[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C. Justice PART 22

0103786/2001

RUBY, ETHAN
VS
BUDGET RENT A CAR

SEQ 3

VACATE

INDEX NO. 103786/01

MOTION DATE 3/11/04

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to ..., were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted in part and denied in part. See attached decision.

FILED
AUG 24 2004
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/16/04

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK

ETHAN RUBY,

Plaintiff,

vs.

BUDGET RENT A CAR CORPORATION, BUDGET RENT A CAR SYSTEMS, INC., NYRAC, INC.,d/b/a BUDGET RENT A CAR, HECTOR ENRIQUE CARIAS-CLAVARRIA and XIANG DING GAO,

Defendants.

Index No. **103786/01**

HON. MILTON A. TINGLING, JSC.

RECITATION, AS REQUIRED BY CPLR § 2219(A), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS

Notice and Amended Notice of Motion and Affirmation Annexed.....	1
Affirmation in Opposition.....	2
Reply Affirmation in Support of Motion.....	3

The defendants Budget Rent A Car Corporation, Budget Rent-A-Car Systems, Inc., NYRAC, Inc. d/b/a Budget Rent-A-Car and Hector Enrique Carias-Clavarria move this court pursuant to CPLR 4404(1) for an order (1) setting aside the jury's award of damages for both past and future pain and suffering, including enjoyment of life, and granting a new trial on the issue of those damages; (2) setting aside the jury's award for both past and future los of earnings and dismissing those claims of damages; and (3) setting aside the jury's award of future damages for medical expenses to the extent unsupported by legally sufficient evidence and granting a new trial as to the remaining medical expense items because of prejudicial errors, or granting a new trial on the ground of excessiveness unless the plaintiff stipulates to a remittitur in an amount to be determined by this court. The motion is granted to the extent the defendants are granted a new trial unless the plaintiff files with the County Clerk a stipulation reducing the award of $24,552,918.20 to $20,312,692.20.

This matter was tried from October 29, 2003 through December 12, 2003 at which time the jury returned a verdict. The plaintiff presented four fact witnesses and eleven expert witnesses. The defendants presented four expert witnesses.

The plaintiff was involved in an accident on November 29, 2000 which left him a paraplegic. On the date of the accident the plaintiff was a pedestrian celebrating a new business venture when he was struck from behind by the defendant's vehicle. The testimony elicited throughout the trial essentially established that Plaintiff had an intensive hospitalization and

rehabilitation. The principal injury was a severed spine at T-6 with complete paraplegia from the nipple-level down. The effects on this young man have been horrific. Testimony that he is confined to a wheelchair, unable to naturally control his bodily functions and exquisitely conscious of what is happening to his body, it is apparent that he is in constant pain. This young man went from being an independent active sport-loving participant to an individual who has had to learn through a grueling process of learning how to live as a paraplegic. He has had to learn how to sit up, get dressed, transfer to and from a wheelchair, etc. He has in fact had to learn to live a totally different lifestyle under a whole new set of unimaginable circumstances.

The testimony of Plaintiff's expert Dr. Fried was: "When it comes down to urinating or moving his bowels, he has no control over it, just a random mind of its own." "The upper half of his body is totally disconnected from the lower half of his body...It doesn't move right, respond right. You don't have control of the bowels, and everything below the nipples are just doing their own thing." "The problem is that with that injury itself, what you are doing is you're dragging three-fourths of the body around with you as if three times your weight is sewn to you, and you're dragging it around with you without adequate sensation or any sensation. He's got pain in this area which is kind of a twisted nightmare, you look at it and not only aren't you feeling it but you hurt, and that just becomes a killer on top of it." Plaintiff's words aptly describes the plaintiff's life post-accident as a nightmare in contrast to his pre-accident existence.

On December 12, 2003 the jury returned the following verdict:

Past medical expenses stipulated to:	$315,218.00
Past pain and suffering	$3,000,000.00
Past loss of earnings	$150,000.00
Future medical expenses for 44.6 years	$5,247,700.20
Future pain and suffering for 44.6 years	$12,000,000.00
Future loss of earnings for 33.6 years	$3,840,000.00
Gross Total	$24,552,918.20

The defendant's first branch of the motion seeks reduction of the past and future pain and suffering award of $15,000,000.00. CPLR 4404(a) states:

> "Motion after a 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 is deemed reasonable by the court."

The language of this Section is straightforward. The standard of review of such an award is whether it deviates materially from what would be a reasonable compensation. Plotkin v. New York City Health & Hosps. Corp., 221 A.D.2d 425. Under this principle the courts have been placed in a position of being actuaries for calculating the values to compensate for future pain and suffering. We are in affect directed to compare one person's pain and suffering to another.

The defendants' moving papers advocate a reduction of the award based on a comparison of awards for alleged similar injuries, to wit, awards to paraplegics and quadraplegics. The court agrees with the the plaintiff's opposition papers that the defendants' motion is based more on CPLR 5501 [c] under which the court can review the verdict and decide whether the award given "deviates materially from what would be reasonable compensation." Under this standard, the court is mandated to review other awards in similar cases and if it finds the award excessive in comparison to other awards, it can order a new trial unless the parties agree and stipulate to an award that the trial court finds appropriate. Therefore the court proceeds to examine and decide this motion under CPLR 5501[c] which is the proper Section for the relief sought by the defendant as illustrated by the defendants' moving papers.

The movants cite two cases of particular interest in support of their motion. In Nevarez v. New York City Health and Hospitals Corp., 248 A.D.2d 307 the case involved medical malpractice during childbirth resulting in the plaintiff been born weighing just three pounds and suffering from cerebral palsy, severely retarded, a spastic quadriplegic and blind among other disabilities. The Appellate Division First Department set aside a jury award as excessive and ruled that $2,000,000.00 was an appropriate award for past and future pain and suffering. In Nowlin v. City of New York, 182 A.D.2d 376, the case involved a 24 year old former ballerina and beauty contestant law school student was rendered a paraplegic in an auto accident wherein she was a passenger. The Appellate Division First Department set aside a jury award as excessive and allowed a downward modification through stipulation garnered by the court which reduced the past and future pain and suffering from $7,750,000.00 to $2,500,000.00. The plaintiff in the Nowlin case was employed as a city attorney at the time of the Appellate Division's decision. The case at hand differs vastly from the primary cases the defendants cite in support of their motion. The two cited cases are reflective of the defendants' arguments in support of their motion.

In the Nevarez case the plaintiff's injuries occurred as a result of medical malpractice while in the process of being born, or childbirth in 1978. The court's decision does not elaborate but one can draw the inference that the award was nominal because the plaintiff was born severely brain damaged and as such could not be aware of any emotional or physical pain. The Nowlin case is clearly distinguishable and troubling. In Nowlin the trial court was able to obtain a stipulation reducing the past and future pain and suffering from 7.75 million to 2.5 million dollars. The Nowlin case in essence condoned an award of $56,433.41 per annum for the plaintiff's 44.3 years life expectancy. In the case at bar, there is no stipulation between the parties reducing any of the award. This court finds the present award for past and future pain and suffering reduced to $13,000,000.00 a more realistic and humane response to the plaintiff's pain and suffering. The $3,000,000.00 awarded for past pain and suffering does not appear to be excessive in light of all the testimony presented in this case detailing Mr. Ruby's experience . The future pain and suffering award of $12,000,000.00 does not deviate materially from what would be reasonable compensation in this court's view. However, pursuant to CPLR 5501[c] an award of $9,000,000.00 seems more appropriate and does not seem excessive or disproportionate to compensate the plaintiff for future pain and suffering in light of the fact that pursuant to the life expectancy tables, the plaintiff's life expectancy is 44.6 years. In Sladick v. Hudson General Corp., the Appellate Division in this Department upheld a stipulation for future

pain and suffering in the amount of $5,000,000.00 when the injury was an amputation of the plaintiff's leg eight inches above the knee. The Court specifically cited the plaintiff's loss of his athletic lifestyle and deterioration of his good leg as a sound basis for the award. In the case at bar, the plaintiff's injuries are infinitely more severe and the loss of athletic life is more pronounced as the plaintiff is a paraplegic and the loss of his athletic lifestyle pales in comparison to the loss of his lifestyle. Furthermore where the Slacdick plaintiff lost part of his leg, the plaintiff herein has for all intent and purposes loss three-fourths of the use of his body. Accordingly, the award is hereby modified to the extent of reducing the future pain and suffering award to $9,000,000.00.

The second branch of the defendants' motion seeks reduction of the award for past and future loss of earnings and/or a dismissal those claims for damages. The defendants argue the plaintiff failed to establish his past and future loss earnings as he was not employed and as such could not establish his loss earnings without impermissible speculation. The plaintiff responded by placing experts on the stand to testify as to both Plaintiff's past certain earnings and losses as well as the reasonable certainty of Plaintiff's future employability and reasonable certainty of compensation. In addition to the expert testimony Plaintiff submitted his income tax returns for the three years prior to the accident which showed the following income: loss of $53,545 in 1998, gain of $125,000 in 1999 and a gain of $513,000 in 2000. The tax returns of a self-employed individual have consistently been found to be relevant, material and necessary on the issue of loss earnings. Holihan v. Regina Corporation, 282 N.Y.S.2d 404. The tax returns offer a basis of comparison. Katz v. Memoli, 28 A.D.2d 1128. The plaintiff has the burden of establishing loss of actual past earnings with reasonable certainty by submitting tax returns or other relevant documentation. Poturniak v. Rupcic, 232 A.D.2d 541 citing Bunge v. New York City Tr. Auth., 216 A.D.2d 264. For the defendants to argue that the tax records of a self-employed person are not reflective of a person's income, and for a court to accept such an argument would be tantamount to every self-employed person being locked out of an award for loss of earnings in personal injury cases. As such, the jury's ward of past and future economic loss is upheld as the record in evidence supports an award for impairment of future earning ability as it has been established with reasonable certainty based on the evidence of the plaintiff's earning ability before and after the accident. Thomas v. Puccio, 270 A.D.2d 480 *citing* Bacigalupo v. Healthshield, Inc., 231 A.D. 2d 538. The plaintiff demonstrated an earning capacity for the three years prior to the accident and said showing of employment prior to the accident entitles him to an award for future earnings. Marmo v. Southside Hospital, 143 A.D.2d 891. The future loss earnings award of $3,800,000.00 is not excessive as the defendants argue in light of the fact that it is somewhat suspect to harken to wage potential versus actual earnings when the potential earnings are significantly lower than the actual wage figure established. Coniker v. State of New York, 2002 WL 32068270 (N.Y.Ct.Cl.) *Citing* Escobar v. Seatrain Lines, Inc., 175 A.D.2d 741.

The third branch of the defendants' motion seeks (1) to set aside the jury's award of future damages for medical expenses to the extent unsupported by legally sufficient evidence and granting a new trial as to the remaining medical expense items because of prejudicial errors, or (2) granting a new trial on the ground of excessiveness unless the plaintiff stipulates to a remittitur in an amount to be determined by this court. This branch of the motion is granted in

part and denied in part to the extent the award is reduced by $1,240,226.00 for unsupported and/or excessive future medical expenses.

This branch of the defendants' motion is primarily directed to the Yudkoff Life Care Plan placed in evidence by the plaintiff. The defendants argue the Plan is excessive, unsupported by the evidence presented and/or the items presented were presented as a result of prejudicial errors by the court. The court denies that branch of the motion alleging prejudicial errors by the court on the grounds the errors cited by the defendants were harmless error. Specifically, any errors in the plaintiff's expert Moore's charts were addressed during presentation and cross-examination. As to the admissibility of the plaintiff's experts, the expert's testimony is critical in attempting to establishing the plaintiff's possible future earnings. The defendants' remaining contentions concerning the admissibility of the experts' testimony are without merit. The remaining contentions of the defendants are addressed in the following manner.

The Yudkoff Life Care Plan calls for $275,256.00 for future medical expenses for fertility and sexual functions. The testimony at trial does not establish a basis for this expense. The testimony specifically establishes that said treatment has proven useless to date and nothing in the record suggests a basis under which said treatment would succeed in the future. Accordingly, the award is reduced by $275,256.00.

The Yudkoff Life Care Plan calls for future medical expenses for counseling. The defendants claim that Plaintiff did not attend the therapy sessions as directed after the accident to the date of trial and as such Plaintiff is not entitled to an award for a treatment he would not attend. The plaintiff explained his failure to appear for said sessions on the grounds that due to difficulties of a paraplegic lifestyle he was unable to attend as he would have liked. The explanation detailed the difficulties as uncontrollable bowel movements, pain, transportation problems, etc. The court finds said explanation sufficient to leave undisturbed the award as it relates to this expense.

The Yudkoff Life Care Plan calls for housing modifications in the amount of $885,000.00, specifically including $685,000.00 for the purchase of property and the closing costs associated therewith. The defendants contend and the court agrees that there is no basis to grant an award for the purpose of purchasing property as with or without the injury the plaintiff would still have to pay for housing. However, and the defendant agrees, there is an additional expense for modifications to the housing in light of the plaintiff's injuries and the plaintiff's proposed $200,000.00 is not challenged. The court finds an award of $200,000.00 sufficient to compensate the plaintiff for the modifications he has to make to any property he may reside in. Accordingly the ward is reduced another $685,000.00.

The Yudkoff Life Care Plan calls for medication expenses in the amount of $186,898.00. Though testimony establishes Plaintiff was not taking the medication at the time of trial, this is insufficient basis to deny the plaintiff's request for medications his body needs. Accordingly, the court will not disturb the award as it relates to this expense.

The Yudkoff Life Care Plan calls for acupuncture treatment totaling $203,150.00. The award is undisturbed based on the aforementioned grounds that the plaintiff explained his inability to maintain his appointments at certain times due to the difficulties of living as a paraplegic.

The Yudkoff Life Care Plan calls for urological expenses in the amount of $200,090.80

and said award is reduced by $94,668.00 as the plaintiff fails to establish a basis for annual renal sonograms and urodynamic testings.

The Yudkoff Life Care Plan calls for future physical, massage and occupational therapy in the amount of $371,884.00. The evidence at trial establishes that a more appropriate award would be the reduction of said award by $185,302.00 in light of the fact the plaintiff did not establish a need for the amount of sessions detailed.

The Yudkoff Life Care Plan calls for future case management expenses in the amount of $34,112.00. The court sees no basis to disturb the ward as it relates to this expense.

The Yudkoff Life Care Plan calls for future equipment and transportation expenses and despite the defendants' contentions, there is no basis to disturb the award as it relates to this expense.

Pursuant to the aforementioned the award is reduced by another $1,240,226.00 for a total reduction of $3,240,226.00. Accordingly the motion is granted to the extent the defendant is granted a new trial unless the plaintiff files with the County Clerk a stipulation reducing the award of $24,552,918.20 to $20,312,692.20.

This constitutes the Order and Decision of the court.

DATED: August 18, 2004

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HON. MILTON A. TINGLING
J.S.C.