

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25168
O/kmg

_____AD3d_____

Argued - October 30, 2009

PETER B. SKELOS, J.P.
RANDALL T. ENG
LEONARD B. AUSTIN
SHERI S. ROMAN, JJ.

2009-00210
2009-00215

DECISION & ORDER

Norma M.T. Braun, etc., et al., respondents, v Edwards
Trucking & Warehousing, Inc., et al., appellants,
et al., defendant.

(Index No. 21519/05)

Nesci-Keane, PLLC, Hawthorne, N.Y. (Thomas J. Keane and Jason M. Bernheimer of counsel), for appellants.

Phillips Nizer, LLP, New York, N.Y. (Michael S. Fischman of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendants Edwards Trucking & Warehousing, Inc., and Elwood Edwards appeal from (1) a judgment of the Supreme Court, Westchester County (Nastasi, J.), entered August 20, 2008, which, upon a jury verdict finding that the plaintiff Norma M. T. Braun sustained a serious injury, and awarding her the principal sums of \$100,000 for lost earnings and \$175,000 for past and future pain and suffering, is in favor of the plaintiffs and against them in the principal sum of \$275,000, and (2) an order of the same court entered November 6, 2008, which denied their motion for leave to reargue their prior application to reduce the award by the amount of \$50,000 in basic economic loss, and to resettle the judgment.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is modified, on the law, by reducing the amount awarded to the plaintiffs from the principal sum of \$275,000 to the principal sum of \$225,000; as so

December 1, 2009

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modified, the judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the appellants.

The appeal from the order must be dismissed, as no appeal lies from an order denying resettlement of the substantive or decretal provisions of a prior order or judgment (*see Blue Chip Mtge. Corp. v Strumpf*, 50 AD3d 936), or from an order denying reargument (*see Brooklyn Union Gas Co. v Interboro Asphalt Surface Co.*, 303 AD2d 532).

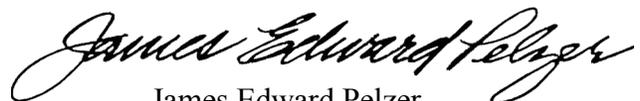
On the morning of July 26, 2006, the plaintiff Norma M. Braun (hereinafter the plaintiff), a pedestrian, was struck by a truck operated by the defendant Elwood Edwards, in Manhattan. Following the commencement of this action, the Supreme Court granted the plaintiffs' motion for summary judgment in favor of the plaintiff on the issue of liability. Subsequently, the jury returned a verdict finding that the plaintiff sustained a serious injury, and awarding her the principal sum of \$175,000 for noneconomic loss, consisting of past and future pain and suffering, and the principal sum of \$100,000 for economic loss, consisting of past lost earnings. The Supreme Court thereafter declined to reduce the verdict pursuant to Insurance Law § 5104(a), on the ground that the appellants "failed to proffer any evidence of *specific* collateral payment made to the plaintiff for any specific loss" (emphasis in original).

We agree with the appellants that the Supreme Court erred in failing to adjust the lost earnings portion of the award in order to account for the no-fault provision, categorically barring recovery by one "covered person" against another for "basic economic loss" (Insurance Law § 5104[a]); *see Chacha v Clement*, 31 AD3d 596). A "covered person," for purposes of the section, is defined as "any owner, operator or occupant of a motor vehicle which has in effect [the insurance required under article six of the Vehicle and Traffic Law]; or any other person entitled to first party benefits" (Insurance Law § 5102[j]).

As the plaintiff does not contend that she is a noncovered person and acknowledged in her pleadings that she is subject to New York's no-fault law, the Supreme Court erred in not reducing the jury award "to reflect the first \$50,000 of basic economic loss, which is not recoverable under the Insurance Law" (*Chacha v Clemente*, 31 AD3d at 597 [internal quotation marks omitted]). We modify to reduce the judgment accordingly.

SKELOS, J.P., ENG, AUSTIN and ROMAN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court