SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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MARY LOU KNOCH,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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DECISION/ORDER

Index No. 43944/07

Submitted: 3/14/13
Mot. Seq. No. 3

HON. DEBRA SILBER, A.J.S.C.:

Recitation as required by CPLR 2219(a), of the papers considered in the review of Plaintiff's motion to set aside a jury verdict on damages, or for additur.

Papers	Numbered
Notice of Motion, Affirmations and Exhibits Annexed.....	1-5
Affirmation in Opposition.....	6
Reply and Exhibits Annexed.....	7-9

Upon the foregoing cited papers, the decision/order on this motion is as follows: Plaintiff moves to set aside the jury verdict rendered on December 14, 2012, or in the alternative, for additur. Defendant City of New York opposes the motion. For the reasons cited herein, the motion is denied in its entirety.

The court notes that immediately post-trial, plaintiff moved orally to set aside the jury's $50,000 award for future pain and suffering as inadequate, as well as for being inconsistent with the jury's $31,000 award for future medical expenses. The court granted plaintiff an extension of the statutory time to make such written motion, until February 7, 2013, and the plaintiff timely did so.

Plaintiff was injured in a trip and fall accident which occurred on May 2, 2007 in the roadway in front of 625 Fulton Street in Kings County. As a result of the accident, plaintiff sustained several injuries, including a minimally displaced fracture of her left humerus.

A unified trial was held from December 7, 2012 to December 14, 2012. On December 14, the jury found both the defendant and plaintiff negligent, and found defendant 60% responsible and plaintiff 40%. The jury awarded plaintiff $150,000 for past pain and suffering; $50,000 for future pain and suffering over 20 years and $31,000 for future medical expenses over one year. Plaintiff did not ask for past medical expenses.

Plaintiff now challenges the adequacy of the award for plaintiff's future pain and suffering. In support of the motion, she cites the testimony of her expert, Dr. Laith Jazrawi. Dr. Jazrawi testified that plaintiff sustained a displaced fracture of the greater tuberosity of her dominant left arm, a partial rotator cuff tear, and other injuries, which were caused by the accident.

Dr. Jazwari testified that a minimally displaced tuberosity fracture such as plaintiff sustained is normally placed in a sling for approximately two to three weeks to allow for healing, and then is followed with a gradually increasing physical therapy program in an attempt to regain motion. However, sometimes a patient does not reach their milestones and can develop adhesive capsulitis or other complications. This is what occurred with the plaintiff, he averred. When a patient, such as the plaintiff, does not improve after three or four months, further intervention is necessary. Trial Transcript Page 27. He testified that adhesive capsulitis, also known as "frozen shoulder," is a clinical diagnosis and cannot be seen on an MRI.

The medical evidence demonstrated that plaintiff's treating orthopedist recommended arthroscopic shoulder surgery. Her doctor requested approval for the surgery because the plaintiff was not improving. He requested approval for a procedure known as "arthroscopic manipulation under anesthesia with lysis of adhesions," which is a combination of releasing the scar tissue, debriding the rotator cuff, doing an acromioplasty and a bursectomy (removing the inflamed tissue).

Dr. Jazwari stated that plaintiff should have had the surgery right away, and because she did not have the surgery, she developed adhesive capsulitis, known as "frozen shoulder," which was secondary to the fracture she sustained. Dr. Jazwari said that with the condition known as adhesive capsulitis, the tissue gets inflamed and contracts, so the sac covering the ball and socket isn't loose as it should be, and thus constricts the movement of the shoulder and "sticks" the ball and socket joint together. Dr. Jazwari said the fracture had healed, but the sequellae of the fracture included the scarring of the tissue, causing frozen shoulder syndrome. He put the MRI films on the light box and showed the jury the findings, including the indications of a tear in plaintiff's labrum (part of the rotator cuff) Transcript Page 25. Dr. Jazwari concluded that plaintiff had a permanent disability which constituted a 75% loss of use of her dominant arm. (Transcript Page 40). He described it as permanent, because it was not improving, and would not improve without surgery.

Dr. Jazwari stated that surgery was the only hope for plaintiff's chance of increasing the motion in her shoulder and for potential pain relief (Transcript, p 43, l 14-16). He said that while physical therapy would be required after the surgery, and the eventual outcome was unclear, as there are sometimes still some restrictions of motion

despite surgery, and some patients have some residual pain, the overall results are better than what can be accomplished with non-surgical treatment (Transcript, p 40, l 20-24).

Dr. Jazwari testified that the cost of the surgery would be a maximum of $18,000. He estimated post-surgery physical therapy at $10,000 and medications at $3,000. This is almost exactly the amount the jury awarded plaintiff for future medical expenses. He also opined that the fracture to her humerus had healed, and that it was the capsular contracture (adhesive capsulitis) which was causing her current symptoms. Dr. Jazrawi further testified that the surgery would, if successful, put an end to her shoulder problems.

Plaintiff testified that after the accident, her left arm and shoulder were in pain and painkillers did not work for her. She missed six weeks of work, then still could not drive and worked only four hours a day from home for six weeks.

Eventually, plaintiff was able to work for six hours a day from home and later returned to work full time. She could not drive for six months. She was sent for physical therapy and went for some number of months. In 2008, she made 10 to 11 visits to the doctor for her condition and in 2009, she went every couple of months. She testified she had constant and excruciating pain and could not sleep. If she touched her arm, she would wake up. She could not even use a computer mouse without pain. She testified that she missed the entire boating season in 2007, including fishing, because she could not use her arm to cast a rod. She still cannot go fishing.

Plaintiff testified that her doctor recommended surgery in 2007, but that her employer, the federal government, (which she colloquially referred to as Worker's

Compensation) would not approve the surgery. In 2008, she claims she asked the doctor for the surgery again, but her employer again denied it. Plaintiff testified she had one injection for the pain in her shoulder, but it did not help, so she did not have another.

Plaintiff testified that she is still in pain and cannot go off the anti-inflammatory medication. She has tried and "everything is painful." She takes Ibuprofen in the morning with the anti-inflammatory. She testified that if she could have the surgery now she would. She also said her health insurance would not pay for it because the accident was while she was working. She had no documentary evidence for the alleged denials by either her employer or her insurance company. She was assured her doctor's office sent the paperwork."

Upon cross-examination, and having her memory refreshed with her deposition testimony, some of the details concerning plaintiff's treatment were further illuminated. She began physical therapy in July of 2007, and ceased treatments in November or December of that year. When she began, she had therapy three or four times a week, but then went less frequently after she resumed work. During the period she went to therapy her shoulder improved and her range of motion increased. She admitted her doctor never told her to stop going to therapy. She admitted that she stopped going to physical therapy because it would have required her to come home from work later than she desired, or to take off time from work, which would have reduced her hours for the calculation of her pension. She subsequently retired.

Asked about her reasons for not having the surgery recommended by her doctor, plaintiff stated that she did not have the surgery because it would have meant a temporary loss of use of her arm, having to work from home, not being able to drive,

missing work, and starting all over with her physical therapy. She also said she was "a little nervous about it."

Defendant's expert orthopedist, Dr. Alan Zimmerman, testified that he had reviewed plaintiff's treating doctor's records, and his notes indicate he chose conservative treatment. The fracture healed within six weeks. He stated that this kind of fracture heals well, but gets stiff quickly, so it is important to start physical therapy quickly. Dr. Zimmerman stated that he does not believe that plaintiff has adhesive capsulitis. He said her expert witness had misused the term. However, it must be noted that his exam of plaintiff was four years prior to the trial.

Dr. Zimmerman said the independent medical examination he conducted on November 18, 2008 showed no evidence of a rotator cuff tear, and any indication of such on the MRI must be degenerative. He himself did not view the MRIs.

Dr. Zimmerman said that plaintiff could expect improvement over time, but would never be "perfect"; however he would expect that she would continue to improve, and that if he were to examine plaintiff again, the exam would show further improvement since his first exam. He stated that it was most unlikely that plaintiff requires surgery, and that she will regain her normal range of motion without treatment. He estimated that she suffered a post-accident reduction in the range of motion of her arm of about 25%. He does not question causation.

It is noted that Dr. Zimmerman did not have access to the notes of plaintiff's treating doctor after August of 2007, so he could not know of her treatment, or that surgery was recommended by her doctor.

Plaintiff's motion seeks an order increasing the jury's award for future pain and

suffering. Counsel claims the verdict made clear they had found not only that the plaintiff would require future shoulder surgery, but would also have pain and suffering for the next twenty years, making $50,000 an inadequate amount to cover that time period.

CPLR § 5501(c) states, in relevant part, that the Appellate Division, "in reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven, in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

Trial courts may also apply this material deviation standard in overturning jury awards, but should exercise its discretion sparingly in doing so. *Shurgan v Tedesco*, 179 AD2d 805 [2nd Dept 1992]; *Prunty v YMCA of Lockport*, 206 AD2d 911 [4th Dept 1994]; *Donlon v City of New York*, 284 AD2d 13 [1st Dept 2001]. For guidance, a trial court will typically turn to prior verdicts approved in similar cases, but must undertake this review and analysis with caution not to rigidly adhere to precedents, because fact patterns and injuries in cases are never identical. It is not appropriate to substitute the court's judgment for that of the jurors, whose primary function was to assess damages. *Po Yee So v Wing Tat Realty, Inc.*, 259 AD2d 373 [1st Dept 1999].

It is well settled that the amount of damages to be awarded for personal injuries is primarily a question for the jury, and that great deference is given to its interpretation of the evidence and findings of fact, if there is sufficient support within the credible evidence, even if there is evidence leading to a contrary conclusion. *Vasquez v Jacobowitz*, 284 AD2d 326 [2nd Dept 2001]; *Raucci v City School Dist.*, 203 AD2d 714; *Florsz v Ogruk,* 184 AD2d 546. A jury's award of damages is entitled to great deference

and a court's discretionary power to overturn a verdict must be used sparingly. See, *Reed v City of New York,* 304 AD2d 1 [1st Dept 2003]. The assignment of a dollar value to plaintiff's future pain and suffering was a question of fact for the jury to resolve. See, *Howard v Lecher* 42 NY2d 109 [1977].

With these principles in mind, this court has reviewed the cases cited by the parties' counsel and the portions of the trial transcript provided and finds that the jury's award for future pain and suffering does not deviate materially from what would be reasonable compensation in light of the testimony of plaintiff and her expert witness.

Reviewing the verdict, it is clear that the jury believed Dr. Jazrawi's testimony that plaintiff requires the shoulder surgery, and, in fact, the jury awarded plaintiff almost exactly the costs for the procedure and follow up physical therapy that he estimated she would incur. Clearly, the jury anticipated that the plaintiff would have the surgery, as she testified she is retired and now wants the surgery. It was clear from the testimony of the plaintiff's expert witness that having the surgery would most effectively restore the range of motion in her shoulder and minimize her future pain and suffering.

Further, the jury was given the charge, requested by defendant, with regard to plaintiff's failure to mitigate her damages, most particularly plaintiff's failure to have the surgery. The Charge reads as follows:

> **PJI 2:325 Damages—Mitigation—General Principles (Failure to Have an Operation)**
>
> A person who has been injured is not permitted to recover for damages that could have been avoided by using means which a reasonably prudent person would have used to (cure the injury, alleviate the pain). The defendant claims that if the plaintiff submitted to an operation (his, her) (injury, pain) would be (completely cured, greatly alleviated) and that such an operation is not dangerous.

> The plaintiff claims that (he, she) declined to have the operation because it was (dangerous, too expensive). The burden of proving that the plaintiff failed to avail (himself, herself) of a reasonably safe procedure which would have (completely cured, greatly alleviated) (his, her) injury is on the defendant. If you find that the plaintiff is entitled to recover in this action, then in deciding the nature and permanence of (his, her) injury and what damages (he, she) may recover for the injury, you must decide whether in refusing to have an operation the plaintiff acted as a reasonably prudent person would have acted under the circumstances. In deciding that question you will take into consideration the evidence concerning the nature of the operation, the expense of such an operation and whether the plaintiff had sufficient funds or had insurance to meet that expense, the extent to which such an operation involves danger to the plaintiff, and the results to be expected from it. If you find that in deciding not to have an operation the plaintiff acted as a reasonably prudent person would have acted then the plaintiff is entitled to recover for (his, her) injuries, as you find them to be, without regard to the possibility of an operation. If, however, you find that the operation is one that a reasonably prudent person would submit to and that the operation would (cure the injury, relieve the pain), you will take that fact into consideration in arriving at the amount of damages that you award.

While plaintiff made an effort to blame her failure to undergo the surgery entirely upon the failure of her employer and her insurance company to pay for it, it would not have been unreasonable for the jury to have concluded that plaintiff decision was at least partially her own choice. Plaintiff admitted that she terminated her physical therapy before doing so was medically recommended. She also testified that she did not want to take the time from work for the operation and the physical therapy which would follow it, because of the temporary impact it could have upon her lifestyle and also the impact it would have on her pension, since she intended to retire shortly. Plaintiff knew that her salary in the years after the accident would affect her pension. She retired at the end of 2011.

While the decision to have the operation without a guarantee of insurance reimbursement might for some have imposed a financial hardship, in this case, the jury

could reasonably have concluded that plaintiff had the means to pay for the procedure. Her expert testified that the cost would be $18,000 today, and was presumably less in 2007.

Plaintiff lives in Suffolk County, and acknowledged she owns a house and a power boat. Although there is an element of O. Henry's "Gift of the Magi" in the idea that plaintiff would have an operation so that she could cast a reel again, only to have to sell her powerboat to pay for it, there was no evidence that she could not have afforded to pay for the operation without selling her boat or taking out a home equity loan on her house. Surely her attorney advised her that she could make a claim for reimbursement in the lawsuit.

A plaintiff must make a reasonable effort to mitigate damages. See, *Jewish Press, Inc. v Willner,* 190 AD2d 841 [2nd Dept 1993]. Generally, a party who claims to have suffered personal injuries by reason of the defendant's negligence or other tortious conduct is required to use reasonable effort to make the damage as small as practicable, and is not entitled to recover for any damage which by the use of such effort might have been avoided. *Favier v Winick*, 151 Misc 2d 910 [Sup Ct Suffolk Co 1992]. The injured person is bound to submit to a surgical operation when a reasonably prudent person under the circumstances would do so. *Favier v Winick*, 151 Misc 2d 910.

The jury, as finder of fact, could easily have factored the plaintiff's failure to mitigate her damages into their conclusions. See, e.g., *Fitzpatrick v United States,* 754 F Supp 1023 [USDC Del 1991] (Verdict took into account plaintiff's failure to have the recommended surgery for his thoracic outlet syndrome, when deriving an award for pain and suffering; at trial plaintiff's doctor testified that he believed nothing would relieve plaintiff's symptoms except decompressing or taking the pressure off the first rib by

surgery).

Plaintiff's own expert testified that plaintiff's failure to have the surgery was what caused her to develop adhesive capsulitis. Further, he testified that the operation, which the jury chose to fully fund, was the one and only treatment which would relieve her pain and increase her range of motion. Clearly, the jury anticipated plaintiff would have the operation and thereby virtually eliminate her future pain and suffering.

The relatively small sum awarded for future pain and suffering was apparently intended to cover the minimal amount of residual pain and suffering post - surgery testified to by Dr. Jazwari.

The only anomaly in the verdict, if any, is the 20 year period for the future pain and suffering damages awarded, which, at $2,500 per year seems low. However, this alone is not a sufficient reason to set aside the verdict. Between what the jury could reasonably have seen as plaintiff's failure to mitigate, and the doctor's testimony of her excellent prospects for future relief after the surgery, considering the verdict for future medical costs, the jury apparently determined that plaintiff's future pain and suffering should not be compensated at the same rate as for her past pain and suffering. See, e.g., *Fitzpatrick v United States,* 754 F Supp 1023; *Adams v Georgian Motel Corp.*, 291 AD2d 760 [3rd Dept 2002] (upholding a 16 year award for future pain and suffering of $20,000, post-spinal fusion surgery).

The determination of whether a damage award is excessive or inadequate depends upon whether the award deviates materially from what would be reasonable compensation. CPLR §5510(c); *Rivera v City of New York,* 40 AD3d 334 [1st Dept 2007]. The cases cited by plaintiff are not analogous; in none of them is it indicated that the evidence required the jury to be charged on failure to mitigate damages. Further, they do

not support a determination that the award for future pain and suffering in the instant case is inadequate.

Plaintiff cannot have it both ways. She cannot obtain both a lifetime of pain and suffering damages and the expenses for the surgery to almost completely relieve the condition she complains of. Plaintiff's expert testified that if she underwent the surgery, she would pretty much restore her range of motion and end her pain. Dr. Jazwari said "the only way at this point to provide her with any increased motion and potential pain relief would be surgical intervention." Transcript Page 43. The jury apparently believed every word the plaintiff's expert said. She really is not in a position to complain now that the jury awarded what her expert asked for. Where there is a lack of "severe residual problems" a small award for future pain and suffering does not deviate from what would be reasonable compensation. *Perone v City of New York*, 86 AD3d 600 (2nd Dept 2011); *Adams v Georgian Motel Corp.*, 291 AD2d 760 (3rd Dept 2002).

This Court further finds the award in the instant case was consistent with the weight of the evidence and did not deviate materially from what would be reasonable compensation. Therefore, plaintiff's motion is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: Brooklyn, New York
May 20, 2013

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

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