UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-21627-CIV-UNGARO-TORRES

DENISE KABA,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant,

_____/

DEFENDANT, CARNIVAL CORPORATION'S RENEWED MOTION FOR ENTRY OF JUDGMENT AS A MATTER OF LAW, MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW, MOTION TO AMEND FINAL JUDGMENT, AND ALTERNATIVE MOTION FOR NEW TRIAL ON DAMAGES ISSUES

Defendant, CARNIVAL CORPORATION (hereinafter "Carnival"), by and through undersigned counsel, files this Renewed Motion for Entry of Judgment as a Matter of Law, Motion to Amend Findings of Fact and Conclusions of Law, Motion to Amend Final Judgment, and Alternative Motion for New Trial on Damages Issues, and states as follows:

1. Plaintiff, Denise Kaba's one-count Complaint was for negligence, alleging that while she was a passenger on Carnival's cruise ship the *Carnival Pride* she slipped and fell on the Lido Deck (near the pool). Mrs. Kaba alleged that as a result of her fall she seriously injured her right knee.

2. Defendant did not dispute liability.

3. The District Court conducted a two-day trial of this matter May 9, 2011, and May 10, 2011.

4. On May 13, 2011, the Court made its Findings of Fact and Conclusions of Law (DE #132) and entered Final Judgment in favor of the Plaintiff (DE #133).

5. At the close of evidence, Carnival moved for judgment as a matter of law on Plaintiff's claims for future loss of earning capacity.[1]

6. The Court subsequently denied Carnival's motion

7. Additionally, the Court awarded Plaintiff $210,000 for past pain and suffering and $1,960,000 for future pain and suffering.

8. As discussed more fully below, Carnival respectfully suggests that the Court's award for future pain and suffering is excessive and not supported by the record evidence presented at trial or otherwise before the Court.

9. Carnival hereby renews that motion for entry of judgment as a matter of law on Plaintiff's claims concerning any loss of future earning capacity and/or wages, and moves this Court to alter and amend its Findings of Fact and Conclusions of Law (DE #132) and Final Judgment (DE #133) accordingly, and to alter and amend them in the additional ways suggested below.

MEMORANDUM OF LAW

Federal Rule of Civil Procedure 50 allows for the renewal of a motion for a judgment as a matter of law, after trial. The Rule provides, in relevant part, that:

> No later than 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial

[1] Plaintiff voluntarily dismissed any claims concerning past loss of earning capacity / wages.

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> under Rule 59. In ruling on the renewed motion, the court may:
>
> (1) allow judgment on the verdict, if the jury returned a verdict;
>
> (2) order a new trial; or
>
> (3) direct the entry of judgment as a matter of law.

Meanwhile, Rule 52 allows a court to amend its findings or make additional findings, and to amend the judgment accordingly. It states, in pertinent part:

> **(b) Amended or Additional Findings.** On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

Finally, Rule 59 (as indicated in Rules 50 and 52) allows for a motion for new trial, and also allows for the filing of a motion to alter or amend a judgment:

> **(a) In General.**
>
> **(1) Grounds for New Trial.** The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:
>
> **(A)** after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or
>
> **(B)** after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.
>
> **(2) Further Action After a Nonjury Trial.** After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
>
> **(b) Time to File a Motion for a New Trial.** A motion for a new trial must be filed no later than 28 days after the entry of

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judgment.

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> **(e) Motion to Alter or Amend a Judgment.** A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Carnival hereby moves for the entry of a judgment as a matter of law in its favor on Plaintiff's economic claims, and simultaneously moves for an order amending the Court's Findings of Fact and Conclusions of Law (DE #132) and amending the Final Judgment (DE #133) to reflect the entry of judgment in Carnival's favor as to Plaintiff's claims for future loss earning capacity / lost wages, and to reflect new findings as suggested below.

Alternatively, Carnival moves for a new trial on the issue of damages, as the damages award was excessive, or moves for a remittitur of the damages award.

Plaintiff's Claim for Future Loss of Earning Capacity

Carnival moved at trial for judgment as a matter of law on Plaintiff's claims for loss of future earning capacity, arguing that her claims were too speculative and were unsupported by her own testimony or that of any witness at trial – fact, lay, or expert. Carnival hereby renews that motion and in support thereof states as follows:

Plaintiff's claim for loss of earning capacity is completely speculative and unsupported by any competent evidence. According to her own expert witness Gerri Pennachio, the testimony of her husband, John Kaba, and her own testimony, Mrs. Kaba had not worked in a quarter of a century, since she left the only job she had ever had (and which she held for four years), and had no *definite* plans to return to any specific line of work either at the time of her accident, or the time of trial.

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Mrs. Kaba testified, unequivocally, that since 1985 she had not: (1) applied for a single job; (2) taken any vocational training courses or classes[2]; (3) made any attempts to find or identify any jobs; and (4) had not spoken with anyone other than her husband, in very general terms, about one day *possibly* returning to work.

Though Plaintiff's expert witness speculated that the Plaintiff might be suited for, and might find a job as, some type of administrative clerk or assistant, there was no evidence that Mrs. Kaba had either the training or experience requisite for these positions, and no evidence that the jobs were numerous or easy to come by in her geographical area.

Plaintiff failed to present any evidence to allow the factfinder to reasonably calculate lost earning capacity. Cf. Eagle Atlantic Corp. v. Maglio, 704 So. 2d 1104, 1105 (Fla. 4th DCA 1997). Moreover, as noted, there no was evidence concerning the employment market for a person of her age and educational background. Id. Thus, there is no basis for an award of future damages. Id.

The impairment of loss of earning capacity must be shown with reasonable certainty, and there must be evidence that will allow the factfinder to arrive at a pecuniary value for the loss. Allstate Ins. Co. v. Shilling, 374 So. 2d 611, 612- 13 (Fla. 4th DCA 1979).

"Once sufficient evidence is presented, the measure of damages is the loss of capacity to earn by virtue of any impairment found by the [factfinder] and the [factfinder] must base its decision on all relevant factors including the plaintiff's age, health, habits, occupation, surroundings, and earnings before and after the injury." W.R. Grace & Co.-

[2] The lone exception being a real estate agent class she took several years prior to the accident and which she did not pass or retake after failing.

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Conn. v. Pike, 661 So. 2d 1301, 1302 (Fla. 3d DCA 1995). "Each of these steps is critical in the . . . determination of an award for loss of future earning capacity." Id.

Of course, Plaintiff had no earnings either before or after her injury, and that "critical" step in the determination of her claim for loss of earning capacity thus cannot be considered.

A damage award that is based on conjecture that a plaintiff would have made more money in the future, when evidence in the record fails to establish with any degree of precision the actual monetary gains, is not reasonably supported by evidence in the record. Deakle v. John E. Graham & Sons, 756 F.2d 821, 829 n.4 (11th Cir. 1985).

Furthermore, this Court is not required to accept that, e.g., Mrs. Kaba would have worked full-time in the future, or for twelve months each year. Cf. Hassan v. United States Postal Serv., 842 F.2d 260, 266 (11th Cir. 1988).

What was done in this case by Ms. Pennachio, Plaintiff's expert, is similar to what was done by the plaintiff's expert in Subaqueous Servs., Inc. v. Corbin, 25 So. 3d 1260 (Fla. 1st DCA 2010), in which the expert "surveyed a broad range of vocations and attendant income statistics" and attempted to apply it to the plaintiff's claim for loss of earning capacity. Subaqueous Servs. at 1267. The appellate court took issue with this, stating:

> Fully understanding that Florida law emphasizes the claimant's capacity to earn, we are not persuaded [the expert] established [plaintiff's] loss of future earning capability with sufficient reckoning. [Expert] based the earning capacity calculation almost entirely on the aforementioned amalgam of diverse occupations, **casting the $25,000 per year estimate adrift from a historical reality spanning the better part of 40 years.**

Id. at 1268.

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The court in Subaqueous Servs. found that the expert's testimony was not imbued with "the necessary degree of certainty." Id. That is equally the case here, where Ms. Pennachio's projections were cast adrift from the historical reality of Mrs. Kaba's life and the better part of three decades in which Mrs. Kaba has not worked, applied for a job, or made any attempts to gain job training. The expert's testimony in the present case was purely speculative, it cannot support a claim for loss of earning capacity, and this Court owes it no deference.

Plaintiff's claim for loss of future earning capacity / wages was not reasonably supported by evidence in the record, and was based on mere conjecture. Deakle v. John E. Graham & Sons, 756 F.2d 821, 829 n.4 (11th Cir. 1985). Thus, the award for loss of future earning capacity must be reversed and judgment entered on Carnival's behalf on that claim. Plaintiff should not receive any award at all for her speculative future loss of earning capacity. The amount should be remitted to zero, and the Court's Findings amended, and the Final Judgment altered and amended to reflect that fact.

Plaintiff's Claim for Future Pain and Suffering

The award to Plaintiff for her future pain and suffering, $1,960,000.00 (DE #132, ¶ 20.b., ¶ 29) is unsupported by the evidence and excessive, and a new finding in this regard must be entered and the judgment amended accordingly.

"A verdict must be set aside if it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the trier of fact may properly operate." Johnson v. U.S., 780 F.2d 902, 908 (11th Cir. 1986).

Here, the evidence was that Plaintiff's mental and physical condition has improved dramatically since her September, 2010 surgery and recovery immediately

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following the same. The record is clear that Plaintiff's darkest times are behind her and, although she continues to have certain limitations, she has been able to get on with her life and enjoy a greater sense of normality since recovering from her September, 2010 surgery than for the 16 month period following her August, 2009 accident.

Mrs. Kaba testified at trial that she now enjoys a range of motion between 90-95 degrees to her right knee, whereas prior to the September, 2010 surgery, she could not bend her knee at all. Mrs. Kaba can bathe herself, cook the majority of meals for her family, clean her home, drive her car, walk without the use of any devices other than her knee brace, and go up and down the stairs in her three-story home – Mrs. Kaba was unable to do any of these things prior to her September, 2010 surgery.

Mrs. Kaba has not had any modifications made to her home – no elevators, lifts, ramps, widening of doors, removal of walls, modifications to her bathroom, etc. Mrs. Kaba has not had to hire a single individual to drive, cook, or clean her house or care for her children. She has not made any modifications to her vehicles or applied for or been given a handicap sticker. In fact, Mrs. Kaba's vocational rehabilitation expert, Gerri Pennachio, testified that she had removed her prior recommendation that her vehicle be modified based upon her recovery. It is also noted that Ms. Pennachio admitted that there was no need or recommendation for any attendant care in her report.

At trial, when confronted with Mrs. Kaba recovery following the September, 2010 surgery, Ms. Pennachio also deleted her recommendations for prescription pain killers (Percocet) and the left foot accelerator and acknowledged that KABA had absolutely no medical procedures scheduled or expected, including the sympathetic nerve blocks included in her life care plan.

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An award of nearly two million dollars is simply excessive, particularly in light of the Court's $210,000 past pain and suffering award. The award of $1,960,000.00 is inordinately large, and must be set aside. The amount should be remitted to something closer to the range suggested by Carnival at trial and evidenced by the jury verdicts submitted to the Court by Carnival at the close of evidence; alternatively, a new trial should be allowed on the issue of Plaintiff's claim for future pain and suffering.[3]

Plaintiff's Claim for Future Medical Expenses

The Court awarded Plaintiff future medical expenses in the amount of $373,564.00. (DE #132, ¶ 17.b., ¶ 28). This number represents the precise mid-point between the evidence Carnival put on as to the lowest number for Plaintiff's future medical expenses ($224,261.00), and Plaintiff's suggested lowest award for future medical expenses ($522,867.00). It thus appears possible that the amount may have been a compromise amount or award.

Generally, a compromise verdict is invalid, and returned an invalid compromise verdict, Alabama Great Southern R. Co. v. Allied Chem. Corp., 501 F.2d 94, 97 (11th Cir. 1974), and cannot be allowed to stand. Davison v. Monessen Southwestern Ry. Co., 144 F. Supp. 599, 600 (D.C. Pa. 1956). The $373,564.00 should not be allowed to stand, because it is unsupported by the evidence, and appears to be an amount that was arrived at by compromising the two disparate amounts suggested by the parties.

The Court should enter an Order amending its Findings, and altering and amending the Final Judgment, and should find that Plaintiff's future medical expenses

[3] "[T]he district court has authority under Rule 59(a) of the Federal Rules of Civil Procedure to order a partial new trial." Burger King Corp. v. Mason, 710 F.2d 1480, 1489 (11th Cir. 1983).

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are no more than $224,261.00. There was absolutely no evidence presented at trial that Plaintiff will ever need or undergo the expensive sympathetic nerve block procedures her vocational rehabilitation expert, Gerri Pennachio, included in the amount requested by Plaintiff. On the contrary, the record is uncontroverted that Mrs. Kaba (1) has not had a sympathetic nerve block or other such procedure since her September, 2010 surgery by Dr. Wickiewicz; (2) no doctor or other medical provider has recommended, scheduled, or suggested that Mrs. Kaba will need such a block or procedure following her September, 2010 surgery; and (3) Mrs. Kaba does not have any such block or procedure scheduled or contemplated at any point in her future. Accordingly, the court should remit the award to the amount of $224,261.00, which is an amount that does not include the cost of sympathetic nerve block procedures, since there is absolutely no evidence that she will / may undergo any in the future.

Plaintiff's Claims for Prejudgment Interest

"In cases arising under federal law, the award of prejudgment interest is a discretionary matter for the district court." In re Air Crash on December 20, 1995, Near Cali, Colombia, No. 96-MDL-1125, 1998 WL 1770591, at * 4 (S.D. Fla. Feb. 25, 1998). Even in admiralty cases, "[t]he decision of whether to award pre-judgment interest is left to the trial court's discretion," and is thus not mandatory. *See* Miller Indus. v. Caterpillar Tractor Co., 733 F.2d 813, 822 (11th Cir. 1984). "The Court must remain mindful of the fact that the purpose of awarding prejudgment interest is compensatory." Allstate Ins. Co. v. Palterovich, 653 F. Supp. 2d 1306, 1327 (S.D. Fla. 2009) (citing Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1550 (11th Cir.1987) and Armco Chile Prodein, S.A. v. M/V Norlandia, 880 F. Supp. 781, 797 (M.D.Fla.1995)).

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Here, there is nothing to compensate Plaintiff *for* on her claims for future medical expenses—many if not most of which may or may not ever be incurred—or on her claims for loss of future earning capacity, which were unsupported and ultimately unproven. Plaintiff should not be awarded prejudgment interest on amounts she has not already expended, may never expend, and/or to which she is not legally entitled. This Court is not bound to award Plaintiff prejudgment interest on all her claims and, in fact, should not.[4]

Carnival is mindful of the Court's position that prejudgment interest is available for past pain and suffering. However, the prejudgment interest should not apply to an award for *future* damages – either economic or pain and suffering. Harnesk v. Carnival Cruise Lines, Inc., No. 87-2328-Civ-Davis, 1991 WL 329584, at *6 (S.D. Fla. Dec. 27, 1991) ("Prejudgment interest shall only be applied to Plaintiff's award for medical expenses and ***past*** pain and suffering. However, prejudgment interest shall ***not be applied to an award for future pain and suffering***." *emph. added*).

Moreover, Florida law only provides for prejudgment interest on *past* damages – i.e., those which Plaintiff actually incurred *after* the date of loss, but *before* judgment. Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985).[5]

[4] CARNIVAL respectfully reminds the Court that CARNIVAL stipulated to judgment as to the Plaintiff's claim for prejudgment interest on her past medical expenses, as well as the past medical expenses themselves.

[5] In her Complaint (DE #1, 5/19/10) KABA invokes not only the maritime statute (28 U.S.C. § 1333) as a basis for jurisdiction, but also the diversity statute, 28 U.S.C. § 1332. Accordingly, Florida law applies to this diversity action. See, e.g., Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n., 117 F.3d 1328, 1336 n.3 (11th Cir. 1997) ("The parties do not dispute that Florida law applies to this diversity action.") Under Florida law, prejudgment interest is not available for past non-pecuniary claims for pain and suffering. *See* Zorn v. Britton, 162 So. 879, 881 (Fla. 1935) ("We have never recognized an allowance of interest on unliquidated damages for personal injuries, and the general rule seems against such allowance in the absence of statute providing for it.").[5] "Historically, plaintiffs in personal injury cases have not been entitled to prejudgment interest." Amerace Corp. v. Stallings, 823 So. 2d 110, 112 (Fla. 2002) (*citing* Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985) ("[w]hen a verdict liquidates damages on a plaintiff's **out-of-pocket, pecuniary** losses, plaintiff is

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Thus, in accordance with maritime law together with Florida law (which applies to this diversity action), any prejudgment interest award must be limited to her claims for ***past*** medical bills she actually paid, out-of-pocket and, possibly, her claims for ***past*** pain and suffering.

If the Court awards any prejudgment interest at all, it should limit the interest to KABA'S liquated claims, and should not allow it on her future claims. *See* Harnesk v. Carnival Cruise Lines, Inc., *supra*.

WHEREFORE, Defendant, CARNIVAL CORPORATION, prays this Honorable Court for entry of an Order:

i. Granting a judgment to CARNIVAL as a matter of law on Plaintiff's claims and, in particular, her economic claims;

ii. Setting aside the Court's Findings of Fact and Conclusions of Law (DE #132) and substituting them with findings in keeping with this Motion;

iii. Altering and amending the Final Judgment (DE #133);

iv. Granting a new trial on the excessive damages award or allowing a remittitur of the amount; and

v. Granting all such other and further relief as this Court deems just and equitable.

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entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss") (emphasis supplied).

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing was electronically filed this 23rd day of May, 2011 using the Court's CM/ECF filing system, which will send electronic notice of the same on all interested persons listed in the attached Service List.

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