STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2018-CP-10-02109
	)	
Rebecca Turisk,	)	
	)	**[Proposed] ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL AS TO PROXIMATE CAUSE AND DAMAGES ONLY, OR, IN THE ALTERNATIVE, FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, ALTERNATIVELY, FOR A NEW TRIAL ABSOLUTE**
Plaintiff,	)	
	)	
vs.	)	
	)	
Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on November 28, 2022 for a hearing regarding Plaintiff Rebecca Turisk's ("Plaintiff") Motion for a New Trial as to Proximate Cause and Damages Only, or, in the alternative, for Judgment Notwithstanding the Verdict, or, also in the alternative, for a New Trial Absolute. In her Motion, Plaintiff argues that she is entitled to a new trial because the "verdict is inconsistent and indicates the jury was confused" and that invocation of the "Thirteenth Juror" doctrine is warranted because "verdict is contrary to the weight of the evidence." For the reasons articulated below, the Court denies Plaintiff's Motion in its entirety.

BACKGROUND

On April 23, 2018, Plaintiff filed this medical malpractice action against Defendants in the Court of Common Pleas for Charleston County, South Carolina. Between November 14, 2022 and November 17, 2022, the parties tried the case to a jury. Contrary to Plaintiff's Motion, at trial, Plaintiff alleged that the Defendants breached the standard of care in two ways: (i) by selecting the inferior pedicle inverted T surgical approach for her breast reduction and lift surgery, and (ii) by inadequately providing Plaintiff with post-surgical care. Defendants defended that their conduct did not fall below the standard of care in any aspect and that Plaintiff's issues were instead known

complications of the procedure about which Plaintiff was appropriately informed of and accepted as risks of the surgery prior to the procedure. At the conclusion of the trial, using a verdict form, the jury returned a verdict for Plaintiff on the first question of whether Defendants breached the standard of care and a verdict for Defendants on the second question of whether the breach proximately caused Plaintiff's injuries. Because the jury did not conclude that Defendants proximately caused Plaintiff's injuries, they did not reach the question of or award any damages to Plaintiff.

STANDARD OF REVIEW

a. NEW TRIAL

Whether to grant a new trial is a matter within the discretion of the trial judge. *Daves v. Cleary*, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003) (*citing Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999)). However, a jury's verdict is entitled to "substantial deference." *Mills v. S.C. State Ports Auth.,* 435 S.C. 213, 227, 865 S.E.2d 910, 917 (Ct. App. 2021). "A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive." *Id.* at 226 (internal citation omitted). A so-called inconsistent verdict is not an automatic ground for a new trial. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49-50, 691 S.E.2d 135, 149 (2010) (internal citation omitted). To the contrary, where there is a logical reason for reconciling an inconsistent verdict, it is the duty of the court to sustain it. *Id.*; *see also Longshore v. Saber Sec. Servs*., 365 S.C. 554, 561, 619 S.E.2d 5, 9 (Ct. App. 2005) (affirming the trial court's decision to not overturn a jury verdict in favor of the defendants on an assault and battery claim where the jury found liability for negligent hiring because the verdict could be "harmonized."); *Johnson v.*

Hoechst Celanese Corp., 317 S.C. 415, 422, 453 S.E.2d 908, 912 (Ct. App. 1995) (affirming denial of plaintiffs' motion for new trial where the jury returned a verdict for two other plaintiffs because the moving plaintiffs did not prove each element of their causes of action).

Equally important to medical malpractice cases like this one, the plaintiff must show, through expert testimony that, "in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence . . . [and] when it is the only evidence of proximate cause relied upon, it must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Daves*, 355 S.C. at 230, 584 S.E.2d at 430 (*quoting James v. Lister*, 331 S.C. 277, 286, 500 S.E.2d 198, 203 (Ct. App. 1998)). In other words, the plaintiff has the burden of proving both a deviation from the standard of care **and** proximate cause through expert testimony. *Id. (emphasis added); see also Richardson's Rests. v. Nat'l Bank of S.C.,* 304 S.C. 289, 295, 403 S.E.2d 669, 672 (Ct. App. 1991) (internal citation omitted) ("In order to prevail on a claim of negligence, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. If he fails to establish any one of these elements, his cause of action fails."). Where a jury finds that she did not do so and it is supported by the evidence, the decision of the jury should not be disturbed through a new trial. *See Stevens,* 342 S.C. at 53, 536 S.E.2d at 666 ("[I]f a jury finds the plaintiff has failed to prove damages proximately caused by the defendant's negligence, then its verdict should be for the defendant."); *Dropkin v. Beachwalk Villas Condo. Ass'n,* 373 S.C. 360, 365, 644 S.E.2d 808, 810 (Ct. App. 2007) (affirming denial of the plaintiff's motion for a new trial in a traditional negligence case where plaintiff did not prove proximate cause).

b. JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)

In reviewing motions for directed verdict and JNOV, the evidence and the reasonable inferences that can be drawn therefrom must be viewed in the light most favorable to the non-moving party, which, at this juncture, is Defendants. *Daves*, 355 S.C. at 229, 584 S.E.2d at 429 (*citing Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993)). The motion should not be granted where the "evidence yields more than one inference[,] or its inference is in doubt." *Id.* (internal citation omitted). As with considering a motion for a new trial, a jury's verdict is given substantial deference when contemplating a JNOV. *See Mills,* 435 S.C. at 227, 865 S.E.2d at 917.

DISCUSSION

a. THE JURY'S VERDICT WAS NOT INCONSISTENT.

As an initial matter, the jury's verdict in this case was not "inconsistent" as Plaintiff now attempts to argue. *See e.g., Stevens*, 342 S.C. at 51, 53, 536 S.E.2d at 661, 666 (holding a verdict that found the defendant liable for ***proximately causing*** the plaintiff's injuries yet awarding zero dollars in damages was facially inconsistent); *Herring v. Home Depot, Inc*., 350 S.C. 373, 381, n.16, 565 S.E.2d 773, 777, n.16 (Ct. App. 2002) (internal citation omitted) (illustrating that a verdict in favor of a plaintiff for both revocation of acceptance and breach of warranty would be inconsistent due to their contradictory elements). Instead, it was a verdict indicative that Plaintiff failed to meet her burden of proof as to at least one of the required elements of her medical malpractice cause of action: proximate cause. This kind of verdict is entirely consistent, permissible and appropriate under South Carolina law. *See Dropkin,* 373 S.C. at 365, 644 S.E.2d at 810 (cited above); *see also Vinson v. Hartley*, 324 S.C. 389, 411-12, 477 S.E.2d 715, 727 (Ct. App. 1996) (denying the plaintiff's motion for a new trial where the jury found for the defendant

on proximate cause although the defendant admitted negligence). Otherwise, a plaintiff would be relieved of its burden to prove each and every element of its cause of action.

Regardless and even assuming *arguendo*, the verdict was somehow "inconsistent," it was not irreconcilably inconsistent as is required by our jurisprudence and, therefore, this assertion is not a basis for granting a new trial. *Austin*, 387 S.C. at 49, 691 S.E.2d at 149 (internal citation omitted) (holding that verdicts must be irreconcilably inconsistent to warrant a new trial). First, contrary to Plaintiff's contention in her Motion, Plaintiff did not pursue a single theory of liability. Plaintiff argued that both Defendants' choice of surgical technique and their post-operative care violated the standard of care. Therefore, it stands to reason that the jury could have found that Defendants' post-operative care breached the standard of care, but that the choice of surgical technique did not. This likelihood completely undermines Plaintiff's assertion that "the surgery itself, at least, proximately caused some damages to Plaintiff[,]" which, as discussed below, is not supported by the record anyway. Alternatively and just as likely, the jury could also have reasonably concluded that another surgical option was appropriate, but also concluded that the choice of technique was not to blame for Plaintiff's complications or claimed damages. Finally, as detailed above, unlike the verdict in *Stevens*, the jury's verdict in this case confirmed that Plaintiff **did not prove** her damages were proximately caused by Defendants' breach. Thus, an award of zero damages is entirely consistent with South Carolina law and does merit a new trial as to any issue or JNOV.

Further, the mere fact that the jury did not find proximate cause does not mean that the jury was somehow "confused" on the issue. Indeed, the record supports that the opposite was true. The jury was verbally instructed on Plaintiff's burden of proof as to all of the required elements and specifically on the issue of proximate cause. Additionally, it was provided with a hard copy of the jury instructions. Furthermore, at Plaintiff's request, the jury was polled after the verdict was read

and each juror confidently affirmed that the verdict was, in fact, the one that they had reached. Accordingly, the Court finds that any concerns that the jury was somehow confused as to proximate cause is completely without support and likewise does not justify a new trial of any kind or JNOV.

b. THE JURY'S VERDICT IS NOT CONTRARY TO THE WEIGHT OF THE EVIDENCE, BUT, RATHER, IS AMPLY SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE.

The jury's verdict is amply supported by the overwhelming weight of the evidence, so the Court finds that there is no basis for the application of South Carolina's thirteenth juror doctrine. Plaintiff's Motion mischaracterizes the testimony of Defendants' experts and Dr. Schimpf, as well as Dr. Herrera. Neither Defendants' experts, Dr. Lefkowitz or Dr. Joseph, Dr. Schimpf, nor Dr. Herrera testified that any of Plaintiff's alleged damages were ***proximately caused*** by any negligent act of Defendants. In fact, Dr. Herrera explicitly refused to testify that Defendants even breached the standard of care. Instead, these experts all testified that despite Defendants' use of the gold-standard surgical technique for this procedure, Plaintiff unfortunately suffered a known complication from her surgery – not due to any negligence, and that Defendants appropriately responded to her concerns.

Notably, Plaintiff's sole expert, Dr. Hultman, also acknowledged that Plaintiff's complications were known to her particular surgery and occur even when the procedure is performed according to the standard of care as it was in this case. Dr. Hultman specifically agreed that Dr. Schimpf met the standard of care in the way that he performed the inferior pedicle approach and that it is the single most-widely used technique for this surgery. He likewise readily admitted that Dr. Schimpf appropriately warned Plaintiff about the inherent risks during the informed consent process and that Defendants' technique is not only the gold standard, but one that he uses himself. Neither the jury, nor the Court is required to accept Dr. Hultman's isolated suggestion that he would have used

a different approach for Plaintiff's surgery. *McCourt by & Through McCourt v. Abernathy*, 318 S.C. 301, 307, 457 S.E.2d 603, 607 (1995) (holding that the jury was properly instructed that "[t]he mere fact that the plaintiff's expert may use a different approach is not considered a deviation from the recognized standard of medical care."); *see also McGrady v. United States*, 650 F. Supp. 379, 381 (D.S.C. 1986) ("The mere fact that a plaintiff's expert witness is of the opinion that he would have chosen a different approach or method in the diagnosis or treatment of a patient is not dispositive of determining the liability issue in a medical malpractice suit.").

Plaintiff's Motion also relies exclusively on evidence of Plaintiff's post-surgical complications. However, South Carolina law is clear that evidence of complication alone is not sufficient to prove liability. *McCourt*, 318 S.C. at 308, 457 S.E.2d at 607 (also holding that jury was properly instructed that negligence may not be inferred from a bad result). Therefore, there is simply no basis in law or fact for the Court to disrupt the jury's verdict under the thirteenth jury doctrine.

Moreover, as referenced above, Defendants' experts testified that Defendants appropriately informed Plaintiff of the risks inherent to her surgery prior to Plaintiff's election of surgery. Plaintiff's expert confirmed this by acknowledging that he did not have any criticisms of Defendants' informed consent process. Plaintiff similarly acknowledged that Defendants properly informed her of the risks of her surgery and testified that she was aware that infection, nipple loss, and the need for additional surgeries were all potential complications of her surgery and agreed to proceed with full knowledge of these potential risks. This goes directly to the application of assumption of the risk, which also supports the jury's verdict of no liability. Simply put, the evidence more than supports the jury's ultimate verdict, so there is no basis for the judicial intervention Plaintiff now seeks.

The Court being fully advised and for the reasons fully set forth above,

IT IS HEREBY ORDERED that Plaintiff's Motion for a New Trial as to Proximate Cause and Damages Only, or, in the alternative, for Judgment Notwithstanding the Verdict, or, also in the alternative, for a New Trial Absolute is **DENIED** in its entirety.

_____
Honorable Maite Murphy
Presiding Circuit Court Judge

December _____, 2022
Charleston, South Carolina

Charleston Common Pleas

Case Caption: Rebecca Turisk VS Dennis K Schimpf M D , defendant, et al

Case Number: 2018CP1002109

Type: Order/Other

So Ordered

s/ Maite Murphy 2166

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Rebecca Turisk,

Plaintiff,

vs.

Dennis K. Schimpf, M.D. and Sweetgrass Plastic Surgery, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
C.A. No.: 2018-CP-10-2109

VERDICT FORM

1. Did the Plaintiff prove by a greater weight or preponderance of the evidence that the Defendants deviated from the standard of care?

✓ YES

_____ NO

If your answer to Question 1 is NO, you are finished. You have found for the Defendants. Please sign the certification below. If your answer is YES, please continue to Question 2.

2. Did the Plaintiff prove by a greater weight or preponderance of the evidence that the Defendants' deviation from the standard of care was the proximate cause of Plaintiff's injuries?

_____ YES

✓ NO

If your answer to Question 2 is NO, you are finished. You have found for the Defendants. Please sign the certification below. If your answer is YES, please continue to Question 3.

3. What do you find as the damages for the Plaintiff?

ACTUAL DAMAGES: $ _____

NON-ECONOMIC DAMAGES: $ _____