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SHORT FORM ORDER

INDEX No. 00-28833

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

Hearing 12-2-05

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/10/05
ADJ. DATES 8/19/05
Mot. Seq. # 009 - Mot D

P/11-7

SHERIE BUTLER,	:	FINKELSTEIN & PARTNERS, LLP
	:	Attys. For Plaintiff
Plaintiff,	:	436 Robinson Ave.
	:	Newburgh, NY 12550
-against-	:	
	:	SHAUB, AHMUTY, CITRIN & SPRATT
LAURA MERROLO and PENSKE TRUCK LEASING CO., INC.,	:	Attys. For Defendants
	:	1983 Marcus Ave.
	:	Lake Success, NY 11042
Defendants.	:	
	:	LESTER, SCHWAB, KATZ & DWYER
	:	Attys. For Defendants - Appellate Counsel
	:	120 Broadway
	:	New York, NY 10271

Upon the following papers numbered 1 to 9 read on this motion for a new trial on damages; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 5-6; Replying Affidavits and supporting papers 8-9; Other 7 (plaintiff's Memorandum of Law); (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this post-trial motion by defendants Laura Merrolo and Penske Truck Leasing Co., Inc., pursuant to CPLR 4404(a) seeking, among other things, a new trial on damages, is granted to the limited extent that a hearing regarding collateral sources pursuant to CPLR 4545 and structuring of the judgment pursuant to CPLR 50-B will be held on [redacted], at 9:30 a.m., in Part 33, at the courthouse located at 235 Griffing Avenue -Annex, Riverhead, New York, unless the parties can agree to these amounts prior thereto, and is denied in all other respects, it is further

ORDERED that ten (10) days prior to the hearing, defendants' counsel shall notify plaintiff's counsel of any and all claims or set-offs that they intend to prove, and it is further

ORDERED that within 20 days of the date herein, movant shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

Defendants offer this post-trial motion pursuant to CPLR 4404(a) seeking a new trial on the issue of damages or a substantial remittitur of the damage award. In this action, liability was conceded and the Court presided over a damages trial that spanned three weeks and included 11 days of trial testimony.

The testimony revealed that the then 19-year-old plaintiff was a passenger on a motorcycle that was involved in an accident with a Penske truck. Plaintiff suffered a catastrophic injury to her right leg, which to date, has resulted in 12 surgical procedures. From the onset, all treating physicians recommended the amputation of the right leg, but plaintiff has insisted upon all possible efforts to save her limb. All medical records and reports were exchanged with opposing counsel and were admitted into evidence during the trial. Since June 19, 1999, the date of the accident, plaintiff's lower leg injury has required multiple surgeries. Plaintiff suffered a comminuted fracture of her right tibia and fibula, as well as, severe injuries to her skin, muscle, arteries, and tendons of her right leg, including disfigurement and scarring. Only tendons where holding the leg together, with all arteries cut. Muscle and skin were missing and bone was exposed. Her leg was placed in an external fixator for six months, a vein was removed from her left leg and grafted into her right leg to replace a damaged artery. She endured irrigation and debridement procedures of the injury site and a muscle graft for her ankle area and a skin graft from her left leg.

Thereafter, she underwent a bone graft from her hip area which, when added with synthetic bone graft material, was grafted to her tibia. Dr. Toledano recommended an amputation at that time. There was an additional debridement procedure, followed by a tibial bone transport, which involved the placement of an Ilizarov frame, to help bone growth. The procedure was a right tibia non-union repair with iliac crest bone graft. This frame was removed after five months, and, in all, plaintiff was immobilized for approximately 11 months. Plaintiff was progressively encouraged to walk without walking casts or crutches.

Thereafter, due to her unstable, drop foot condition, plaintiff endured a re-fracture of the injured site, as she sought to cross a street. Plaintiff underwent insertion of an intra medullary titanium rod and five screws into her tibia, which were removed after about four months. Thereafter, plaintiff's tibia began to bend backwards until it reached an angle of 50 degrees and formed a "false joint" at the injury site, which was caused by pulling from her Achilles tendon, that is, the pulling of muscles on bone on each side of the non-union. The bending of the tibia forced plaintiff to walk only on the tips of her toes of her right foot. Two doctors, Dr. Dee and Dr. Pool, from whom plaintiff sought treatment, offered options that included amputation.

However, plaintiff fought to save her lower right leg and sought treatment from Dr. William O. Thompson, an orthopedic surgeon. He performed a revision or "take down" surgery, which reduced the angle of the tibia bone to 20 degrees. Bone had to be cut away to bring the foot back out. A metal plate with seven screws and an internal bone stimulator were affixed to the fracture site. The surgery did not involve the drop foot or nerve damaged conditions, since these were permanent and only reduced the deformity. Six months after the surgery, plaintiff was permitted to walk with a CamWalker or a rocker-bottom shoe. Plaintiff has no sensation on the top of her foot, has a permanent drop foot, which remains in a pigeon-toed position, and has right leg shortening of an inch. Plaintiff experiences pain and there continues to be a non-union of the fracture site. Dr. Thompson offered a poor prognosis, including the fact that plaintiff's ankle is arthritic and will become increasingly so in the future. Dr. Thompson's note of May 3, 2003 and his prognosis discuss amputation, which has never been plaintiff's wish.

Dr. Joel Mandel also testified on behalf of plaintiff. He explained that her ankle has no active motion and that the non-union of the fracture still exists. He further offered an opinion that no matter what procedures are attempted to correct the non-union, he believes that plaintiff will have to eventually come to an amputation of the right lower leg. His January, 2003 report and the January, 2005 report both discuss amputation.

Defendants' expert, Dr. Robert Goldberg offered an opinion that the fracture had healed, although he had not reviewed x-rays taken on the date of the subsequent fall. This was an issue for the jury to resolve. He also agreed that there was a likelihood of re-fracture at the injured site. Dr. Goldberg agreed that plaintiff's neurological deficiencies were not going to improve and that she will have permanent limitations in walking, lifting, and carrying. Finally, Dr. Goldberg recommended amputation as a better course for plaintiff. Defendants also called Dr. Robert Rozbruch, one of plaintiff's treating physicians. He testified that plaintiff had been recommended for an amputation, that the original fracture had not healed, and currently remains at risk for a re-fracture.

The jury awarded plaintiff $1.47 million for past pain and suffering, $2.5 million for future pain and suffering over fifty-five years, $72,500 for past lost earnings and $1.5 million for future lost earnings over twenty-five years, $245,000 for past medical expenses (the parties had stipulated to the amount), and $100,000 for future medical expenses over fifty-five years.

Pursuant to CPLR 4404(a) a "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 ..." A jury verdict should not be set aside as against the weight of the evidence unless the evidence so preponderates in favor of the moving party that the verdict could not have been reached on any fair interpretation of the evidence (*see* ***Grassi v Ulrich***, 87 NY2d 954, 956, 641 NYS2d 588 [1996]; ***Cohen v Hallmark Cards, Inc.***, 45 NY2d 493, 410 NYS2d 282 [1978]). Issues of credibility are for the jury, which had the opportunity to

see and hear the witnesses, and the jury's resolution of credibility issues is entitled to deference (*see* ***Bertelle v New York City Tr. Auth.***, 19 AD3d 343, 796 NYS2d 415 [2d Dept 2005]; ***Robinson v City of New York***, 300 AD2d 384, 385, 751 NYS2d 533 [2d Dept 2002]). Moreover, a successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence (*see* ***Louis Puccio Devs., Inc. v Dean***, 18 AD3d 826, 796 NYS2d 630 [2d Dept 2005]; ***Miglino v Supermarkets Gen. Corp.***, 243 AD2d 451, 451-2, 662 NYS2d 818 [2d Dept 1997]). The fact-finding function of the jury is accorded great deference (*see* ***O'Brien v Barretta***, 1 AD3d 330, 766 NYS2d 871 [2d Dept 2003]). Finally, the Supreme Court's disposition of a motion to set aside the verdict as against the weight of the evidence is entitled to great respect (*see* ***Harris v Marlow***, 18 AD3d 608, 795 NYS2d 608 [2d Dept 2005]; ***Nicastro v Park***, 113 AD2d 129, 137, 495 NYS2d 184 [2d Dept 1985]).

Defendants request a review of the jury award as excessive under CPLR 5501(c), claiming that it materially deviates from reasonable compensation for plaintiff's injuries and decisions of the Second Department. The Court can not agree that such is the proper standard for review under a CPLR 4404 motion. CPLR 5501(c) sets forth the scope of review of the Appellate Division. The language is specifically directed to the appellate courts. The State Legislature did not include trial courts in this scope of review. The statute states, in pertinent part:

> In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter 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 (emphasis added).

In the same legislation wherein the State Legislature adopted the amendment to CPLR 5501(c), it also adopted a new section (b) to CPLR 5522, concerning disposition of appeal, which reads as follows:

> In an appeal from a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate, the *appellate division* shall set forth in its decision the reasons therefor, including the factors it considered in complying with subdivision (c) of section fifty-five hundred one of this chapter (emphasis added).

At issue is the intent of the State Legislature in enacting CPLR 5501(c). The primary consideration of courts in interpreting a statute is to "ascertain and give effect to the intention of the Legislature"

(McKinney's Cons. Laws of N.Y., Book 1, Statutes § 92[2], at 177). As stated by the Court of Appeals in ***Matter of ATM One, LLC, v Landaverde***, 2 NY3d 472, 779 NYS2d 808 (2004):

> In matters of statutory and regulatory interpretation, we have repeatedly recognized that
>
> > "legislative intent is the great and controlling principle, and the proper judicial function is to discern and apply the will of the [enactors]. Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history" (***Mowczan v Bacon***, 92 NY2d 281, 285 [1998] [internal quotation marks and citations omitted]; *see* ***Matter of Sutka v Conners***, 73 NY2d 395, 403 [1989]).

The Second Department has recently held in ***Matter of Astoria Gas Turbine Power, LLC, v Tax Commn. of City of New York***, 14 AD3d 553, 788 NYS2d 417 (2d Dept 2005):

> In ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding the statute's passage, and the history of the times (*see* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 124).

Application of these principles leads to the conclusion that defendants' construction of the statutory language is contrary to the legislative intent.

CPLR 5501(c) was adopted in 1986 as part of legislation (L 1986, c 682, §10) entitled "Toxic Torts-Statute of Limitations." In his message approving the toxic torts bill on July 30, 1986, then Governor Mario M. Cuomo noted the following concerning this particular provision:

> Finally, the bill amends the appellate standard of review for awards in personal injury, property damage and wrongful death actions. It requires the Appellate Division to determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation. It also requires the court in such actions to set forth the reasons for its decision and the factors that it considered. This will assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for

similarly situated defendants throughout the State.

The Memorandum in support of the Senate bill by State Senator Ronald B. Stafford notes the following:

> Appellate Division would be authorized to find that an award is excessive or inadequate if it "deviates materially from what would be reasonable compensation."

The State of New York Department of Health supported the legislation with a letter dated July 30, 1986 noting:

> Amendments to Civil Practice Law and Rules §§4213(6), 5501(c), 4111(f), and 5522 provide for itemization of verdicts, establish the court's responsibilities to specify elements considered in awarding damages, and set forth the appellate division's authority to determine if an award is excessive or inadequate if it deviates materially from what would be considered reasonable compensation.

The then Attorney General, Robert Abrams, supported the legislation in a Memorandum dated July 21, 1986, which noted:

> Finally, the bill amends CPLR §§ 5501 (c) and 5521 to expressly permit an appellate court to overturn a money judgment if it deviated materially from what would be reasonable compensation and to require the appellate court, in overturning such a judgment, to set forth in its decision the reasons therefor.

The Memorandum from the New York State Department of Environmental Conservation dated July 31, 1986 stated:

> The third tort law reform established under this legislation, which allows appellate courts to rule on damage awards based on their relationship to "reasonable compensation," is designed to discourage rapid increases in liability insurance premiums without limiting the ability of a plaintiff to fully and fairly recover all damages due him.

The Memorandum from the Office of Court Administration, dated July 2, 1986, which supported the toxic tort bill, noted that the changes "also relate to appeals of awards in such actions based upon contentions of excessiveness or inadequacy."

The above statutes were adopted as part of a series of tort reform measures, which were brought about by an insurance crisis arising out of spiraling medical malpractice premiums, the unavailability of liability coverage, and claims of excessive verdicts (*see* ***Donlon v City of New York***, 284 AD2d 13, 727 NYS2d 94 [1st Dept 2001]). In one of the companion statutory changes (*see* L 1986, c 266), the Memorandum accompanying the Governor's Program Bill noted, in passing:

> Other proposals now under consideration by the Legislature would extend many of these reforms across the board, would reform joint and several liability and would increase appellate scrutiny of excessive verdicts.

The Legislative Findings and Declaration which accompanied the reforms noted that the new standard would "invite more careful appellate scrutiny" (Ch 266, 1986 N Y Laws 470 [McKinney]). In the legislative bill jacket accompanying those statutory changes, a June 27, 1986 letter from The Business Council of New York State offered the following:

> Also, the change in the appellate court review standard from "shocking to the conscience of the court" to "deviates materially from what would be reasonable compensation" will invite more careful appellate scrutiny and should eventually lead to more consistency in awards.

The new standard accords less deference to the jury's award than does the traditional standard (*see* ***Consorti v Armstrong World Indus.***, 64 F3d 781 [2d Cir 1995]). In ***Gasperini v Center For Humanities, Inc.***, 518 US 415, 116 S Ct 2211, 135 L Ed 659 (1996), the Supreme Court of the United States, in a 5 - 4 decision which explored the Seventh Amendment's reexamination clause, examined CPLR 5501(c) and noted that the "deviates materially" standard was designed to give the appellate courts greater authority to review jury awards and, "in design and operation, influence outcomes by tightening the range of tolerable awards" (***Gasperini v Center For Humanities, Inc.***, 518 US at 425, *supra*). In ***Gasperini***, *supra*, the court acknowledged that the New York appellate courts are empowered to review the size of jury verdicts pursuant to CPLR 5501(c) and that the statute contains a procedural instruction assigning decision making authority to the Appellate Division (*see* 518 US at 426, *supra*). The court also noted that "[a]lthough phrased as a direction to New York's intermediate appellate courts, 5501(c)'s "deviates materially" standard, *as construed by New York's courts*, instructs state trial judges as well" (518 US at 425, *supra*) (emphasis added).

Originally, such was not the interpretation of CPLR 5501(c) (*see* ***O'Connor v Graziosi***, 131 AD2d 553, 554, 516 NYS2d 276 [2d Dept 1987], *lv denied* 70 NY2d 613 [1987] [the 1986 legislation "was apparently intended to relax the former standard of review and to facilitate appellate changes in verdicts"]; ***Harvey v Mazal Am. Partners***, 79 NY2d 218, 225, 581 NYS2d 639 [1992] [instructing Appellate Division

to only use the "deviates materially" standard]). In fact, the Court of Appeals has only discussed CPLR 5501(c) as an Appellate Division standard (*see* ***Christopher v Great Atl. & Pac. Tea Co., Inc.***, 76 NY2d 1003, 564 NYS2d 715 [1990]).

However, as time passed, various appellate departments have applied the "deviates materially" standard to the trial courts (*see* ***Inya v Ide Hyundai, Inc.***, 209 AD2d 1015, 619 NYS2d 440 [4th Dept 1994]; ***Prunty v YMCA of Lockport, Inc.***, 206 AD2d 911, 616 NYS2d 117 [4th Dept 1994]; ***Cochetti v Gralow***, 192 AD2d 974, 597 NYS2d 234 [3d Dept 1993]; ***Wendell v Supermarkets Gen. Corp.***, 189 AD2d 1063, 1064, 592 NYS2d 895 [3d Dept 1993]; ***Shurgan v Tedesco***, 179 AD2d 805, 578 NYS2d 658 [2d Dept 1992] [which does not expressly address the issue, but apparently approved, without explanation, trial court application of the appellate standard]), even though the appellate departments are the only courts authorized by statue to do so. The First Department has not directly addressed the issue. The above cases fail to offer an explanation for imposing the appellate standard for review upon the trial courts. Nor do they examine the legislative intent behind the statue.

Additionally, in ***Ashton v Bobruitsky***, 214 AD2d 630, 631, 625 NYS2d 585 (2d Dept 1995), the Second Department offered a two-stage standard for trial courts ("trial court had the power ... to review the question of whether the jury's verdict on the issue of damages was against the weight of the evidence [*see*, CPLR 4404(a)] and to set it aside if it found that the verdict deviated materially from what would be reasonable compensation [citation omitted]") (*see* ***Carr v Third Colony Corp.***, NYLJ Dec 14, 2001[Civ Ct Kings County 2001] ["the Second Department appears to allow, if not require, both methodologies"]).

Cognizant of the fact that "future damages cannot be computed with exactitude" (***Kirschhoffer v Van Dyke***, 173 AD2d 7, 10, 577 NYS2d 512 [3d Dept 1981]), the Court must acknowledge the limited utility of comparing damage awards in different cases, particularly since the Court is without access to the full records in the prior cases. Such a review is made even more difficult when the appellate courts fail to abide by the dictates of CPLR 5522(b) and in failing to identify the reasons for their decision in reducing an award (*see e. g.,* ***Patterson v Nassau Community Coll.***, 308 AD2d 519, 764 NYS2d 841 [2d Dept 2003] [$4,500,000 for past and future pain and suffering]; ***Angerome v City of New York***, 300 AD2d 423, 750 NYS2d 886 [2d Dept 2002] [$3,500,000 for past and future pain and suffering]; ***Sugrim v City of New York***, 266 AD2d 203, 697 NYS2d 314 [2d Dept 1999] [$3,500,000 for past and future pain and suffering]; ***Miller v Long Is. R.R.***, 286 AD2d 713, 730 NYS2d 449 [2d Dept 2001] [$3,250,000 for past and future pain and suffering]; ***Schiller v New York City Tr. Auth.***, 300 AD2d 296, 750 NYS2d 774 [2d Dept 2002]; ***Cooper v Apple Radio Car Serv.***, 261 AD2d 500, 690 NYS2d 598 [2d Dept 1999]; ***Perez v Vintis***, 249 AD2d 526, 671 NYS2d 356 [2d Dept 1998]).

Moreover, unlike the Appellate Division, which can review the record detached from the trial setting and compare that record to prior decisions, this Court sat through eleven days of trial, witnessed the credibility of each witness, examined plaintiff's physical condition on a direct and daily basis, listened to two

dramatically divergent summations, and observed the impact of all on the jury. It has been remarked that trial judges have the "unique opportunity to consider the evidence in the living courtroom context" (***Taylor v Washington Term. Co.***, 409 F2d 145, 148 [CADC 1969]), while appellate judges see only the "cold paper record" (***Gasperini v Center For Humanities, Inc.***, 66 F3d 427, 431 [2d Cir 1995]; *vacated and remanded* 518 US 415, *supra*]). It does not appear to be the intention of the State Legislature to entrust the new statutory standard of review to the trial court. Only the Appellate Divisions, detached from the actual jury trials, can assume that role (*see* ***Gasperini v Center For Humanities, Inc.***, 518 US 415, 450, *supra*, dissent, Scalia; "[g]ranting appellate courts authority to decide whether as award is 'excessive or inadequate' in the manner of CPLR §5501(c) may reflect a sound understanding of the capacities of modern juries and trial judges").

Additionally, as the process has developed, instead of reviewing the trial court's determination on a 4404 motion only for abuse of discretion, the "appellate courts engage in a *de novo* review for material deviation, giving the defendant a double shot at getting the damages award set aside" (***Gasperini v Center For Humanities, Inc.***, 518 US 415, 467, *supra*, dissent, Scalia).

The Court acknowledges the fact that commentators have exposed the lack of statutory authority for the imposition of the appellate standard of review upon the trial courts, but then question whether the standards differ in any meaningful way or whether they are merging into a single standard (*see* Siegel, Practice Commentary 5501:10 to CPLR 5501, McKinney's Cons. Laws of N.Y., Book7B [1995]; *see also* Siegel, N.Y. Prac. § 407 [4th ed.]; 8 N.Y. Prac., New York Civil Appellate Practice § 4:9). It can be argued that the weight of the evidence standard includes verdicts in other cases of which the judge is aware. However, in the face of such a clear and unambiguous statutory direction of appellate scope of review, this Court can not question the intention of the State Legislators and will not partake in what amounts to judicial legislation by applying the dictates of §5501(c) to the instant motion.

If this Court is not bound by 5501(c)'s "deviates materially" standard, and since it would be an error to apply the "shocks the conscience" test to defendants' motion to set aside the verdict (*compare* ***Lauria v New York City Dept. of Envtl. Protection***, 152 Misc2d 543, 577 NYS2d 543 [Civ Ct Richmond County 1991]; *affirmed* 156 Misc 2d 31, 600 NYS2d 603 [App Term 2th & 11th Jud Dist 1993]), then "reasonableness" of the damage award must be determined by whether or not the jury's decision is in any way supported by an examination of the record evidence (*see* ***Simeon v Urrey***, 278 AD2d 624, 717 NYS2d 690 [3d Dept 2000] ["To successfully challenge a determination as to the amount of damages to be awarded, the record evidence must preponderate in favor of the moving party to such a degree that the verdict could not have been reached on any fair interpretation of the evidence"]; ***Rodriguez v City of New York***, 191 AD2d 420, 594 NYS2d 61 [2d Dept 1993]; ***Campbell v City of Elmira***, 198 AD2d 736, 604 NYS2d 609 [3d Dept 1993], *affd* 84 NY2d 505, 620 NYS2d 302 [1994]; *compare* ***Donlon v City of New York***, 284 AD2d 13, 727 NYS2d 94 [1st Dept 2001] [as for appellate review]).

This court will adhere to the "weight of the evidence" standard adopted by the State Legislature for

trial courts, as set forth under CPLR 4404 (*see* ***Inzinna v Brinker Rest. Corp.***, 302 AD2d 967, 754 NYS2d 495 [4th Dept 2003]; ***Murad v First Union Auto Fin. Inc.***, NYLJ August 30, 2001 p 21, col 4 [Sup Ct Nassau County 2001]; *cf* ***Miraglia v H & L Holding Corp.***, 5 Misc3d 1021, 799 NYS2d 162 [Sup Ct Bronx County 2004]) and rejects the first branch of defendants' motion which addresses the scope of review under CPLR 5501(c).

A review of the Practice Commentaries by David D. Siegel (*see* C4404:4 Additur and Remittitur) notes:

> When the jury decides damages in an amount that exceeds what the court finds to be the maximum that the proof can possibly support, the court can set aside the verdict and grant a new trial on the issue of damages unless the plaintiff stipulates to accept damages in the lower figure the court finds to be the limit.
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> * * *
>
> Both of these procedural phenomena are members of the weight-of-the-evidence family, since they result in a new trial of damages rather than in a judgment for a sum the court fixes. See Siegel, New York Practice 2d Ed. §407.

The "weight of the evidence" standard is the product of the experience of the judge, first as a lawyer and then as a judge and "it's impossible to articulate its borders with any but illusory precision" (*see* Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C4404:3). It is when the judge is too uncomfortable with the verdict to allow it to stand, but not uncomfortable enough to grant judgement to the other side in spite of it (*id.*).

Contrary to defendants' contention, there was a valid line of reasoning and permissible inferences which could have led rational people to the conclusion reached by the jury on the basis of the evidence presented at the trial, and the verdict was supported by a fair interpretation of the evidence (*see* ***Reichert v City of New York***, 17 AD3d 654, 792 NYS2d 915 [2d Dept 2005]; ***Cohen v Hallmark Cards***, 45 NY2d 493, *supra*).

The Court finds that, under the circumstances of this case, the pain and suffering awards are not against the weight of the evidence as excessive and could have been reached upon a fair interpretation of the evidence (*see* CPLR 4404). The verdict award was fully supported by the record. Defendants still can argue to the Second Department that the awards deviated materially from what would be reasonable compensation (*see* CPLR 5501[c]; *see also* ***Grigoli v Passantino***, 15 AD3d 349, 790 NYS2d 161[2d Dept 2005]; ***Barcliff v Brooklyn Hosp.***, 212 AD2d 562, 622 NYS2d 562 [2d Dept 1995]).

As discussed above, a trial court should be wary of substituting its judgment for that of the jury. Simply looking at other damage awards can not be the sole criteria relied upon in deciding a CPLR 4404 motion. As held in ***Po Yee So v Wing Tat Realty, Inc.***, 259 AD2d 373, 374, 687 NYS2d 99 (1st Dept 1999), "Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible."

In their post-trial motion, defendants focus their challenge to the pain and suffering award by contrasting the jury's verdict to various lesser verdicts involving amputation of a lower extremity. The implication is that if below the knee amputation cases result in a lower verdict than that before the Court, plaintiff, who still has some limited use of her right leg after 12 surgical procedures, must have her jury verdict reduced. However, such a position is contrary to that advanced by defendants during the trial of this action. On redirect of their expert, Dr. Goldberg, defendants elicited the following question and answer (March 17, 2005, transcript p 236):

> Q. What comment or analysis did you make with regard to amputation, in the case of Sherrie Butler?
>
> A. As was read to you, individuals who elect not to have amputations have problems with infections, pseudoarthrosis and limb shortening is a common complaints.
> However, below the knee traumatic amputations both done early on, had it been done at the time that she showed up, or delayed at sometime thereafter, can function quite well.
> Below the knee amputees can engage in sports, can run marathons, can dance, can play tennis, can work a full-time job, and many require nothing in the way of analgesics whatsoever.

Based upon defendants' position on this issue at trial, as reflected in the question and answer above, the Court is not persuaded by defendants' position advanced in their post-trial motion. In this case, negligence was conceded by defendants. Due to their negligence, plaintiff was faced with two medically acceptable courses of treatment, that is, amputation or attempt to save the leg by undergoing numerous surgical procedures. Plaintiff was forced to make this choice due to defendants' actions. Plaintiff's injuries should not be discounted because she sought to save her leg, when faced with that life-altering decision.

Since the "weight of the evidence" standard is the product of the experience of the judge, a review of prior verdicts does provide some indication of the consensus of opinion of jurors and courts of the proper relation between the character of the injury and the amount of compensation awarded (*see* ***Senko v Fonda***, 53 AD2d 638, 639, 384 NYS2d 849 [2d Dept 1976]). However, such a review is not controlling, as it is under CPLR 5501(c). Under the "weight of the evidence" standard, the Court must still examine the limits of what

damages a jury may reasonably award and use the power of remittitur when those bounds have been exceeded. Here, the Court has researched numerous catastrophic leg injury cases and has not been able to find any that include as many hospitalizations and procedures as endured by plaintiff.

In examining the following cases, the Court finds that the challenged pain and suffering awards would be considered reasonable compensation, although, admittedly on the higher end of the range of comparable cases (*see* ***Carl v Daniels***, 268 AD2d 395, 702 NYS2d 279 [1st Dept 2000] [$4,800,000 for past and future pain and suffering for severe comminuted fracture requiring three surgeries, substantial range of motion limitation, and chronic pain]; ***Hoenig v Shyed***, 284 AD2d 225, 727 NYS2d 80 [1st Dept 2001] [$5,600,000 for past and future pain and suffering for an above the knee amputation]; ***Patterson v Nassau Community Col.***, 308 AD2d 519, 764 NYS2d 841 [2d Dept 2003] [$4,500,000 for past and future pain and suffering]; ***Bondi v Bambrick***, 308 AD2d 330, 764 NYS2d 674 [1st Dept 2003] [$9,750,000 for past and future pain and suffering where 35-year-old woman lost part of her left leg and underwent nine surgeries including skin grafts and relocation of muscle tissue]; ***Kovit v Hallums***, 307 AD2d 336, 763 NYS2d 325 [2d Dept 2003] [$3,750,000 for past and future pain and suffering for an above the knee amputation]; ***Hotaling v CSX Transp.***, 5 AD3d 964, 773 NYS2d 755 [3d Dept 2004] [and various cases cited therein] [$6,000,000 for past and future pain and suffering for above-the-knee amputation]; ***Mundy v New York City Tr. Auth.***, 299 AD2d 243, 749 NYS2d 710 [1st Dept 2002] [$8,000,000 for past and future pain and suffering]; ***Walker v Zdanowitz***, 265 AD2d 404, 696 NYS2d 509 [2d Dept 1999] [$4,000,000 for past and future pain and suffering where both legs were amputated]; ***Miller v Long Is. R.R.***, 286 AD2d 713, 730 NYS2d 449 [2d Dept 2001] [$3,250,000 for past and future pain and suffering]; ***Stokes v New York Med. Group, P.C.***, 304 AD2d 449, 757 NYS2d 723 [1st Dept 2003] [$3,000,000 for past and future pain and suffering for two gangrenous toes and permanent gait impairment]; ***Machado v City of New York***, 304 AD2d 626, 758 NYS2d 165 [2d Dept 2003] [$2,000,000 for past and future pain and suffering from six knee surgeries]; ***Barrowman v Niagara Mohawk Power Co.***, 252 AD2d 946, 675 NYS2d 734 [4th Dept 1998] [$3,000,000 for past and future pain and suffering involving cervical and lumbar fusion surgeries]; ***Miraglia v H & L Holding Corp.***, 5 Misc3d 1021(A), 2004 WL 2785185 [Sup Ct Bronx County 2004] [$15,000,000 for past and future pain and suffering for wheelchair bound paraplegic]; *see also* ***Williams v Bright***, 167 Misc2d 312, 632 NYS2d 760 [Sup Ct New York County 1995], *reversed on other grounds* 230 AD2d 548, 658 NYS2d 910 [1st Dept 1997] [$1,000,000 for past and $2,750,000 for future pain and suffering for severe leg and spine fractures]).

Catastrophic injury cases such as ***Reed v City of New York***, 304 AD2d 1, 757 NYS2d 244 (1st Dept 2003) ($5,000,000 for past and future pain and suffering), ***Storms v Vargas***, 256 AD2d 458, 682 NYS2d 404 (2d Dept 1998) ($4,000,000 for past and future pain and suffering), and ***Schifelbine v Foster Wheeler Corp.***, 4 AD3d 736, 772 NYS2d 140 (4th Dept 2004) *affirming* 3 Misc 3d 151, 776 NYS2d 146 (Sup Ct Allegany County 2002) ($6,500,000 for past and future pain and suffering) are also helpful as a guide.

While some of the above cases involve an amputation of a lower limb, sufficient proof was offered to support the contention that plaintiff faces the strong medical possibility of future surgeries and a future

amputation. In any event, the injuries she has suffered, standing alone, support the jury's verdict. The Court finds that the injuries in ***Hotaling v CSX Transp.***, 5 AD3d 964, *supra,* with a plaintiff who, when faced with the same options facing the instant plaintiff, chose the option of amputation over the procedure the instant plaintiff chose, the injuries in ***Bondi v Bambrick***, 308 AD2d 330, *supra*, with an older plaintiff but a partial amputation, and the injuries in ***Carl v Daniels***, 268 AD2d 395, *supra*, to be quite similar to the instant case.

The Court finds that pain and suffering awards are the maximum compensation for the past nearly six years of plaintiff's pain and suffering during and after the numerous hospitalizations and procedures and for the fifty-five years of future pain, suffering, disability, future medical treatment, and loss of enjoyment of life. The awards are clearly within the maximum limit of a reasonable range for such awards. It cannot be said that the jury awards for past and future pain and suffering are against the weight of the evidence or materially deviated from reasonable compensation. The Court will adhere to the general rule that courts should exercise their discretionary power over damage awards sparingly (*see* ***DePasquale v Klenetsky***, 255 AD2d 546, 680 NYS2d 666 [2d Dept 1998]; ***Calhoun v Cooper***, 206 AD2d 497, 614 NYS2d 762 [2d Dept 1994]; ***Shurgan v Tedesco***, 179 AD2d 805, 806, *supra*).

The Court rejects the second branch of defendants' motion which claims that the remark by plaintiff's counsel during summation seeking an award of $15 million was prejudicial. No caselaw is offered by defendants to support their position that by requesting such a sum, plaintiff's counsel committed reversible error. In fact, defendants' counsel first raised the issue in his summation by offering figures of $500,000 for past and $500,00 for future pain and suffering. In the charge to the jury, the Court recited PJI 2:277A, which addresses the issue of comment by counsel during closing remarks of verdict figures. Moreover, counsel is mistaken in the belief that the Court sustained an objection to summation remarks concerning the figure of $15 million as an award for pain and suffering. A review of the transcript shows that the Court was sustaining an objection based upon plaintiff's counsel's remark wherein he was giving his own opinion, that is, "I believe the evidence justifies that kind of award." The objection was to counsel stepping over the line and, in essence, testifying as to his opinion; not to the claim that the figure was inappropriate.

The Court also agrees with plaintiff's contention that certain arguments raised by defendants' motion are inappropriate as for a CPLR 4404(a) motion since these issues were either decided by the Court during the trial or were fully submitted to the jury and decided against defendants. Defendants objected to every significant evidentiary ruling made during the course of the trial that was adverse to defendants and yet fail to raise new legal arguments or set forth grounds for reconsideration of the trial rulings. The Court adheres to its prior trial rulings.

Defendants' claim that plaintiff's failure to attend physical therapy to treat and improve her foot drop condition contributed to a re-fracture of the original fracture site was fully explored by defendants during the trial. Based upon the totality of the evidence, including Dr. Thompson's opinion that physical therapy does not fix a foot drop, Dr. Goldberg's acknowledgment of the pulling on the bone due to the lack of musculature

in the front of the leg, and Dr. Rozbruch's May 4, 2000 notes that referenced "major risks of recurrent fracture and bending of regenerate," it is clear that the jury sided with plaintiff's claim that her foot drop was caused by the original accident and that the foot drop condition caused the subsequent fall.

Additionally, defendants' claim that plaintiff's failure to seek orthopedic treatment for two years during which time her tibia angulation worsened (the failure to mitigate claim), was apparently resolved by the jury in plaintiff's favor, in light of the evidence that she sought treatment but was required to pay for same herself, which she could not afford, as revealed by the testimony of Dr. Rozbruch. Moreover, Dr. Thompson testified that the bone was bending because, as shown on x-rays, the original fracture had never properly healed and became more angulated.

Defendants' claim that plaintiff was capable of walking two miles a day was apparently resolved against defendants based upon the totality of the evidence and plaintiff's appearance in court. These are all factual issues that were in dispute during the trial and are appropriately left to be resolved by the jury.

Based upon the entire record, the Court rejects defendants' contention that the evidence offered with regard to a future possible amputation is speculative. As detailed above, sufficient evidence exists to support the likely prospect that amputation is a strong possibility in the future. Various doctors testified as to the non-union of the fracture site and the lack of proper blood supply. Various doctors agreed that such future surgery will take place. The medical testimony as to the possibility of such future surgery is similar to that offered in ***Miranda v New Dimensions Realty Co.***, 278 AD2d 137, 718 NYS2d 54 (1st Dept 2000) and ***Wendell v Supermarkets Gen. Corp.***, 189 AD2d 1063, 592 NYS2d 895 (3d Dept 1993). Here, the testimony concerning the possibility of future amputation was supported by the requisite showing of medical certainty (*cf* ***Mink v Metro-North Commuter R.R. Co.***, 182 AD2d 601, 583 NYS2d 837 [1st Dept 1992]).

The Court adheres to the prior rulings as to the claimed "improper 3101(d) response." The Court's position was clearly set forth on the record (*see* transcript, March 10, 2005 p 12; *see also* ***Malanga v City of New York***, 300 AD2d 549, 752 NYS2d 391 [2d Dept 2002]; ***Rokita v Barrett***, 303 AD2d 983, 757 NYS2d 184 [4th Dept 2003]).

The fourth branch of defendants' motion challenges the lost earning award as being speculative and not proven with reasonable certainty. Claims for lost earnings "must be ascertainable with a reasonable degree of certainty and may not be based on conjecture" (***Bailey v Jamaica Buses Co. Inc.***, 210 AD2d 192, 620 NYS2d 257 [2d Dept 1994]; ***Schiller v New York City Transit Authority***, 300 AD2d 296, 750 NYS2d 774 [2d Dept 2002]).

Plaintiff's expert economist testified as to plaintiff's past and future loss of earnings. Defendants challenge many of the assumptions utilized by the expert in arriving at his computations. However, the award for lost wages was not against the weight of the evidence, which is a factual question (*see* ***Colonno v***

Executive I Assocs., 228 AD2d 859, 644 NYS2d 105 [3d Dept 1996]). Here, the jury could have reached their conclusion on the basis of a fair interpretation of the evidence presented at trial. The issues addressed in defendants' motion, such as plaintiff's inability to work in the future, the rate of pay for a full-time cashier, and the average inflation rate, were raised before and rejected by the jury, which attached great weight to the testimony of plaintiff's expert.

Trial testimony discussed plaintiff's limited work history as a cashier at various part-time jobs, such as at Jones Beach, McDonald's, Waldbaums grocery store, and a Party City store, and additionally as a telemarketer. Plaintiff's earnings were (fluctuating between $5.50 to $8.00 an hour), and would likely have remained relatively low. Plaintiff's expert utilized the median wage rate for a cashier in 2001 as the basis of his calculations. That rate was even lower than the rate utilized by defendants' expert economist. In light of plaintiff's past work history, the wage rate was reasonable for future, full-time work. The jury rejected plaintiff's earning potential in the computer business, since such would be speculative (*see* ***Naveja v Hillcrest Gen. Hosp.***, 148 AD2d 429, 538 NYS2d 584 [2d Dept 1989]).

While expert testimony must be based on facts supported by the evidence, the facts need only be "fairly inferable" from the evidence (***Tarlowe v Metropolitan Ski Slopes***, 28 NY2d 410, 414, 322 NYS2d 665 [1971]). Such was the case here. Here, the evidence was not too speculative or too remote to be probative on the issue of loss of earnings. While sparse, the evidence was not so insufficient that the jury could not rely on it as a matter of law. The award is supported by plaintiff's expert.

Moreover, in light of testimony from defendants' own expert that plaintiff could work as a cashier in a parking garage or a movie theater, or as a dispatcher or telemarketer, at a comparable rate of pay as that offered by plaintiff's expert, the real conflict between the parties is whether or not plaintiff is capable of working. There was "competent medical evidence that [plaintiff] was unable to work because of injuries" for which defendants are responsible (***Szynalo v Barretti Carting Corp.***, 304 AD2d 558, 559, 756 NYS2d 904 [2d Dept 2003]). The jury determined that issue against defendants.

The jury verdict was entirely consistent with the expert testimony presented. In light of the difficult credibility issues that surfaced concerning defendants' expert, the jury could have properly relied upon the testimony of plaintiff's expert. As such, loss of earnings was established with the requisite reasonable certainty and does not exceed the amount of compensation warranted by the evidence (*see* ***Hoerner v Chrysler Fin. Co., LLC***, 21 AD3d 1254, __ NYS2d __ [4th Dept 2005]; ***McKay v Ciani***, 288 AD2d 587, 732 NYS2d 447 [3d Dept 2001]). The Court rejects the fourth branch of defendants' motion.

Defendants' final challenge to the jury award centers on the $100,000 award for future medical expenses. Defendants claim that the award amounts to a double recovery since the future lost earnings award included a component of future health benefits. However, this issue was not raised at trial. Defendants also claim that the award is speculative or excessive. An examination of the testimony of plaintiff's treating

physician reveals that there is ample basis in the record for the award, which is supported by the evidence. In fact, if one were to calculate the various items of future medical costs set forth in the testimony of Dr. Thompson, the total sum surpasses $110,000. The Court rejects defendants' challenge to the future medical expenses award.

The Court agrees with defendants' request for a hearing regarding collateral sources pursuant to CPLR 4545 and structuring of the judgment pursuant to CPLR 50-B. The hearing will be held at the Courthouse-Annex, Part 33, Griffing Avenue, New York on December 2, 2005 at 9:30 am, unless the parties can agree to these amounts prior thereto. Moreover, the Court directs that ten (10) days prior to the hearing, defendants' counsel shall notify plaintiff's counsel of any and all claims or set-offs that they intend to prove.

Accordingly, the motion is granted as herein indicated. This constitutes the Order and decision of the Court.

DATED: 11/3/05

THOMAS F. WHELAN, J.S.C.