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Trials&TRIBULATIONS

Preserve your challenge to an excessive additur

Following a jury trial in a negligence action, a trial court may set aside the verdict on the ground that the award is either excessive or inadequate and “deviates materially from what would be reasonable compensation,” see CPLR 5501 (c); *Prunty v. YMCA of Lockport, Inc.*, 206 AD2d 911, 912 (Fourth Dept. 1994). Upon setting aside the verdict, the trial court may order a new trial on damages “unless” the defendant stipulates to increased damages (“additur”) or the plaintiff stipulates to reduced damages (“remittitur”), see CPLR 5501(c); Siegel, NY Prac §407, at 713 (5th ed.). With regard to an additur, the damages assessed by the trial court must represent the “minimum amount[s] that the jury could have found as a matter of law based on the evidence at trial,” *Camacho v. Rochester City School Dist.*, 20 AD3d 916, 916 (Fourth Dept. 2005).

In a recent decision, *Oakes v. Patel*, __ AD3d __, 2011 WL 3631296 (Fourth Dept., Aug. 19), the Appellate Division, Fourth Department found that the defendants in a medical malpractice case failed to preserve for appellate review the issue of whether the trial court’s additur was excessive. The Fourth Department made clear that preservation of that issue for appeal requires the defendant to specifically “challenge” the additur before the trial court.

The Fourth Department ruled that the defendants’ opposition in *Oakes* to the plaintiffs’ motion to set aside the damages verdict, and refusal to stipulate to the trial court’s additur, were insufficient to preserve the issue of whether the additur was excessive. While the procedural posture of the *Oakes* case is somewhat complicated, it deals with a circumstance which occurs often enough that practitioners should exercise caution to ensure that any challenge to a trial court’s additur is preserved for review.

Facts

The plaintiffs filed suit in Supreme Court, Erie County against the defendant physicians and hospital seeking money damages for medical malpractice in connection with the

defendants’ failure to diagnose and treat plaintiff Oakes for a sentinel bleed from a cerebral aneurysm. The case proceeded to a jury trial on liability and damages, and the jury returned a verdict finding that the defendants were negligent, and apportioned fault among the defendants.

The jury awarded the plaintiffs itemized damages, including \$1 million for past pain and suffering; \$60,000 for plaintiff wife’s past loss of services, along with future damages covering 18 years consisting of \$1 million for future pain and suffering; \$1.8 million for future supportive living expenses; and \$150,000 for plaintiff wife’s future loss of services. The plaintiffs thereafter moved to set aside the verdict because the damage amounts were inadequate. The trial court granted the plaintiffs’ motion and ordered a new trial on only damages unless the defendants stipulated to an award of \$5 million for past pain and suffering, \$1.5 million for past loss of services, \$5 million for future pain and suffering, \$2 million for future loss of services, and \$3.9 million for future supportive living expenses.

Not surprisingly, the defendants refused to stipulate to the trial court’s additur and opted for a new trial. After the trial on only damages, the jury returned a verdict awarding the plaintiffs \$5.6 million for past pain and suffering; \$1.5 million for past loss of services, as well as future damages consisting of \$4.72 million for future supportive services; \$4 million for future pain and suffering; \$150,000 for future loss of household services; and \$750,000 for future loss of services.

The trial court denied the defendants’ motions to set aside the verdict as excessive, and the defendants appealed.

The decision

With regard to the issues arising from the first trial, the Fourth Department majority affirmed that portion of the trial court’s order which set aside the award of damages as inadequate. However, the majority identified that the issue of

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whether the trial court's additur was appropriate was not properly before the court because: (1) the issue was not preserved in light of the defendants' failure to "challenge the court's additur before, during or after the second trial"; and (2) although references to the additur were made in the fact recitations of the defendants' appellate briefs, the defendants failed to raise the issue on appeal by making a substantive contention that the additur was excessive.

As to the second trial, the Fourth Department found that the damages awarded by the jury did "not deviate materially from what would be reasonable compensation," *Id.* at *2.

The dissent

The dissent (Peradotto, J.) opined that the defendants did preserve the additur issue by opposing the plaintiffs' motion to set aside the verdict after the first trial on the ground that the verdict did not deviate materially from what would be reasonable compensation. The dissent reasoned that the defendants' "contention necessarily encompass[ed] the argument that an additur in any amount would be inappropriate," *Id.* at *5.

In the dissent's view, the defendants' opposition to the motion to set aside the verdict, along with their refusal to stipulate to the additur, sufficiently preserved the issue for appeal. The dissent also noted that the defendants' statements in their appellate briefs regarding the excessive nature of the additur were sufficient to raise the issue on appeal.

On the merits, the dissent concluded that the trial court's additur was excessive and did not represent "the minimum amounts the jury could have awarded as a matter of law based on the evidence at trial," *Id.* at *4 (internal quotation marks omitted). The dissent would have modified the first judgment to afford the defendants the opportunity

to stipulate to an appropriate additur in lieu of a new trial and would not have reached any of the issues raised pertaining to the second trial.

Steps to ensure preservation of the additur issue

The Fourth Department's treatment of the additur issue in *Oakes* may leave practitioners wondering how to "challenge the court's additur" in order to preserve the issue for appeal, *Id.* at *2.

The *Oakes* decision clearly sets forth what is not enough — simply opposing the plaintiff's motion to set aside the verdict by asserting that the damages verdict was adequate, and, later, refusing to stipulate to the additur. As such, there are three possible approaches to achieving preservation of the additur issue for appeal.

The defense could expressly assert, in its response brief opposing the plaintiff's motion to set aside the verdict, that the jury's verdict did not deviate materially from what would be reasonable compensation (CPLR 5501[c]), and therefore any additur issued by the court would be in excess of the "minimum amount[s] that the jury could have found as a matter of law based on the evidence at trial," *Camacho*, 20 AD3d at 916.

However, this approach is preemptive and speculative because the argument is made prior to the court's order setting aside the verdict and issuing the additur. Raising the challenge in their response brief may leave some attorneys feeling uneasy that the issue is not preserved if not raised after the trial court issues its order.

The safer approach would be to challenge the additur after the court issues the order. At a minimum, the defense could make an oral motion on the record to modify the additur on the ground that it is in excess of the minimum amounts that the jury could have found as a matter of law based on the evidence, see *Camacho*, 20 AD3d at 916.

In a case where the plaintiff orally requested an additur after the jury returned the damages verdict, the Appellate Division, Third Department found that the oral request was sufficient to preserve for appellate review the issue of whether the verdict was inadequate and should be subject to an additur by the Appellate Division, see *Murphy v. Lewry*, 235 AD2d 968, 968 (Third Dept. 1997). Defense attorneys opting to make an oral motion should, of course, ensure that their argument is transcribed on the record in order to demonstrate on appeal that the issue was raised before the trial court.

To further ensure preservation, the defense could, in addition to an oral motion, make a written motion to vacate or modify the order setting forth the additur pursuant to CPLR 5015(a). Although the grounds for the motion — that the additur is excessive — would not fall under any of the grounds set forth in CPLR 5015(a)(1)–(5), the Fourth Department has recognized that " 'a court maintains inherent power to vacate a judgment [or order] in the interest of justice [, and that t]he enumerated grounds in CPLR 5015 are neither preemptive nor exhaustive and were not intended to limit that power,'" *Matter of Chomik v. Sypniak*, 70 AD3d 1136, 1137 (Fourth Dept. 2010), quoting *Ruben v. American & Foreign Ins. Co.*, 185 AD2d 63, 67 (Fourth Dept. 1992).

Thus, if the defense makes a written motion to challenge the additur, it should move to vacate or modify the trial court's order setting forth the additur in the interest of justice.

Notably, if the trial court rejects the defendant's challenge to the additur, and the defendant then stipulates to the additur, the defendant cannot challenge the additur on appeal. The defense must opt for a new trial to be "aggrieved" by

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the modification of damages, *Adams v. Genie Indus., Inc.*, 14 NY3d 535, 540-541 (2010).

It goes without saying that the steps discussed in this article are not exclusive. This discussion does not take into consideration the numerous procedural circumstances that may arise after the court issues an order granting a new trial unless the affected party stipulates to

modified damages.

If defense attorneys are confronted with a situation similar to that in *Oakes*, however, the procedural steps discussed herein will provide a framework for preserving the additur issue for appeal. After all, when it comes to determining an additur or remittitur, “[w]hat is maximum or minimum to one judge is not necessarily so to another, of course, and ... appellate judges will

disagree, too,” see Siegel, NY Prac §407, at 713 (5th ed.).

By properly challenging the trial court’s additur in both oral and written form, attorneys would cover their bases to ensure preservation of the issue for appeal.

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