SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 23 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Justice of the Supreme Court

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ALVA DINORA MONTOYA, BLANCA HERRERRA and ELDA HERRERRA,

Plaintiff(s),

-against-

BRIAN J. MATTHEWS, NASSAU COUNTY COMPTROLLER'S OFFICE, NASSAU COUNTY POLICE DEPARTMENT, THE CITY OF NEW YORK, NEW YORK CITY OF TRANSPORTATION, EVELYN M. FLORES and EDWIN J. FLORES,

Defendant(s).

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Index No. 6322/12

Motion Seq. No.: 004
Motion Submitted: 8/15/18

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Memorandum of Law/Supporting Exhibits.....X
Reply Affirmation.....X

Plaintiffs, Alva Dinora Montoya (Montoya), Blanca Herrerra (Blanca) and Elda Herrerra (Elda), move this court for an order, pursuant to CPLR§§ 4401, 4404 and 5501(c), setting aside the jury verdict rendered on December 19, 2017 as related to the

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amount of damages awarded. Defendant, County of Nassau (the County) opposes the motion. This matter was referred to this court for a trial on damages. A prior trial on liability, before the Hon. Jack L. Libert of this court, found the County 100% liable for causing the accident.

Plaintiffs were all injured in a car accident that occurred on July 10, 2011. They were passengers in a minivan that collided with a County-owned ambulance. Montoya testified to multiple injuries that resulted in two separate fusion surgeries, one on her neck and one on her back. While the surgeries provided some relief, within a year she was experiencing the same amount of pain and was told she would need further surgery. While she returned to work as a babysitter, she eventually had to stop because the pain she experienced prevented her from performing the work. In particular, she was unable to pick up the child.

Blanca testified to back and pelvis pain after the accident. She suffered a pelvic fracture and went to physical therapy for six to eight months, but stopped once insurance would not longer pay for it. She stopped working prior to the accident due to a high risk pregnancy, and began working again as a housekeeper about one year after the accident, six hours a day.

Elda testified that her face was lacerated by a piece of glass during the accident, and she suffered a scar as a result She complained about other various pain and ailments, and after the accident wore a sling for approximately one month. She testified that three

months before the trial she saw a doctor for pain and numbness in her arm.

In further support of their arguments, Plaintiffs called a number of experts as witnesses. Dr,. Michael Shapiro performed the surgeries on Montaya and testified about her injuries, the surgeries, the pain she will continue to suffer, and her substantial future medical needs. Dr. Karen Avanesov, an orthopedist and pain management specialist, also testified as to Montoya's significant injuries, and how future care and surgeries will be required. Dr. Avanesov testified that Montoya's future surgeries and medical care would cost between $80,000.00 to $120,000.00 for neck surgeries, between $120,000.00 and $200,000.00 for back surgeries, annual MRIs at $1,200.00 and medication at $700.00 to $1000.00 per month. There will be other expenses as well.

Dr. Avanesov also examined Blanca and determined she may need surgery in the future as well. Aside from not needing neck surgeries, her future medical costs were similar to Montoya's.

Dr. Mark Grossman, an orthopedist, testified as to his treatment of Elda. As a result of the accident, he testified that Elda suffered rib fractures and a clavicle fracture. While he found her fractures had healed, the clavicle fracture might require future treatment, such as breaking and resetting the bone.

The jury awarded Montoya $250,000.00 for past pain and suffering, $225,000.00 for five years of future pain and suffering and $65,000.00 for five years of future medical expenses. Blanca was awarded $125,000.00 for past pain and suffering, $100,000.00 for

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five years of future pain and suffering and $50,000.00 for five years of future medical expenses. The jury awarded Elda $75,000.00 for past pain and suffering and $45,000.00 for five years of future pain and suffering.

The defense called Dr. John Killian as their sole witness. Dr. Killian, an orthopedic surgeon, performed an independent medical examination on all three Plaintiffs. He testified that the injuries suffered by all three Plaintiffs had completely healed. He also testified that Montoya's herniated discs were pre-existing and not caused by the accident, but acknowledged she had back surgery after the accident. Plaintiffs now move to set aside the verdict, arguing the amounts awarded by the jury were too low.

CPLR Rule 4404 provides, in pertinent part:

> (a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as it deemed reasonable by the court.

For this court to grant Plaintiff's motion to set aside the verdict as a matter of law, pursuant to Rule 4404(a) of the CPLR, ". . . the court must conclude that there is 'simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence at trial' " (*Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 29 [2d Dept 2008]).

Moreover, a jury verdict should not be set aside as contrary to the weight of the evidence "unless the jury could not have reached the verdict on any fair interpretation of the evidence" (*Nicastro v Park*, 113 AD2d 129, 134 [2d Dept 1985]). "[T]he determination of the jury which observed the witnesses and the evidence is entitled to great deference" (*Hernandez v Carter & Parr Mobile*, 224 AD2d 586, 587 [2d Dept 1996]).

This court finds and determines that on the record before the court there is clearly a view of the evidence that supports the verdict of the jury herein as related to Blanca and Elda. Neither one needed surgery after the accident, and while Dr. Avanesov testified that Elda may require future surgery, the jury could have reasonably believed Dr. Killian that she was completely healed.

However, the court finds the jury's award should be set aside as related to Montoya, and a new trial on her damages should be ordered. Montoya suffered significant injuries and that required at least two surgeries, and Dr. Shapiro and Dr. Avanesov presented compelling evidence that future surgeries and medical care would be required.

The court should only set aside a jury's award of damages where the award materially deviates from reasonable compensation. (*Starkman v. City of Long Beach*, 148 AD3d 1070 [2d Dept. 2017]). In determining what constitute reasonable compensation, the court is to consider recent, comparable cases. *Id.* In so doing, the court finds the jury's award as related to Montoya materially deviated from reasonable compensation.

(*See Starkman v City of Long Beach, supra*, (award of $500,000.00 for past pain and suffering and $750,000.00 for future pain and suffering not reasonable in light of injuries where principal injuries were fractured ribs and transverse process fractures in vertebrae): *Kusulas v. Saco*, 134 AD3d 772 [2d Dept 2015]($1,000.000.00 for past pain and suffering and $1,000.000.00 for future pain and suffering reasonable for herniated discs, spinal fusion surgery and medical treatment); *Halsey v New York City Tr. Auth.*, 114 AD3D 726 [2d Dept 2014]($3,000.000.00 for future pain and suffering reasonable for, *inter alia*, protruding disc that results in radiating pain that was not corrected with surgery). As such, the verdict will be set aside as related to Montoya. The parties are directed to appear in Central Jury for jury selection on November 27, 2018 at 9:30 a.m.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion to set aside the verdict is GRANTED as related to Montoya, consistent with the terms of this order; and it is further

ORDERED, that Plaintiffs' motion to set aside the verdict is DENIED as related to Blanca and Elda.

This constitutes the Decision and Order of the Court.

Dated: October 22, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S.C.

ENTERED
OCT 24 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE