

<b>Thompson v Toscano</b>
2016 NY Slip Op 32455(U)
December 15, 2016
Supreme Court, Bronx County
Docket Number: 301674/2012
Judge: Julia I. Rodriguez
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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM- PART 27**

CHARLETTE THOMPSON,  
Plaintiff,  
-against-  
ANDREW R. TOSCANO, MAARIA R. TOSCANO,  
CHARLES A. ROSS and BRANDON MAYNE,  
Defendants.

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**POST TRIAL  
DECISION and ORDER**

Present:  
Hon. Julia I. Rodriguez  
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Post-trial motion by Defendants Andrew R. Toscano and Maria R. Toscano:

<u>Papers Submitted</u>	<u>Numbered</u>
Defendants' Post Trial Notice of Motion, Affirmation & Exhibits	1, 2, 3
Plaintiff's Affirmation in Opposition	4

This Court presided over the trial of the personal injury action brought by Plaintiff Charlotte Thompson arising from a two-vehicle collision on December 12, 2012; Plaintiff was a front seat passenger in an automobile operated by Defendant Brandon Mayne which made contact with a vehicle operated by Defendant Andrew Toscano. After the accident Plaintiff alleged she sustained injury to her neck, back and left shoulder. At trial the jury returned a verdict awarding Plaintiff \$400,000 for past pain and suffering; \$750,000 for future pain and suffering premised upon a life expectancy of 25 years; and \$605,100 for future medical expenses; the \$605,100 was reduced to \$64,372 by the court and its reasons therefore were set forth on the record post-verdict.

Defendants **Andrew Toscano** and **Maria R. Toscano** (the "Moving Defendants") move pursuant to CPLR §4404 and 5501(c) to set aside the jury award on damages on the grounds that the jury award was excessive, that the verdict amounts were against the weight of the evidence and a new trial on damages is warranted in the interests of justice. Specifically, the Moving Defendants contend that the award of \$400,000 for past pain and suffering, \$750,000 for future pain and suffering, and \$64,372 for future medical expenses deviates materially from what would be reasonable compensation.

In deciding a post-trial motion under CPLR §4404, the rule is that a court should set aside a jury verdict "only if there was no valid line of reasoning and permissible

inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented.” *Cedano v. City of New York*, 35 Misc.3d 1223(A), 2009 WL 8604421 (Sup. Ct. Bx. Co. 2009), quoting *Lolik v. Big v. Supermarkets, Inc.* 86 N.Y.2d 744 (1995). After consideration of the trial evidence, including the testimony of Plaintiff, Doctors Scilaris and Nason, the court finds that the jury’s assessment that Plaintiff was entitled to compensation for past and future pain and suffering and future medical expenses could “be reached on the basis of the evidence presented.” However, the Court will entertain Defendants’ post-trial motion in accordance with CPLR 5501(c) on the ground that both awards for past and future pain and suffering deviate materially from reasonable compensation for awards involving similar injury. It is well settled that the method for such review is for the trial court to evaluate whether the challenged award deviates materially from comparable awards. *Cedano v. City of New York, et al*, 35 Misc.3d 1223(A), 2009 WL 8604421 (Sup. Ct. Bx. Co. 2009); *Fudall v. New York City Transit Authority*, 6 Misc.3d 1020(A), 800 N.Y.S.2d 346 (Sup. Ct. N.Y. Co. 2005); *Allen v. Amzoski*, 2 Misc.3d 1001(A), 784 N.Y.S.2d 918 (Sup. Ct. Bx. Co. 1999).

While every case presents its own unique set of circumstances and evidence, a review of verdicts in similar cases reveals as follows:

1. *Morales v. Manhattan & Bronx Surface Transit Operating Authority, et al*, 106 A.D.3d 459, 965 N.Y.S.2d 864 (1<sup>st</sup> Dep’t 2013). As in the instant case, the plaintiff in *Morales* underwent shoulder surgery and a course of physical therapy after the accident, and although her medical records indicated limited treatment after surgery, she continued to complain of pain and limitations at trial. In the instant case, Dr. Scilaris repaired a tear of the labrum and opined that Plaintiff suffered a significant limitation and permanent loss of range of motion of her left shoulder. The plaintiff in *Morales* suffered a partial thickness rotator cuff, and “her expert opined that her shoulder and lower back conditions were permanent and recommended further surgery for the shoulder injury” [106 A.D.3d

at 461]. In *Morales* the jury's award of \$400,000 for past pain and suffering and \$300,000 for future pain and suffering over 48.6 years was reduced to \$300,000 [pps] and \$250,000 [fps], respectively.

2. *Rubio v. New York City Transit Authority*, 99 A.D.3d 532, 952 N.Y.S.2d 512 (1<sup>st</sup> Dept. 2012) involved a 62 year old passenger on a bus who had a pre-existing biceps tear at the time of the accident. The *Rubio* plaintiff "suffered a rotator cuff tear, for which he underwent an unsuccessful surgical repair, resulting in a permanent reduction in strength and range of motion" [99 A.D.3d at 534]. In *Rubio* the jury's award of \$750,000 for past pain and suffering and \$1,684,615.40 for future pain and suffering over 14.6 years was reduced to \$500,000 [pps] and \$500,000 [fps], respectively. The \$30,000 award for past medical expenses was left intact.

3. In *Bouzas v. Kosher Deluxe Restaurant*, 83 A.D.3d 538, 922 N.Y.S.2d 24 (1<sup>st</sup> Dept. 2011) Plaintiff sustained a dislocated shoulder in a slip and fall accident. The jury's award of \$10,000 for past pain and suffering was increased to \$100,000. This case is of minimal guidance as the jury awarded zero for future pain and suffering, Plaintiff's age was not stated, and although Plaintiff underwent surgery to repair a torn rotator cuff, that injury was found to have been pre-existing and not caused by the dislocation.

4. *Konfidan v. FF Taxi, Inc.*, 95 A.D.3d 471, 942 N.Y.S.2d 873 (1<sup>st</sup> Dept. 2012) involved a plaintiff who sustained two labral tears in his right shoulder in a motor vehicle accident. At the time of trial plaintiff was 33 years old and stated he suffered from pain on a daily basis and still needed treatment for his shoulder. While the case does not allude to an award for past pain and suffering, the award for future pain and suffering is reduced from \$400,000 to \$250,000.

5. *DeSimone v. Royal GM, Inc.*, 49 A.D.3d 490, 856 N.Y.S.2d 628 (2d Dept. 2008) concerned a car accident. While the opinion is bereft of detail, it can be discerned that the jury's award for plaintiff's rotator cuff injury and herniated cervical disc was upheld: \$100,000 for past pain and suffering and \$250,000 for future pain and suffering.

6. In *Skellham v. Hendricks*, 270 A.D.2d 619, 704 N.Y.S.2d 684 (3d Dept. 2000), the plaintiff was a postmaster who was not able to return to that occupation as a result of the motor accident. Plaintiff's orthopedic surgeon testified that Plaintiff "suffered from medial epicondylitis with right ulnar neuropathy and partial motion loss of the right elbow, rotator cuff tendonitis and bursitis of the right shoulder, as well as cervical syndrome...Plaintiff underwent surgery on his elbow in July 1996 and arthroscopic surgery on his right shoulder in May 1998, which ... resulted in significant surgical scarring to his right arm" [270 A.D.2d at 620]. While Plaintiff Mark Skellman's age is not specified, the decision notes that his earning capacity/working life expectancy was projected as 24 years. The court concluded that the jury's award to Mark Skellman of \$20,000 for past lost earnings and \$200,000 for future lost earnings was supported by the record, and the jury's award for \$250,000 for past pain and suffering and \$130,000 for future pain and suffering did not materially deviate from reasonable compensation.

After the accident on Dec. 15, 2011 Plaintiff presented at Jacobi Hospital with complaints of pain in her neck and jaw; x-rays and CT scans were taken of her neck and jaw. Plaintiff was given an injection of medication for the pain in her neck, and was discharged with instructions to follow up with an orthopedist. Thereafter Plaintiff commenced physical therapy for up to seven months. In the interim, in March 2012 Plaintiff consulted with Dr. Hostin, an orthopedic surgeon, who ordered an MRI of Plaintiff's left shoulder; he opined the MRI revealed tears which required surgery. On September 6, 2012 Plaintiff consulted with Dr. Scilaris, another orthopedic surgeon for a second opinion; he administered a cortisone injection and also recommended surgery. On Sept. 19, 2012 Dr. Scilaris performed arthroscopic surgery on the left shoulder, and Plaintiff resumed physical therapy post-surgery for five to six months. Three months after the surgery Plaintiff continued to experience pain in her left shoulder; upon examination Dr. Scilaris reported Plaintiff had a 50% loss of range motion of her left shoulder. Thereafter, Dr. Scilaris examined Plaintiff on February 21, 2014, February 5,


2015 and January 14, 2016. At trial Scilaris testified that Plaintiff suffered significant limitation of her left shoulder, and that her injuries were permanent and progressive in nature.

At trial Plaintiff testified she had good and bad days with respect to pain, and that she could not move her shoulder "100%", and that it was "not back to normal." She described experiencing pain in activities of daily living, such as reaching up with her left hand, washing her back, braiding her own and niece's hair, and sleeping.

Based upon the foregoing review, in light that the trial evidence did not establish with any specificity that plaintiff is a candidate for future surgery, the court finds that an award for \$300,00 for past pain and suffering, and 250,000 for future pain and suffering for a period of 25 years constitutes reasonable compensation under the circumstances herein. This total sum of \$550,00 is in addition to the award of \$64,372 for future medical expenses.

Based upon the foregoing reasons, Defendant's post-trial motion to set aside the jury's verdict as excessive is **granted** to extent that a new trial is ordered as to damages only unless, within 30 days of service of a copy of this Decision & Order with Notice of Entry, Plaintiff stipulates in writing to reduce the award of \$400,000 to \$300,00 for past pain and suffering, and to reduce the award of \$750,00 for future pain and suffering to \$250,000 for a period of 25, in addition to the reduced award of \$64,372.0,000, for a total recovery of \$614,372.00.

Dated: Bronx, New York  
November 15 2016

  
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Hon. Julia I. Rodriguez, J.S.C.