

**Capone v Kotch**

2012 NY Slip Op 30891(U)

March 28, 2012

Supreme Court, Nassau County

Docket Number: 18959/08

Judge: Jeffrey S. Brown

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN  
JUSTICE**

-----X  
**ELIZABETH A. CAPONE and JOSEPH CAPONE and  
LIBERTY MUTUAL COMPANY a/s/o JOSEPH  
CAPONE and ELIZABETH CAPONE,**

**Plaintiffs,**

**-against-**

**ANNE M. KOTCH, Executrix of the Estate of  
John Gray, Deceased,**

**Defendant.**

-----X

**TRIAL/IAS PART 17**

**INDEX # 18959/08**

**Motion Seq. 3  
Motion Date 11.14.11  
Submit Date 2.29.12**

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The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit .....	2
Reply Affidavit.....	3

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Plaintiffs Elizabeth A. Capone and Joseph Capone move for an order 1) setting aside the jury verdict rendered on October 11, 2011; 2) granting a new trial, or in the alternative, 3) granting addittur and, if addittur not stipulated to by the parties, granting a new trial on the grounds that the jury award was inadequate, against the weight of the evidence, and the verdict rendered could not be reached on any fair interpretation of the credible evidence.

This action arises out of a motor vehicle accident which occurred on June 6, 2008. Prior to the trial of this action, defendant conceded liability. Damages were tried by this court from September 27<sup>th</sup> through October 11<sup>th</sup> 2011, when the jury reached a unanimous verdict. The jury found that as a result of the accident, the plaintiff, Elizabeth A. Capone, sustained a significant limitation of a body function or system. However, the jury further found that as a result of the accident, the plaintiff did not sustain a permanent consequential limitation of use of a body organ or member nor a medically determined injury of a non-permanent nature that prevented her from performing substantially all of the material acts that constituted her usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the accident.

The jury awarded plaintiff \$7,500 for pain and suffering and \$33,000 for lost wages up until the date of the verdict. The jury, however, did not make an award for future pain and suffering nor future lost earnings. Finally, the jury did not make an award to Joseph Capone for loss of services of his wife.

Plaintiff contends that the award for past and future pain and suffering is totally inadequate, materially deviates from reasonable compensation and is not supported by any valid line of reasoning and permissible inference based upon the evidence presented at this trial. Further, plaintiff states that there is no dispute that plaintiff had a "discectomy, removal of two herniated discs under general anesthesia, as well as implantation of a titanium instrumentation and four screws." Moreover, plaintiff alleges that the jury found that the underlying accident caused the "serious injuries" to plaintiff Elizabeth Capone, thereby rejecting defendant's defense that the herniated discs were from a pre-existing injury.

Plaintiff also contends that defendant's expert, Jerrold Gorski, M.D. testified that he found "nil" range of motion after his two examinations and testified that plaintiff has a permanent partial disability.

Defendant asserts that plaintiff is precluded from arguing that the jury verdict should be set aside, due to plaintiff's position that this verdict is inconsistent, because plaintiff failed to object to the verdict prior to the discharge of the jury and that it is unpreserved for appellate review. Defendant further contends that the issue before the jury was one of credibility and that the resolution of conflicting medical testimony presented at the trial falls within the province of the jury and its function at the trial. Defendant opines that the jury did not believe that the subject accident caused plaintiff's cervical herniations. Defendant contends that, at most, plaintiff sustained an exacerbation of an underlying degenerative disc disease.

In reply, plaintiff points out that based upon the jury's affirmative finding of a significant limitation of a body function or system as a result of the underlying accident, it is undisputed that this accident caused serious injury to Elizabeth Capone. The issue of pre-existing injury was put to rest by the jury's affirmative finding to question one of the verdict sheet.

"Generally, the amount of damages to be awarded to the plaintiff for personal injuries is a question for the jury, and a motion for a new trial on the issue of damages will not be granted unless the award materially differs from what is reasonable compensation (see CPLR 5501[c]; *Gaetan v. New York City Transit Authority*, 213 AD2d 510)" (*Sescila v. Garine*, 225 AD2d 684 [2<sup>nd</sup> Dept. 1996]).

"The standard for determining whether a jury verdict is contrary to the weight of the evidence is whether the evidence so preponderated in favor of the movant that the verdict could

not have been reached on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746, 655 NE2d 163, 631 NYS2d 122 [1995]; *Trabal v Queens Surgi-Center*, 8 AD3d 555, 557, 779 NYS2d 504 [2004]; *Torres v Esaian*, 5 AD3d 670, 773 NYS2d 453 [2004]; *Nicastro v Park*, 113 AD2d 129, 134, 495 NYS2d 184 [1985]). The trial court's disposition of a motion to set aside the verdict as contrary to the weight of the evidence is entitled to great respect (*see Nicastro v Park*, 113 AD2d at 137)" (*Beck v Westchester County Health Care Corp.*, 72 AD3d 714 [2<sup>nd</sup> Dept. 2010]).

Dr. Michael Shapiro, an orthopedic surgeon, testified that the MRI studies showed two herniated cervical discs at the C4-C5 and C5-C6 levels. At that time, the plaintiff had limited range of neck motion. Subsequent to the accident, on December 2, 2008, Dr. Shapiro performed discectomies at the C4-C5 and C5-C6 levels of the cervical spine and permanently fused the vertebrae by inserting titanium hardware and four screws to hold the bones together. Plaintiff testified to numerous procedures before and after the fusion in an attempt to alleviate the pain. Plaintiff testified that after the accident, but before the surgery, she could not move her head forward or side to side without pain. Plaintiff stated that she continues to have numbness and pain in the cervical area and by touch cannot feel the back of her neck or by her ear, cannot turn her head around or hold her head up for long periods of time. Plaintiff's testimony revealed that she has had almost constant neck pain since the date of the accident for which she takes pain medication. Dr. Shapiro testified that plaintiff's range of motion will be permanently limited due to the fusion of the cervical vertebrae.

A long line of appellate cases stand for the proposition that a party cannot argue a jury verdict is inconsistent and move to set it aside unless it is objected to upon this ground prior to

the discharge of the jury. Otherwise, it would not be preserved for appellate review (see *Jamal v. Gohel*, 25 AD3d 587 [2006]; *Sukhoo v. City of New York*, 1 AD3d 349 [2003]; *Delacruz v. Galaxy Elecs.*, 300 AD2d 278 [2002]; *Barry v. Manglass*, 55 NY2d 803, 806 [1981]).

In the case at bar, after the court concluded the taking of the verdict, counsel for plaintiff asked that the jury be polled. Subsequently, after the jury left the courtroom, counsel for plaintiff asked this court to reserve his right to make a post verdict motion. Clearly, plaintiff did not raise any exception to the verdict prior to the jury's discharge. Even though the plaintiff failed to timely raise the inconsistency, under certain circumstances, the appellate court has found it was appropriate for the trial court to entertain such an application (*McAdams v. Esposito* 35 AD3d 552 [2006]; *Fryer v. Maimonides Med. Ctr.*, 31 AD3d 604 [2006]; *Van Nostrand v. Froehlich*, 18 AD3d 539 [2005]; *Cromas v. Kosher Plaza Supermarket*, 300 AD2d 273 [2002]; *Sescila v. Garine*, 225 AD2d 684 [1996]). This court determines that such an application is appropriate in this case.

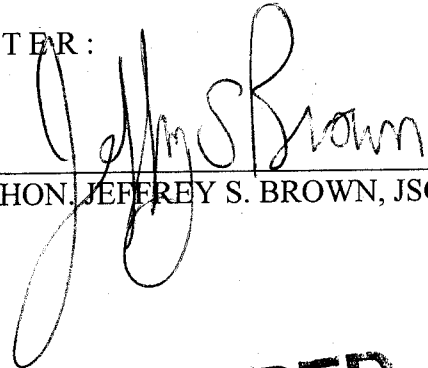
The jury verdict awarded the plaintiff damages in the sum of only \$7,500 for past pain and suffering and \$0 for future pain and suffering. The court determines that this award deviated materially from the amount of reasonable compensation and was not based upon any fair interpretation of the evidence. The jury found that the plaintiff suffered a significant limitation of a body function or system from the underlying automobile accident. Based on the evidence presented to the jury which included the fusion of the two cervical vertebrae, the minimal award for pain and suffering up to the date of verdict and no award for future pain and suffering, is contrary to a fair interpretation of the evidence.

Therefore, this court sets aside that portion of the verdict for past and future pain and suffering and grants a new trial solely on these two issues.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
March 28, 2012

ENTER:



HON. JEFFREY S. BROWN, JSC

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**ENTERED**  
APR 02 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE