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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

DEBORAH ANNE SMITH,

Plaintiff,

-against-

CLIFFORD C. VOHRER, LEASE PLAN USA, INC., DANIEL SOTOMAYOR and LA MANADA AUTO CORP.,

Defendants.

MEMORANDUM DECISION/ ORDER
Index No.6677/04

HON. MARK FRIEDLANDER:

Defendants Clifford C. Vohrer and Lease Plan U.S.A., Inc. (hereinafter collectively referred to as Vohrer), as well as Defendants Daniel Sotomayor and La Manada Auto Corp. (hereinafter collectively referred to as Sotomayor) move for an order, pursuant to CPLR 4404, setting aside the verdict and entering judgment notwithstanding the verdict, or, in the alternative, granting a new trial, on the grounds that the verdict is against the weight of the credible evidence.

That portion of the applications which relates to the question of whether plaintiff suffered a serious injury is decided in another order, issued simultaneously herewith. All other aspects of the two applications (papers relating to which are contained in a separate motion folder) are addressed hereinafter.

The motion made by Vohrer includes a request for an order, pursuant to CPLR 4401, renewing trial motions by Vohrer on the same subjects treated herein. The court will treat the portions of Vohrer's applications addressed hereinafter as made pursuant to CPLR 4404 only. A motion made pursuant to CPLR 4401 is made during the trial; a motion made pursuant to CPLR 4404 is made post-trial. As a post-trial motion, a CPLR 4404 motion often concerns issues raised at the time of trial, which is equivalent to

what Vohrer terms a "renewal" of Vohrer's trial motions made pursuant to CPLR 4401 (see Siegel, New York Practice,[Fourth Edition], p.685).

This is a personal injury action in which plaintiff alleges that she was injured as a result of a motor vehicle accident which took place at the intersection of Bruckner Boulevard and 138th Street, Bronx, New York on September 17, 2002. Plaintiff was a passenger in the back seat of a livery vehicle owned by defendant La Manada Auto Corp. and operated by defendant Daniel Sotomayor, which came into contact with the vehicle owned by Lease Plan USA, Inc. and operated by Clifford Vohrer.

The Sotomayor vehicle was in the far right lane of Bruckner Boulevard and had just begun to accelerate through the intersection with 138th Street, after its red light allegedly changed to green, when it was hit on its right side, within the intersection, by the Vohrer vehicle, causing the Sotomayor vehicle to spin and hit a building wall. The Vohrer vehicle had been traveling on 138th Street, and Vohrer claimed that he, too, had the green light to proceed through the intersection with Bruckner Boulevard.

The trial of this action commenced on May 30, 2007 and the jury reached its verdict on June 7, 2007. The jury found Vohrer to be 60% responsible for the accident, and found Sotomayor to be 40% responsible. The jury awarded Plaintiff $175,000 for past pain and suffering, and $260,000 for future pain and suffering, for a total award of $435,000. Plaintiff was 48 years old at the time of the accident and 53 years old at trial.

I. Bases for the Post-Trial Motions.

Sotomayor's post-trial motion contains five parts (other than the serious injury issue, which is treated in the accompanying decision): First, that the finding of 40% liability on the part of Sotomayor was contrary to the weight of the evidence; Second, that the mention of the word "insurance" during trial was prejudicial, Third, that service of a summons and complaint on Sotomayor outside the courtroom might have tainted the jury and was therefore prejudicial; Fourth, that the jury improperly failed to

consider Plaintiff's failure to wear a seatbelt as a factor in mitigating damages; and Fifth, that the damages awarded were excessive.

Vohrer's motion repeats the Sotomayor arguments as to the mention of the word "insurance" and as to the Plaintiff's non-use of her seatbelt. Vohrer also seeks a setting aside of the jury verdict on the ground that he should not have borne any liability for the collision. In this sense, his ground is similar to the first ground asserted by Sotomayor, supra, but is its mirror image. Finally, Vohrer sets forth two additional grounds for his motion: First, that Plaintiff's physician improperly testified with regard to an examination of Plaintiff on the eve of trial (as to which no report was made or exchanged) and also made reference to Plaintiff's need for future surgery; and, Second, that the Court wrongly instructed the jury on the issue of aggravation of Plaintiff's pre-accident condition.

For the reasons set forth infra, the applications of Sotomayor and Vohrer are denied in all respects and the jury verdict is allowed to stand as recorded. It need not be belabored that the Court should not usurp the jury's function and find a verdict to be against the weight of the evidence unless there is no fair interpretation of the evidence which could possibly sustain the verdict. Although such motion is addressed to the discretion of the Court, the Court should not interfere with the jury's fact-finding unless it determines that no reasonable jurors could have reached the verdict in question on the basis of the testimony at trial. See generally, Lolik v. Boig Supermarkets, 86 N.Y.2d 744; McLoughlin v. Hamburg, 227 A.D.2d 951.

II. The Apportionment of Fault.

With respect to apportionment of liability, Sotomayor now argues that the jury finding of 40% of fault on his part was unreasonable, while Vohrer argues that Sotomayor bears all of the fault, and that the finding of 60% of fault on the part of Vohrer is therefore unreasonable. Neither defendant makes a persuasive argument that the jury was unreasonable. Sotomayor claimed that he proceeded through a

traffic light which had just turned green. Plaintiff, who was seated in his car, agreed at trial that Sotomayor had the green light. Since it was not in Plaintiff's interest to exonerate defendant Sotomayor in any respect, the jury could well have found Sotomayor's account credible.

However, Sotomayor's current application goes further, by arguing that such finding creates a presumption that Vohrer proceeded through a red light, and bears all the blame. Vohrer, in his testimony, claimed that he had the green light. He pointed out that he had to get through many lanes of busy traffic to hit the other vehicle on the far side of the intersection, a feat which would have been impossible, in the heavy cross-traffic of Bruckner Boulevard, if he had indeed proceeded through a red light. Sotomayor had testified that his vision to his left was blocked by a large truck, which started to move forward at the same time he did. Apparently, the truck observed Vohrer's car coming through and stopped, but Sotomayor continued forward, not seeing the Vohrer car until he was hit.

While Sotomayor blames Vohrer for going through a red light, Vohrer blames Sotomayor for proceeding blindly into an intersection while his view was blocked by a truck, citing cases which hold that, even when proceeding through a green light, a driver must still exercise care to see what he should see, particularly a vehicle in the intersection which is likely to collide with his. (See PJI 2:79). Sotomayor argues that PJI 2:79 does not refer to a driver whose vision is obscured completely, but this assertion is unpersuasive. The examples provided cannot possibly cover every eventuality and are not meant to be exhaustive. In any event, despite Sotomayor's unconvincing criticism of Schiskie v. Fernan, 277 A.D.2d 441, as insufficiently explained, it does tell us that proceeding into an intersection, with a green light, but with an obstructed view, can support liability. In Schiskie, the driver with the green light was found 100% responsible, but such harsh result is inappropriate here, partly because Sotomayor may have relied on other factors in his decision to proceed, as explained infra.

The precedents cited by each defendant are neither controlling nor even persuasive, as the

particular facts adduced here are not reflected in such decisions. It is true, as Sotomayor argues, that Vohrer's account is unsupported by anyone else and is entirely self-serving. It is also true, as Vohrer argues, that Sotomayor might have had a duty to anticipate that, at the turn of the light, vehicles from the side street might still be crossing the wide boulevard. Sotomayor did testify that he went forward as soon as the light changed and that the accident occurred almost immediately.

If Sotomayor was depending on the truck to determine the safety of proceeding, such calculation was not entirely unreasonable, as the truck would also have shielded him from harm, being between him and the crossing traffic. It might not have been reasonable for Sotomayor to wait while the truck passed entirely (as traffic backed up in his lane) in order to see to his left. However, if this was his plan, how did it happen that the truck stopped entirely to let Vohrer pass, while Sotomayor proceeded forward, not seeing Vohrer until he was hit? If Sotomayor sought to depend on the high vantage point of the truck driver as his substitute eyes, his duty included continuing to monitor the truck through the whole intersection, rather than accelerating past it (and looking only forward) while still in danger. Considering that this was a driver who was obeying the traffic signal, it cannot be said definitively that his conduct bears any less or more than 40% responsibility for the ensuing accident. The jury's finding is thus not unreasonable.

The jury could also have had a reasonable basis for inferring that Vohrer's conduct consisted of rushing through the intersection at the last moment, while the light was about to turn red. Vohrer may have hoped to make it to the other side before the Bruckner traffic began to flow. Although the exact number of lanes in Bruckner Boulevard was the subject of some dispute during Vohrer's testimony, the jury was clearly aware that it was a very wide avenue, with central lanes and service road lanes on each side. Even if the jury had believed Vohrer's unsupported testimony as to having the green light (on the basis that he could not otherwise have gotten through the cross-traffic), they might have reached the

conclusion that he recklessly dived into the wide intersection at the last moment. The pre-trial instructions given to jurors encourage them, in the face of conflicting accounts, to try to "reconcile" the accounts by fitting the two stories together. The jurors could well have followed such instruction, as indicated above, and such reconciled account could well and reasonably support a finding of 60% of fault on the part of Vohrer.

By reason of the foregoing, neither defendant has made a persuasive argument that the jury's verdict should be set aside, in order to diminish his respective share of the fault as apportioned by the jurors.

III. The Utterance of the Word "Insurance."

Sotomayor's second point, that the trial was prejudiced by the mere mention of the word insurance, is echoed by Vohrer as well. Such argument must fail. In the first instance, it should be noted that both defendants here embarked upon a noticeable strategy, during trial, of repeatedly seeking the declaration of a mistrial. Whenever a purported issue arose, the reaction of both counsel was invariably to declare the problem irremediable. At no point was a curative instruction ever requested, or acknowledged to be of possible help. While defendants may have made a strategic calculation that bringing an end to this particular trial was in their long term interests, their repeated requests served to alert the Court that every purported departure from proper procedure would be characterized as overwhelmingly prejudicial.

The instance of the mention of the word "insurance" was characteristic of the above pattern. It was elicited, not by Plaintiff's counsel, but by counsel for defendants. (Both movants, in their moving papers, misleadingly attempt to obscure the fact that this question was posed by defendants). In seeking to elicit whether Plaintiff was examined by one of their physicians, the attorney cross-examining Plaintiff asked repeatedly whether Plaintiff was told by her attorney to go to another doctor. Plaintiff finally

responded that she received letters to go see the "insurance company," and then continued immediately, "I have been to several doctors.. " No other reference to insurance was made or elicited. Defendants sought no curative instruction, only the declaration of a mistrial.

It was clear from the context that Plaintiff had not been primed to mention the word. Thus, no fault can be laid to Plaintiff or her counsel. Nor did defendants necessarily expect that their queries would elicit this mention. In fact, all parties were probably correct in not requesting a curative instruction, because such instruction would only have drawn attention to the subject. As it is, the mention passed so quickly that it had no discernable effect on any juror. It was not even clear whether Plaintiff was referring to liability insurance or medical insurance. If a single fleeting reference to the word insurance were held to immediately pollute all our trials, far too much waste of court resources would follow.

The cases cited by movants in this regard are inapposite, in that they deal with far more emphasis at trial on the concept of insurance. Defendants also cite cases from the early part of the 20th century when automotive insurance was a far more novel concept, not yet legally required for all drivers. In this day and age, jurors, most of whom are drivers, have surely internalized the role of insurance companies in automobile accidents, and, while we still try to de-emphasize insurance coverage at trial, the argument that mere mention of the word taints the whole process is an elevation of unreality above common sense. By reason of the foregoing, there was no reason to declare a mistrial following the inadvertent use of the word insurance.

IV. The Service of Process at the Courtroom Door.

Sotomayor next argues that the service of process on him outside the courtroom was a basis for declaration of a mistrial. Apparently, the lessee of the Vohrer vehicle initiated an action for property damage against Sotomayor, by serving process in the Bronx courthouse on the fourth day of this six day

trial. Counsel for Vohrer denied any connection to this event, claiming he represented Vohrer only on the personal injury action. Sotomayor's counsel moved again for mistrial, claiming the jury might have been influenced by the event. Counsel for Sotomayor, in the instant motion, mischaracterizes the Court's denial of a mistrial by claiming that the Court said it "was not clear" whether any jurors saw the service of process. In fact, this Court denied the application for mistrial because Sotomayor had produced no evidence whatsoever that any juror saw, heard or was within the vicinity of, the event complained of.

While Sotomayor's counsel may have been considerably exercised by the action taken at that place and time, with its attendant possibility of inflaming the jury, counsel's indignation, without more, is not a basis for declaring a mistrial, four days into the trial. Indeed, the possibility of a juror witnessing the event was remote. The jurors were, at the time, sequestered in the jury room, awaiting the beginning of the trial day. The hallway entrance to the courtroom was not adjacent to the jury, but was sufficiently distant that two doorways would have to be traversed from there to get to the jury room, with the second entrance being closed.

To say that the process server came "from the direction of the jury room," as Sotomayor's counsel does, is disingenuous, if it is meant to signify that the process server was likely to have been anywhere near the jury room. In fact, there would have been no reason for the process server to go anywhere near the jury room, by traversing even the first door (leading to the corridor containing the closed door to the jury room).

There having been no indication offered by anyone that a single juror saw or heard the event, it would have been not only error, but folly, to sacrifice the trial in progress, on the basis of sheer speculation as to what could have occurred under other circumstances. Significantly, counsel never requested a polling of the jury, even for the limited purpose of determining if jurors had been outside the jury room during the previous fifteen minutes (or however long it was between the event and the

complaint to the Court). The Court concluded that neither counsel nor his client actually believed that any juror had been anywhere nearby. In addition, following trial, counsel, who were invited to speak with the jurors, could have posed this question to the jurors (as they were planning post-trial motions) but apparently, they did not do so. Consequently, such portion of the application as seeks a setting aside of the verdict by reason of the service of process on Sotomayor is denied in all respects.

V. The Seatbelt Issue.

Both defendants next argue that the jury should have diminished the award to Plaintiff by an amount reflecting Plaintiff's failure to wear a seatbelt, and that the jury's failure to do so was unreasonable and should require a setting aside of the verdict. Defendants did adduce expert testimony to the effect that the wearing of a seatbelt would have prevented Plaintiff from sustaining the injury to her knee, by preventing her knee from coming into contact with the interior of the car. Significantly, though, the effect of such testimony was mitigated by the testimony of Plaintiff's physician that Plaintiff's injury could have been caused by a twisting motion (unrelated to hitting the surfaces in the car), and by Plaintiff's earlier account at trial that, at the time of the accident, it seemed to her that "someone twisted and wrenched" her knee.

Although the jury could reasonably have found from the above that none of Plaintiff's injuries needed to be ascribed specifically to her failure to use a seatbelt, the most important single fact here is that the jury never reached this question. Instead, the jury answered (Question 12 on the verdict sheet) that a reasonably prudent person in Plaintiff's position would not have worn a seatbelt. Under these circumstances, the jury was specifically instructed to skip the question as to the proportion of Plaintiff's injuries caused by the lack of seat belt use, and all of the extensive argument of the parties on this subject is rendered irrelevant.

It cannot be argued that the jury had no reasonable basis for its answer to question 12. In this

instance, no statute required the use of a seat belt (in the back seat of a livery vehicle). In fact, the lack of statutory requirement is the reason that question 12 was presented to the jury. The PJI directs the use of such question. If it were to be the presumption that all reasonable people used their seatbelts, the question would become meaningless. Clearly, there exist circumstances under which it is reasonable not to have donned a seatbelt.

Here, where Plaintiff was taking a short trip on city streets, in the back seat of a large and heavy livery car, the jurors may have felt that the reasonable person would not have thought a seatbelt necessary. It matters not that statistics may show seatbelts to be advisable even under these circumstances. The mere fact that question 12, as phrased, is in use, instructs us that a jury may find it reasonable for a Plaintiff to eschew the seat belt under some circumstances. It is surely reasonable to conclude that the circumstances here, as outlined above, present a case which is very close to that end of the spectrum where the failure to fasten a seat belt does not seem unreasonable. Indeed, it may be argued that most jurors know better than counsel and the Court what the common convention is for passengers like Plaintiff who use livery cars to commute to work.

The cases cited by movants are not persuasive, in that they deal with situations in which seat belt use was mandatory (thus obviating the need for a finding as to reasonableness), or they are older cases, tried before seat belt use was mandated, but dealing with driver use of the seat belt, which, at the very least, is more likely to be found to be impelled by prudence than is the use in the instant case. In light of the foregoing, the Court sees no reason to disturb the jury's finding as to the effect (or lack thereof) of Plaintiff's failure to use a seat belt, on the damages awarded to her.

VI. The Testimony of Plaintiff's Physician.

Vohrer argues that the verdict should be set aside because Plaintiff's physician was permitted to testify as to his examination of Plaintiff just before trial, and because Plaintiff's physician referred to the

possible future need for knee replacement. Vohrer asserts that no report was exchanged prior to trial, relating to the May 2007 examination of Plaintiff by Dr. Struhl. Vohrer further argues that the doctor was impermissibly allowed to testify as to Plaintiff's development of traumatic arthritis over the period from his last examination to May 2007, that arthritis had not been previously claimed by Plaintiff and that defendants could not prepare to counter this evidence because of the surprise at trial. Plaintiff, in response, contends that Dr. Struhl, as a treating physician, was able to testify without the previous exchange of a report, and that, in any event, no report of the May 2007 examination had ever been prepared.

Movant's cited cases as to his purported surprise at trial are not persuasive. They deal, almost entirely, with situations in which the injury or claim testified to at trial was distinct from, or unrelated to, or even contrary to, that claimed prior to trial. Here, the treating physician testified to a natural and expected sequella of traumatic joint injury, not at all at variance with Plaintiff's prior claims. Defendants, who knew that Plaintiff had claims for future pain and suffering, could have anticipated that an update on her condition would be offered, and nothing in the update could have come as a surprise. As a consequence, this Court allowed the doctor's testimony over objection. When the doctor also made very brief reference to a possible future need for knee replacement, the Court cut him off, and informed the jury that such item would not be before them for consideration. This was done because, at least arguably, such conclusion went beyond what defendants could have anticipated from Plaintiff's claims before trial.

The Court is not convinced that discussion of the possibility of knee replacement should necessarily have been prohibited. Having presided over many trials relating to traumatic knee injury, the Court has observed first-hand how consistently such injuries are predicted to result in the eventual need for knee replacement. It may be that such a sequella of knee injury is as expected as the development of traumatic arthritis. However, in the exercise of caution, the Court precluded it and so advised the jury.

Movant's request for a mistrial based on this brief mention is therefore overreaching.

Movant has not contested the fact that Dr. Struhl was a treating physician, and does not convincingly address the fact that his reports did not need to be exchanged (if they existed). The cases cited by movant in this regard may quote generic propositions as dicta, but rule against the defendants in those situations. By contrast, the law in the First Department is clear that the exchange requirement does not apply to treating physicians. Finger v. Brande, 306 A.D.2d 104. Because the treating physician properly testified only as to items that are natural and expected outgrowths of the detailed injury already disclosed to defendants, no part of the testimony received in evidence could have prejudiced defendants or constituted a ground for mistrial.

VII. The Jury Instruction on Aggravation.

Vohrer next seeks a mistrial on the ground that the Court gave an improper instruction to the jury. The instruction in question is PJI 2:282, relating to aggravation of Plaintiff's pre-existing injury. Vohrer maintains that the instruction was fatally prejudicial: Because Plaintiff had not claimed aggravation in her pre-trial pleadings; because Plaintiff offered no evidence of aggravation at trial; because neither party had requested such instruction; and because the Court informed the parties that the instruction would be given just after the summations, thus preventing the defendants from commenting on it in their closings to the jury.

The Court does not find the above arguments to be persuasive. In the first instance, Plaintiff's Bill of Particulars does make reference to "aggravations," thus resolving the hyper-technical need to find a predicate for considering such issue at trial. More importantly, however, it was defendants who offered to the jury a theory based on aggravation, when their medical expert testified clearly that Plaintiff had a pre-existing arthritic condition which was exacerbated by the car accident (R. 334). Once defendants placed this concept before the jury, it was certainly necessary for the jury to be instructed as to how such notion,

if adopted by them, was to be handled. Thus, although Plaintiff did not present evidence of aggravation at trial, preferring instead to seek damages for the total injury to Plaintiff's knee, defendants opened the door to the need for the instruction and cannot be heard now to say that it was improper.

It is also proper to include a jury charge despite the fact that neither side has requested it, if such charge is relevant to the evidence presented. Movant has cited no authority to limit the Court to charging only those charges requested by the parties, and indeed such rule would defy common sense.

The claim by defendants that the instruction came as a surprise to them is equally surprising to the Court. It is a consistent practice of the undersigned to consult carefully with counsel as to the jury charges to be given. Much of this discussion takes place off the record, after which counsel are given the opportunity to make a record as to their objections. The Court will give counsel the benefit of the doubt and accept their claim that they were unaware the aggravation charge would be read to the jury. In the first place, the Court has no clear memory of the circumstances to call upon, for the purpose of offering a different account. Second, it is presumed that the record of trial shows the Court acceding to counsel's claim of surprise (although movant has not attached a copy of the record relating to objections prior to the charge and the Court's response thereto).

The undersigned believes that it is most likely that counsel and the Court (or the law secretary) discussed the aggravation issue at some point, but that the Court did not alert counsel specifically at the point when it was finally decided by the Court to include the aggravation charge in the jury instructions. Nevertheless, even if defendants were unaware during their summations that aggravation would be charged, there is no basis in this for a mistrial, because there is no prejudicial error.

The objections by defendants were raised immediately following summations. If defendants truly felt prejudiced, they could have requested a re-opening of their summations, which would have been granted by the Court. They did not do this, and their choice not to do so was very much in keeping with

their practice throughout the trial, as mentioned supra, of repeatedly finding reasons to seek a mistrial. Defendants, possibly for strategic reasons, resisted the idea of curing any purported error, preferring to insist that all such alleged errors were "incurable." It is also revealing that this Court denied the motion for mistrial immediately after hearing the summations. Undoubtedly, with the summations fresh in memory, the Court was aware of how completely counsel for defendants had covered the issues, and protected their interests, even considering the impending use of the aggravation charge. Tellingly, movant does not now submit to the Court any portion of the record relating to summations, to point out where the missing piece should have been added.

Further, the aggravation charge related to evidence raised by defendants themselves during trial, and was therefore, in part, conceived to assist them, in minimizing the damages to be awarded, should the jury credit the contention of their expert that there was an exacerbation of a pre-existing injury. Under such circumstance, they forfeited the right to insist on knowing about the charge before summations, because they neglected to ask for the charge in the first place; but they also cannot invoke the right to complain about the ultimate use of the charge, when its design was to enable the jury to minimize their liability, as their expert had suggested. At the very least, such error, if error it was, cannot rise to the level of requiring a setting aside of the verdict.

Finally, the jury's eventual award is of a level that indicates that they did not pay heed to the concept of aggravation. While a bare number given by the jury is never absolute proof of their view of a case, experience dictates that the amount awarded by the jury here was probably for the full extent of Plaintiff's knee injury. If the jury did not find the concept of aggravation to be controlling here, the giving of the charge becomes irrelevant. For all of the above reasons, that portion of Vohrer's motion which seeks a mistrial based on the Court's instructions to the jury is denied in all respects.

VIII. The Amount of the Damages.

Both defendants move to reduce the damages awarded as excessive. As indicated supra, the jury awarded $175,000 for past pain and suffering, and $260,000 for future pain and suffering The total award was thus $435,000. Movants invoke other cases in which amounts awarded were lower or were reduced below the level awarded here. However, there is great difficulty in comparing injuries and plaintiffs, because the variation in details of the injury, and in the plaintiffs themselves, is not always apparent from the descriptions in past decisions.

In general, the precedents cited by both Plaintiff and defendants do not militate in favor of disturbing the jury's award here. Plaintiff cites four instances in which awards of $600,000 were sustained, but, in each situation, for injuries that were greater than those claimed here (meniscus tears plus additional injuries, or meniscus tears with greater number of surgeries). Plaintiff cites another decision which sustained an award twenty thousand dollars lower than the instant one (Lopez v.Con Edison, 40 A.D.3d 221), in compensation for meniscal tears and chondromalacia. While the court there sustained a verdict similar to the instant one, it also emphasized that there were two meniscal tears, although both may have related to the same knee.

Defendant Vohrer cites Gonzalez v. MABSTOA, 160 A.D.2d 420, for the proposition that a court has in the past lowered a jury award for a torn meniscus with cartilage damage. Vohrer does not cite the amounts involved in that case, and his reticence in that regard is clarified when it is discovered that the court there in fact lowered a $1,200,000 award to a mere $600,000. Also, that decision dates from 1990, and inflation has lowered the value of such an award during the past 18 years

Vohrer cites Bartlett v. Snappy Car Rental, 214 A.D. 596, but there a court reduced a verdict to an amount which is not that much lower than the jury award here (a cumulative amount of $385,000 there, as opposed to $435,000 here). Further, although the injuries may have been similar, the court there found

pre-existing injuries. Here, the jury showed no indication of crediting the existence of previous degenerative disease. In Maze v. DiBartolo, 130 A.D.2d 720, also cited by Vohrer, the award was lowered from $300,000 to $100,000, but that case dealt with a back injury, not a knee injury. The court there also found pre-existing back problems, from two prior accidents as well as degeneration, and the court also found that there was no surgery at all, and the injuries were not shown to be permanent. In short, there is no basis at all to compare the instant case to Maze. Other citations by Vohrer are even less illustrative for these purposes.

Sotomayor cites Feliciano v. Ford Motor, 28 A.D.3d 221, a torn meniscus case, wherein the trial court lowered a jury award from a total of $460,000 to $370,000. Upon an appeal by defendant, the Appellate Division, First Department, refused to lower the award any further. This result does not at all imply that the same appellate court would tamper with the jury award here, which is only 18% higher than that upheld a few years ago. It does suggest, however, that the same court, if it entertained the instant application, would lower the instant award no more than that same 18%.

Sotomayor also cites two Appellate Term decisions, which are notable chiefly for the deference shown to jury-determined amounts. Both relate to torn menisci. In one, a jury awarded $330,000, which sum was appealed by defendant and sustained by the Appellate Term. In the other, the jury awarded merely $75,000, which the Appellate Term later raised to $200,000. The amounts by which those awards are lower than the instant award can as easily be laid to (either complete or partial) deference to the jury as to independent evaluation of the injury.

In sum, the totality of the cases cited by all parties leads to the conclusion that this Court can reasonably uphold the award made by the jury, or lower it by an amount up to 15-20%. It would seem that neither result would constitute an abuse of discretion. On balance, therefore, the Court chooses to leave the jury determination undisturbed. In considering all of the evidence presented, the Court sustains

the jury's award of damages and denies those parts of defendants' motions which seek to set aside the jury's award as excessive

By reason of the foregoing, the post-trial motions of defendants are denied in all respects, for the reasons set forth hereinabove.

This constitutes the Decision and Order of the Court.

Dated: 4/2/08

MARK FRIEDLANDER, J.S.C.