fragments from the greater trochanter.

Reeves when shown the 9/20/13 SOS x-rays readily identified the fracture of the greater trochanter and fragment stating that it was displaced [T - pg. 384 L. 4 to pg. 386 L. 22]. This confirmed the opinion of Hootnick except that Reeves tended to minimize the displacement. Reeves would later acknowledge that the bone did

displace and the fracture worsened over time [T - pg. 425 L. 10-14; pg. 433 L. 18 to pg. 435 L. 13]. Reeves could not recall looking at or that he was even provided with CT or bone scan imaging that would provide much greater detail [T - pg. 427 L. 15 to page 428 L. 17]. Greenky denied “any significant vertical displacement of the fracture blaming differences in the projection of the different x-rays as merely causing the appearance of displacement [T - pg. 536 L. 20 to pg. 537 L. 11].

Reeves agreed that the fracture was pretty obvious and a portion of the greater trochanter was fractured all the way through with the bone being broken off and shifted [T - pg. 430 L. 13 to pg. 431 L. 13]. This confirmed the testimony by Hootnick. Greenky agreed that the fracture was obvious but disagreed that the greater trochanter was fractured all the way through or that the bone was broken off and shifted [T - pg. 557 L. 14-23].

Reeves noted that the greater trochanter had migrated from it’s normal anatomic position based on SOS x-rays taken 10/22/13, 11/22/13 and 1/2/14 [T - pg. 388 L. 14-24; pg. 393 L. 15 to pg. 394 L. 10]. This confirmed the opinion of Hootnick except that Reeves tended to minimize the degree of migration. Greenky testified that the greater trochanter was in “the typical place” on the preoperative x-rays and in “the appropriate place” on the same x-rays [T - pg. 561 L. 25 to pg. 562 L. 7].

Viewing the 11/22/13 x-rays, Reeves indicated the possibility of a proximal migration of the fracture [T - pg. 389 L. 20 to pg. 390 L. 6]. This confirmed the opinion of Hootnick except that Reeves indicated that there was also a slight difference in how the x-rays were taken.

Reeves acknowledged “absolutely” that unexpected fractures could occur during a total hip replacement based on his own experience [T - pg. 391 L. 19-22]. This was confirmed by the testimony from Hootnick and Greenky with similar experiences.

Reeves acknowledged that the lesser trochanter had been removed by surgical cuts [T - pg. 394 L. 14 to pg. 395 L. 3]. This was consistent with the testimony of Hootnick. Greenky insisted that he only made the two parallel cuts of bone at the femoral neck with no additional cuts being made in obvious disagreement with Reeves as well as his own previous testimony about removing the lesser trochanter

[T - pg. 618 L. 21 to pg. 620 L. 9]. On cross examination, Greenky was confronted with the surgical x-rays and was compelled to admit an additional perpendicular cut in the bone that was not reflected by his operative note that he then denied making or couldn't recall [T - pg. 627 L. 10 to pg. 630 L. 4].

Greenky produced a model left hip on which he claimed to have tried to replicate Murphy's surgery "almost exactly" [T - pg. 506 L. 14 to pg. 508 L. 3]. The jury heard how Greenky had made only two cuts to the model [T - pg. 634 L. 16-17]. The cuts made by Greenky to the model were at 60 degrees to one another rather than parallel as described by his surgical report [T - pg. 635 L. 3-8; pg. 636 L. 14-17]. He suggested that he created the model to represent what he left Murphy's right hip like as shown by the postoperative x-ray [T - pg. 636 L. 18-24; pg. 657 L. 4-7].

Reeves attempted to give a surgical motivation to cutting the lesser trochanter as a removal of "a little more bone in order to gain access" [T - pg. 395 L. 4 to pg. 396 L. 18]. With reference to the lesser trochanter, Greenky testified that he cut the bone "in a place I thought I would get enough room to do the operation portion on the acetabulum" [T - 515 L. 5-8]. Clark's deposition was read to the jury stating that part of the lesser trochanter might be cut but that he had never removed it entirely and knew of no reason that a surgeon would do so [T - pg. 848 L. 8-19]. Hootnick testified that the only reason that Greenky could have had in removing the lesser trochanter would be if it had fractured noting that the repair would have taken several hours [T - pg. 286 L. 13 to pg. 287 L. 7; pg. 302 L. 15 to pg. 304 L. 17].

The jury heard defense counsel attempt to deny the surgical amputation by suggesting that the lesser trochanter had been "reabsorbed" [T - pg. 334 L. 4 to pg. 335 L. 9]. Similarly, the jury heard defense counsel, through Greenky, imply that the calcar and lesser trochanter could not be seen on post surgical x-rays because the hip was slightly internally rotated [T - pg. 552 L. 21 to pg. 553 L. 12]. Reeves agreed that the loss of the medial calcar and lesser trochanter were not absorptive or not seen due to internal rotation but resulted from the surgery [T - pg. 447 L. 7-20]. Greenky acknowledged that he removed almost all of the lesser trochanter [T - pg. 515 L. 2-4].

Reviewing the final SOS x-rays from 5/23/14, Reeves testified that the greater trochanter "may have retracted slightly" [T - pg. 401 L. 21 to pg. 402 L. 4]. Later, he testified in reference to the May 2015 CT scan that there was a greater

displacement of the greater trochanter than seen in previous films [T - pg. 443 L. 2-13]. Hootnick's testimony as to displacement of the greater trochanter was confirmed although Reeves attempted to minimize the degree of displacement.

Reeves also noted that any movement of bone upwards, rotational or otherwise would be considered displacement [T - pg. 424 L. 4-12]. Greenky acknowledged that the greater trochanter had rotated and was tilting when comparing x-rays from SOS of 3/21/14 and 5/23/14 with an x-ray from 1/30/15 [T - pg. 563 L 4-12; pg. 641 L. 13 to pg. 642 L. 3]. Greenky also confirmed that the tilting and rotation of the greater trochanter was shown by x-rays to be increasing over time following the surgery [T - pg. 642 l. 4-21]. This confirmed testimony given by Hootnick. Greenky had his own definition of displacement which excluded rotation as testified by Reeves [T - pg. 640 L. 14 to pg. 641 L. 12].

Greenky acknowledged that the rotation of the greater trochanter "definitely reduced leverage" of the gluteus medius muscle causing weakness in the hip with pain being caused by the unhealed fractured trochanter [T - pg. 645 L. 4 to pg. 646 L. 8]. Reeves later testified that the abductor muscles pulls up on the greater trochanter every time one bears weight or takes a step [T - pg. 431 L. 14-20].

Greenky saw no "deleterious consequences" to continued weight bearing or physical therapy [T - pg. 658 L. 2-20]. Reeves testified that there was no deviation from the standard of care by Greenky in sending Murphy to physical therapy with a fractured and displaced hip [T - pg. 405 L. 7-22]. This was in opposition to the testimony of Hootnick and the recommendation that Dr. Bogosian had made to Greenky as noted earlier.

Reeves agreed that a continued post surgical antalgic gait and Trendelenburg gait could produce symptoms of low back pain [T - pg. L.]. This confirmed the very detailed testimony provided by Hootnick [T - pg. 310 L. 2 to pg. 312 L. 24] describing the various muscles that would ordinarily be attached to the lesser trochanter and how this had the effect of altering Murphy's gait. Greenky refused to acknowledge any possible link while at the same time indicating that he didn't disagree with Reeves [T - pg. 604 to pg. 606 L. 8].

STAGGERED SCHEDULING

The Court made very clear pretrial rulings on the subject of staggered scheduling. The defense motion in limine on this subject was denied when it was made too late prior to trial. The Court allowed reference to the staggered surgical schedule but expert testimony that the same was a deviation from the standard of care was disallowed and none of the experts were allowed to testify as to a deviation based on this practice [T - pg. 15 L. 1 to pg. 16 L. 15]. At the outset, there was nothing improper about plaintiff's reference to staggered scheduling.

On motion argument, the Court asked counsel to clarify the basis for the motion and counsel did so stating as follows:

“If I can sort of modify that, Your Honor. I think there are two aspects of that. First would be the admission of testimony that related to the facts that there were 14 surgeries done in - on that day, that they were used the staggered method, and that there was a certain dollar amount paid, and the Court allowed that, and I think the Court was completely correct on. Under the case law, such facts as are provable by custom, habit and practice.

But where I would vary from what you just said on that is that we take the position very strongly that the production of that habitual - the proof of habitual fact does not establish a standard of care nor does it connect proximately, causally any injury by the - to the patient from these practices or from the dollar amounts.” [M - pg. 5 L. 5-21].

Counsel then noted that there was no argument made by Murphy that the staggered schedule was a violation of the standard of care [M - pg. 5 L. 22 to pg. 6 L. 11]. Counsel also stated that Murphy never made any “deep pockets” argument to the jury beyond reference to a possible total amount paid by reason of the schedule [M - pg. 6 L. 11 to pg. 7 L. 16]. Counsel went on to state:

“There certainly was no evidence - no expert evidence produced at all during the course of the trial that the - the fact that there were 14 surgeries done in that day was a deviation from accepted standards. There was no testimony that the performance of 14 surgeries in a day causally resulted in injury to the patient. No testimony that the dollar

amounts that were charged for the surgeries were not acceptable or beyond the scope of what is normal, and no testimony that the staggering of surgeries was either a deviation from standards or causally related to injury to this patient” [M - pg. 7 L. 17 to pg. 8 L. 4].

“...we will agree that factually, yes, the custom, habit and practice was as stated. They proved that fact. That’s fine. I agree with that. That - that’s not the issue...” [M - pg. 9 L. 3-7].

The argument being made by Greenky and SOS is that they were deprived of a fair trial because Murphy’s counsel made improper inflammatory remarks about staggered scheduling that were patently irrelevant and unduly prejudicial serving as nothing more than a proxy for innuendo that they put money motives above patient care. In trying to make this argument, despite the foregoing statements made on motion argument, reference is made to two main cases that are said to be “instructive” and these are briefly reviewed below.

Brooks v. Judlau Contracting, Inc., 39 AD3d 447 (2nd Dept 2007) is a case where counsel “repeatedly denigrated the ethics and veracity of plaintiff’s witnesses and their counsel”, made “continual and deliberate efforts to divert attention” and repeatedly engaged in “inflammatory and prejudicial comments”. Valenzuela v. City of New York, 59 AD3d 40 (1st Dept 2008) is a case where counsel, in front of the jury, repeatedly claimed personal knowledge and accused opposing counsel of lying. Neither case has application here. Murphy’s counsel, Robert E. Lahm and Joshua M. Gillette, at all times comported themselves with decorum and professional restraint befitting the highest standards of the profession. The Brooks and Valenzuela cases have no application to this matter.

A second aspect of the issue raised attempts to distinguish Greenberg v. New York City Transit Authority, 290 AD2d 412 (2nd Dept 2002); Gier v. CGF Health Systems, Inc., 307 AD2d 729 (4th Dept 2003); Rivera v. Anilesh, 8 NY3d 627 (2007) with respect to the ruling on the motion in limine. The effort is not successful particularly with respect to the Gier case which is on point with respect to a malpractice action. The staggered scheduling was a matter of routine professional practice for Greenky and SOS. The Court’s ruling on the motion in limine is simply not at issue as acknowledged by defense counsel on argument of this motion.

It is also argued that the staggered surgical schedule wasn't mentioned in the pleadings or bill of particulars and the evidence should have been precluded based on Larkin v. Diaz, 257 AD2d 843 (3rd Dept 1999) and Weinberger v. NYS Olympic Regional Development Authority, 133 AD3d 1006 (3rd Dept 2015). This was briefly mentioned by the motion in limine although neither Larkin or Weinberger were cited. The Court precluded use of the staggered scheduling as affirmative proof of negligence, thus properly restricting the proof in accordance with both cases despite the fact that the motion in limine was late.

Weinberger v. NYS Olympic Regional Development Authority, 133 AD3d 1006 (3rd Dept 2015) is a conceptually similar situation where plaintiff wanted to allege that his skiing accident happened on an entirely different trail and to allege that the failure to close the trail was negligence. The Court allowed the proof as to the different trail but not the new negligence theory. All that the Court allowed in this case was proof of the schedule while disallowing any new theory of liability to be based on the schedule. The ruling is the same, in essence, as in Weinberger.

Greenky and SOS also try to equate the reference to the staggered surgical scheduling to the mention of evidence of insurance coverage or that Greenky and SOS make money from such surgeries. Such arguments lack merit. The whole claim of prejudice presumes that a jury would not know that Greenky and SOS had other patients to take care of and that Murphy was not Greenky's only patient for the day. It further presumes that the jury wouldn't know without even being told that Greenky and SOS were getting paid for their services. Counsel acknowledged this much [T - pg. 14 L. 10-11]. None of this has anything to do with a mention of insurance coverage.

The actual argument made by Murphy was that Greenky rushed through the surgery because he had other patients to see. This was fair comment countered by testimony that Greenky took longer with Murphy's case than he did with his other cases. The issue as presented to the jury was whether Greenky caused a fracture of the lesser trochanter and the greater trochanter during the surgery that he then failed to properly fix. The schedule was merely the "ski trail" on which the negligence of this doctor took place.

As to the schedule, counsel's comment was to the effect that Murphy's case was right in the middle of the surgical day being the seventh out of fourteen

procedures being done [T - pg. 50 L. 23 to pg. 51 L. 3]. It was never suggested by any witness or by counsel that the schedule was evidence of negligence.

The brief reference on Greenky's cross examination to news articles taking issue with surgical scheduling was ineffective eliciting no favorable response from Greenky [T - pg. 620 L. 20 to pg. 621 L. 19]. Such cross examination was proper given that defense counsel had raised the issue on Greenky's direct testimony and elicited testimony that the practice of staggered surgery resulted in "lower complication rates" [T - pg. 597 L. 6 to pg. 598 L. 1].

The subject of the staggered scheduling was a small part of the trial and the references were limited rather than persistent. The Court is not persuaded that it had any effect on the verdict let alone that it improperly influenced the verdict.

Defendants also raise as basis for this motion the very few reference that were made to the rather obvious fact that Greenky and SOS were paid for their services. The issue of compensation was mentioned in passing during Murphy's opening argument [T - pg. 10 L. 18-21]. There was no objection.

Greenky and SOS point to the line of questioning as to the specific fees being charged and the total being charged for that one day of surgery [T - pg. 221 L. 18 to pg. 222 L. 16]. The argument as to prejudice presumes that this jury didn't already know that surgeons are compensated for their services. Secondly, Greenky noted the rather paltry medicare fee of \$1,200 or other set lower fees that would apply to the surgeries. Third, there was no objection. Greenky had a standing objection as to questions on the surgical schedule, not the fees charged. The issue wasn't preserved. Taylor v. Dayton Suregrip & Shore Co., 64 AD2d 809 (4th Dept 1978); Holtz v. Aldridge, 256 AD2d 1198 (4th Dept 1998); Wall v. Shepard, 53 AD3d 1050 (4th Dept 2008).

Lastly, cross examination of Greenky on the subject of fees [T - pg. 650 L. 11 to pg. 652 L. 23] was proper given that the issue had been raised by the defense on direct examination [T - pg. 598 L. 2-21].

Murphy's counsel commented on Greenky's absence in court during closing arguments and made a guess that it was "surgery day". Greenky's absence from proceedings that day was obvious and the Court agrees with Murphy's counsel that

the remainder of the comment was “pretty snarky” just as he told the jury [T - pg. 726 L. 20-23]. There was no objection and the issue was not preserved. Eschberger v. Consolidated Rail Corp., 174 AD2d 983 (4th Dept 1991); Celentano v. Manheim Services Corp., 258 AD2d 493 (2nd Dept 1999). Had an objection been made, the jury would have been told to disregard the comment about “surgery day”. The single comment involved neither staggered surgery or Greenky’s compensation and is not seen to have had any impact on the jury’s deliberations.

Finally, Greenky and SOS complain that Murphy’s counsel “revisited” the issue of staggered surgery at the end of closing remarks [T - pg. 734 L. 8-16]. The comment was simply that the two hours that it would have taken to repair the fractures would have added to the length of Greenky’s surgical day. There was nothing improper about the comment at all. Again counsel failed to object and this constituted a waiver. Eschberger v. Consolidated Rail Corp., 174 AD2d 983 (4th Dept 1991); Celentano v. Manheim Services Corp., 258 AD2d 493 (2nd Dept 1999).

Greenky and SOS go off topic to claim that testimony as to Murphy’s retirement should trigger a new trial as there was no wage loss claim put forward in the pleadings under Johnson v. Lazarowitz, 4 AD3d 334 (2nd Dept 2004). There was no objection and the issue was not preserved. The Johnson case indicates that the trial court “permitted” wage loss testimony, thus indicating that there was an objection. Further, a new trial was warranted in Johnson due to deliberate, grossly prejudicial and “vituperative remarks” the court found to be “egregious” and “inflammatory” together with counsel’s reference to defendant’s liability insurance. The case is not, as claimed by Greenky, “strikingly similar”.

The claim about Murphy’s retirement is completely without merit. The jury came back with a question during deliberations on the point and was specifically instructed that there was no claim or proof of economic loss and that the same was not part of the case which was solely for pain and suffering [T - pg. 776 L. 1-17]. There is no indication that the instruction was disregarded or misunderstood.

SOS LIABILITY

The parties were in agreement that the 9/20/13 SOS x-ray showed a fracture of the hip. Reeves testifying for defendants agreed that the fracture was visible and pretty obvious [T - pg. 430 L. 18-25]. The verdict sheet as finalized and agreed by the

parties removed PA Lampert from the case except as an agent, servant or employee of SOS and no exception was taken to the verdict sheet. [T - pg. 742 L. 20 to pg. 743 L. 9]. There was no direct and independent claim as to Lampert that the jury was asked to decide as that part of the verdict was directed to SOS which included Greenky as well as Lampert.

Further, Hootnik testified as to the SOS standard of care and deviation, as previously noted. The objection as to Lampert's standard of care was sustained [T - pg. 283 L. 7 to pg. 284 L. 1] but this did nothing to remove SOS from the case. The further argument that no proof of proximate causation for the mishandling of the 9/20/13 SOS x-ray lacks merit given Hootnik's testimony that it played a small part in causing injury to Murphy. At the very least, she should not have been continued in physical therapy or weight bearing activity. Lastly, a finding of liability as to Greenky translates to a finding against SOS. The claim to set aside the verdict in this regard has no merit.

HOOTNICK'S TESTIMONY

Greenky and SOS also argue that Hootnik's testimony that fractures occurred to Murphy's hip during surgery was entirely speculative and should have been excluded on the basis that the C-arm surgical and recovery room postoperative x-rays do not show a fracture to either the lesser or greater trochanter. The argument has no merit.

As noted above the C-arm surgical x-ray was taken after the lesser trochanter had been amputated. It wasn't present to be seen. There was testimony that there was no reason to have amputated the entirety of the lesser trochanter. Greenky didn't even plan on making a cut to the lesser trochanter when templating the surgery. Reeves testified that he could see a limited cut to the lesser trochanter. He never supported the amputation of the lesser trochanter.

The timing of the C-arm surgical x-ray also impacted consideration of the fracture of the greater trochanter. The surgical x-ray was taken very early in the process of making the remaining bone ready for the implant with a surgical rasp. There were yet larger rasps to be used to create the canal for the prosthesis to be then implanted and driven home. This left every reason to believe that the fracture of the greater trochanter took place at some point after the surgical x-ray had been taken.

Regardless of the x-ray, Greenky was hands on bone during the surgery and had to know of the fracture.

As to the fracture of the greater trochanter that Hootnick thought was “more subtle” by x-ray evidence, the “indication” for the postoperative recovery room x-ray was to show the position of the implant. Hootnick left no doubt as to his opinion that Greenky knew that the greater trochanter had fractured. From the testimony presented, the jury had reason to doubt the quality and detail to be shown by the x-ray. The titanium implant shows up easily and blocks the visualization of the bone according to Greenky. Also, the quality of the x-ray to clearly show the fracture to the greater trochanter at that early stage was an open question for the jury.

The objection to strike the testimony of Hootnick on this basis was not made until after the proof had been closed. The objection as to Hootnick’s testimony was waived when it wasn’t raised at the time he was being questioned and that testimony was offered. Even if the objection had been timely raised, the issue would have been resolved under Viele v. Vyveberg, 83 AD3d 1428 (4th Dept., 2011). The Court had the discretion to allow the testimony and as noted there are numerous points of agreement with Hootnick’s testimony by Reeves. There was a wealth of medical information for use by Hootnick and his opinions had substantive basis. There was also the foundational testimony taken from Greenky.

No doctor, except Hootnick, provided any rational explanation behind the amputation of the lesser trochanter. As stated by Clark there was no reason for the amputation. The opinion by Hootnick was met with only an unsupported denial by Greenky that the lesser trochanter had ever been fractured. The jury was not required to believe Greenky and obviously didn’t.

The same is true with the fracture of the greater trochanter. The C-arm surgical x-ray was taken early in the surgery and before a larger rasp was used on the greater trochanter and well before the prosthetic stem was implanted and driven home with a mallet [T - pg. 272 L. 6-16; T - pg. 469 L. 14-24]. This x-ray does not, therefore, show the absence of a fracture at a point where a fracture very well could have been sustained [T - pg. 345 L. 4-9]. It also does not show any portion of the greater trochanter that had already been removed. The quality of the recovery room postsurgical x-ray was an open question but there was sufficient testimony to show that there had been a significant problem during the surgery to the extent that the

greater trochanter was not located where it should have been.

In summary, there was nothing speculative about Hootnick's testimony. It was adequately supported by the testimony of Greenky which preceded as well as the medical record, x-rays included. The amputation of the lesser trochanter was by all accounts an unusual, unexpected and unexplained outcome. The significant fracture of the greater trochanter was obvious on the first postsurgical office visit. The displacement of the fracture, the floating bone fragments and the vertical displacement and rotation of the femur out of alignment with the femoral compartment were well established for the jury to consider. Disagreement by Greenky and SOS does not mean that the jury could not reach a liability finding on any fair interpretation of the evidence.

VERDICT

With the liability verdict sustained, there remains the issue of possibly excessive damages raised by Greenky and SOS. No issue is raised as to the jury awards for future pain and suffering for Murphy or the future loss of consortium for her husband, David. No cross motion for relief as to these awards has been filed. Accordingly, the jury award to Dorothy G Murphy for future pain and suffering in the amount of \$250,000.00 and the award to David Murphy for future loss of consortium of \$100,000.00 is not before the Court and stands unchallenged in all respects.

A. Award for past pain and suffering.

Review of the award starts necessarily with the record presented to the jury. A picture was painted of Murphy both before and after the hip surgery. There was also an understanding of the surgery both as it was intended and as it was actually done. As noted above, all of the witness agreed that Murphy has issues with the right hip that are related to the surgery. It was also understood that Murphy developed severe back pain in the years after the hip surgery with the extent of relationship to the surgery presenting as an open question of fact.

Murphy was 63 years of age at the time of the trial making her around 57 years of age at the time of the surgery [T - pg. 83 L. 7-8]. By all accounts, Murphy lead a very active and productive life. She married David in 1981 and raised three boys taking an active interest in their school and athletic activities, even managing Peter's

travel soccer team for two years and teaching her sons how to swim [T - pg. 83 L. 2-5; pg. 228 L. 6-20; pg. 230 L. 9-21]. She also taught Nathan how to water ski and introduced him to winter skiing [T - pg. 229 L. 11-19].

Murphy was employed as a bank examiner by the US Treasury Department from June 1983 until her retirement in April 2017 [T - pg. 82 L. 21 to pg. 83 L. 1]. She had a well accomplished career spanning 33 years and 11 months [T - pg. 85 L. 1 to pg. 86 L. 23; pg. 87 L. 13-15]. The job required her to travel, she estimated, between 50 to 70% of the year [T - pg. 86 L. 2].

Her last promotion was as an examiner in charge of a \$20 Billion bank in New Jersey in November 2013 which required the family to relocate to Hackensack, New Jersey [T - pg. 88 L. 3-12]. She researched the subject of hip surgery and was interested in the anterior approach as it offered the possibility of quicker healing time which was desirable given the promotion and relocation [T - 93 L. 18-25]. Murphy had wanted to continue in her position until at least age 65 [T - pg. 88 L. 13-22] but felt that she could no longer sustain the traveling required due to her hip and the difficulty she was experiencing in getting around [T - pg. 88 L. 13 to pg. 89 L. 11].

Throughout the course of her life and until she developed an issue with her right hip, Murphy was very much the amateur athlete engaging in softball, soccer, water skiing and downhill, slalom and cross country skiing [T - 83 L. 15 to pg. 84 L. 1]. Nathan recounted watching his mom play soccer describing how she was not one to sit out for a minute [T - pg. 229 L. 21 to pg. 230 L. 3].

The balance of employment, travel, raising three boys, married life, homemaking and athletics was maintained by a mix of patience, tenacity, fortitude [T - pg. 231 L. 13 to pg. 232 L. 19] and always having a "to do list" of 20 or 30 items and getting them done by being tireless [T - pg. 243 L. 19-25].

Murphy summed up the difference in her life following the surgery with Greenky as follows:

"A I think the biggest thing is I was always a very active person. I always did a lot, and I would think nothing of jumping in the car and running an errand or doing anything. Now, I think about it. I plan how I'm going to do it. What I can accomplish, what I can't,

because days that I have to do a lot of walking, my hip will actually feel like it's on fire sometimes, and it cramps. It's a weird sensation where I just -- the muscles just cramp up around my entire joint. It's like a Charlie horse, and so you start planning what you're going to do so you're the most efficient because I use to think nothing of going walking the mall and shopping. I enjoyed shopping, but I don't do that any more. I don't go to malls, and like I said, you think about who has shopping carts and who doesn't. I never use to think about that. I think about where stairs are, and, in fact, I was even concerned about stairs walking up to the witness stand. I have just simple things like putting on a pair of pantihose or sitting down on the toilet or getting back up from the toilet. M'y husband put grab bars in that helped me. My greatest pain is trying to go upstairs. It's just -- I can't go upstairs without some type of assistance and so I guess I can go upstairs but not without great difficulty, and I certainly can't carry anything to go upstairs because I'm using my left-hand for my weight to help me. You know, simple things like just bending down getting something out of the cabinet and trying to get back up again. I loved to cook, and, you know, our pots and pans are on the lower cabinet so you start rearranging things that you can do. It's just effected my daily day and the way I approach things just because I compensate for the weaknesses in my hip and my leg.

Q How about your physical activities?

A I was a big walker and one of my dreams was to walk the beach, and I use to walk miles and I loved picking up seashells and I can't do that now. It's very difficult for me to walk any great distance because -- I use to think nothing of walking a mile or two. When I worked during the recession, I was sent down to Jacksonville, Florida, to do special equity reviews, so I would always stay out near the beach so I could walk the Jacksonville Beach, and my hotel was a good mile, mile and a half, and I could walk down to the pier and back, and I can't do that now. And that's what frustrates me a lot because I worked very hard to retire and be near water and the ocean and the things that give me most pleasure are simple and I can't do them the way I use to." [T - pg. 116 L. 21 to pg. 17].

Murphy testified about how she came to SOS seeking treatment because she was not able to walk a city block without pain and she just wanted to be able to walk again [T - pg. 126 L. 12-23]. Greenky testified that the total hip replacement was intended to provide dramatic results to relieve Murphy's right hip pain, weakness, Trendelenburg gait and analgic symptoms, including going up stairs and walking distances but resolved neither the pain nor the Trendelenburg [T - pg. 604 L. 1-23]. The jury had good basis to believe that the negligence of Greenky related to Murphy's continuing disability.

The amputation of the lesser trochanter meant the loss also of the iliacus and psoas muscles that would be attached to it [T - pg. 185 L. 2-5]. The psoas muscle helps to balance the pelvis and acts as a hip flexor and stabilizer and this causes the pelvis to torque and twist during gait which in turn causes sacroiliac and lumbar discomfort [T - pg. 310 L. 2 to pg. 312 L. 24].

The gluteus medius and minimus muscles attach to the greater trochanter as hip abductor muscles pulling the hip out to the side [T - pg. 373 L. 22 to pg. 374 L. 20]. Additionally, the piriformis, upper and lower gemellus, obturator internus and obturator externus muscles all attach to the greater trochanter [T - pg. 184 L. 21 to pg. 185 L. 1]. All of these muscles pulled on the fractured greater trochanter to such an extent that by the time of the SOS x-ray of 9/30/13, it had displaced both upwards and rotationally [T - pg. 431 L. 17 to pg. 432 L. 2]. The displacement grew worse as time went by and through x-rays taken in June 2017 [T - 425 L. 13-19].

The CT scans taken of the hip in 2015 show a non-union of the fracture of the greater trochanter [T - pg. 347 L. 24 to pg. 348 L. 18]. The prosthesis is only partially supported [T - pg. 340 L. 15-23]. The prosthesis is also driven further into the shaft of the greater trochanter than intended which makes the right leg shorter than the left leg while the shifting, torque and tipping of the pelvis produces low back pain [T - pg. 294 L. 24 to pg. 295 L. 10; pg. 310 L. 2 to pg. 312 L. 24].

The jury heard that Murphy had no back pain after brief treatment in 2002 until some time after the hip surgery [T - pg. 350 L. 9 to pg. 551 L. 5]. Her low back pain is significant enough to require treatment including a recommendation of surgical intervention [T - pg. 166 L. 19 to pg. 167 L. 11]. As previously stated the hip pain, analgic gait, Trendelenburg, difficulty climbing stairs and limited ability to walk have all continued and were made worse by the surgery that had been intended

to dramatically improve Murphy's life. Murphy has been reduced to needing a cane to get around [T - pg. 84 L. 4-19; pg. 101 L. 16 to pg. 102 L. 3; pg. 212 L. 11 to pg. 213 L. 5]. The result is also a continuous pain level even when sitting at a 3 or 4 out of 5 which has been consistent since the treatment with Greenky ended [T - pg. 145 L. 3-13].

As previously noted, the fracture of the greater trochanter never healed during the balance of the treatment with Greenky [T - pg. 213 L. 15-18] and the jury considered that Murphy was sent to and continued with physical therapy and weight bearing on a fractured and displaced right hip. The lead to great frustration on the part of Murphy [T - pg. 103 L. 11-25; pg. 104 L. 4-20; pg. 107 L. 1-2]. It was also significant that Greenky equated the trochantric rest period advocated by his partner, Dr. Bogosian, with his telling the physical therapist "to go slow with hip abduction", assuming that such an undocumented order was even actually given [T - pg. 213 L. 25 to pg. 214 L. 5].

The jury was given a sense of the anxiety Murphy experienced having already had 15 sessions of physical therapy before finding out that she had a "crack" in her hip [T - pg. 116 L. 8-10]. They also heard about the fruitless search for doctors who might be able to help and the shocking realization that so much bone had been removed from her hip during the surgery [T - pg. 108 L. 17 to pg. 113 L. 18; pg. 114 L. 20 to pg. 115 L. 25]. There is no possibility of a medical resolution of Murphy's situation given the Greenky did not fix what he broke during the surgery [T - pg. 302 L. 15 to pg. 304 L. 17; pg. 314 L. 8-24].

The jury had to consider Nathan's testimony and observations of helplessly watching his mother screaming in pain when her leg seized up [T - pg. 233 L. 19-25] together with his observations of her now normal constant pain [T - pg. 233 L. 5-15]. Peter noted that he really "didn't see any progression" after the surgery in how his mother was able to get around [T - pg. 241 L. 20-22]. He would come home to find his mother "either on the couch or the chair in pain, in agony, and it would - it was difficult to look at" [T - pg. 242 L. 6-8]. He observed that his mother's patience became "very thin" [T - pg. 13-15] and that he observed frequent complaints of pain ranging from a loud "ow" to moaning and groaning [T - pg. 242 L. 23-25]. Peter also assisted his mother to help her up and guard her from falling as she would try to go upstairs [T - pg. 243 L. 1-9].

The jury had every right to conclude that Murphy's previous life balance of patience had evaporated with her pain, that her tenacity and fortitude were no longer sufficient to cope with her injury and that the previous "to do list" of 20 or 30 items was whittled down to almost nothing [T - pg. 244 L. 4-8]. The jury also understood that Murphy has no path back to her former life simply because Greenky elected not to fix what he had broken.

Greenky and SOS can certainly point to various disputes of fact when it come to damages but none of that detracts from the foregoing view of the evidence that seems to have been adopted by the jury. The award should be sustained as long as there is credible evidence to support it. Mecca v. Buffalo Niagara Convention Center Management Corp., 158 AD3d 1161 (4th Dept 2018).

Turning to an evaluation of other verdicts, most of the cases relied upon by Greenky and SOS are over 20 years old and none contain the detailed information needed to properly compare to the case at hand. As illustration, Greeky and SOS reference Mullen v. Eswar, 233 AD2d 376 (2nd Dept 1996) where a hip replacement surgery was unsuccessful due to a prolonged infection and a verdict of \$1,000,000 was reduced to \$350,000 for past pain and suffering and \$250,00 for future pain and suffering. Mullen has no reference to being sent to physical therapy on a fractured and displaced hip despite being advised that physical therapy should be discontinued until the fracture had healed. The case gives no indication of fractures that could have and should have been repaired when they occurred or that the failure to do so caused the mental and physical torment seen in this case. The Mullen case presents no compelling before and after portrait and doesn't even indicate the duration for the past and future awards.

Having heard the same proof as presented to this jury, the Court is not able to conclude that it lacks any basis in the credible evidence. As demonstrated in Mecca v. Buffalo Niagara Convention Center Management Corp., 158 AD3d 1161 (4th Dept 2018), the finding of damages is primarily a question for the jury and the judgment of the jury is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony. In this case, as in Mecca, where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view.

Reviewing other verdicts, the Court does not believe, based on the record

presented, that the award in this case is inconsistent with other like cases. See Starkman v. City of Long Beach, 148 AD3d 1070 (2nd Dept 2017); Cano v. Mid-Valley Oil Company, Inc., 151 AD3d 685 (2nd Dept 2017); Singh v. State of New York, 2008 Jury Verdicts LEXIS 35454 (Court of Claims 2008); Brulinski v. 10 East End Avenue Owners, Inc., 2006 Jury Verdicts LEXIS 46906 (NY County 2006); and Wang v. Life Star Response Corp., 2013 Jury Verdicts LEXIS 9400 (Kings County 2013).

B. Award for Past Loss of Consortium.

As seen with the past pain and suffering award, the record as presented to this jury on the issue of past consortium has to be considered in detail.

Mr. And Mrs. Murphy had been married for 38 years at the time of the trial [T - pg. 163 L. 5-8]. By all accounts, David is as athletically inclined as his spouse used to be [T - pg. 230 L. 23-25]. David's life has changed dramatically as a consequence of his wife's injury. Everything has to be planned based on the length of the walk required and the size of the crowd [T - pg. 163 L. 19-22]. As he stated, "Around the house, I'm her legs, basically [T - pg. 164 L. 3-4].

David has had to fully take over moving things up and down stairs, vacuuming, cooking, moving anything that needs to be moved, picked up or pushed, doing the laundry, making the beds and retrieving things from high cabinets and everything else that his wife used to do [T - pg. 164 L. 4 to pg. 165 L. 13]. Shopping now requires an orchestrated team effort to minimize the amount of walking for his wife and so that he can load and unload everything [T - pg. 164 L. 20 to pg. 165 L. 2]. David also noted that he used to have some peace and quiet while his wife went shopping and lamented their more timid and tentative lifestyle [T - pg. 164 L. 6-9]. David recounted that social activities have to include avoidance of crowds, uneven pavement, grass or uneven surfaces given his wife's fear of tripping [T - pg. 165 L. 14-24]. As he put it, "we do what we can, but if she does too much, she pays for it at the end of the day. That's a given." [T - pg. 165 L. 25 to pg. 166 L. 1]. Murphy's pain and suffering is just as obvious to David as to his sons as reflected earlier.

The Court concludes that the award for part loss of consortium has a basis in the credible evidence presented to the jury. The Murphys were all pleasant and credible witnesses from start to finish. Hootnick gave credible testimony supported

in large measure by not only the weight of the medical evidence but also the other physicians who provided testimony, including Reeves and even Greenky in a lot of respects. The Court also finds that the award for past loss of consortium finds support in at least two cases. Couillard v. The Shaw Group, 2016 Jury Verdicts LEXIS 3681 (NY County 2016); Bustos v. Segarra, 2010 Jury Verdicts LEXIS 26068 (NY County 2011).

Accordingly, the motion by defendant, Brett B. Greenky, M.D., and Syracuse Orthopedic Specialists, P.C., pursuant to CPLR §4404 is **DENIED** in all respects.

IT IS SO ORDERED.

ENTER

Dated: November 27, 2019
Syracuse, NY


HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE