At a Special Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 15th day of April, 2005

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

WALTER C. TORTO and PAULETTE TORTO,

Plaintiff,

vs.

CALVIN BOYNTON and PATRICIA BOYNTON,

Defendant.

DECISION AND ORDER

Index No. 2000-1383
RJI No. 2002-0694-M

APPEARANCES:

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HON. JEFFREY A. TAIT, JSC

This matter is before the Court on the motion of the plaintiffs to set aside a jury verdict dismissing the plaintiffs' claims against the defendants. This matter was tried before a jury at the Broome County Courthouse on January 24 through January 26, 2005. The motion was made within the time limits provided in the New York Civil Practice Law and Rules. The return date was adjourned at the request of the parties' attorneys and was argued on April 15, 2005.

The facts of this case are not complicated. Plaintiff Walter Torto was returning home in the early morning hours of October 2, 1998 from a night of bowling.[1] The defendants owned property adjoining the road on which Mr. Torto was traveling, which they used to operate a business boarding horses. Two of the horses defendants boarded escaped the confines of the fencing that kept them on the defendants' property and wandered into the roadway. The car plaintiff was driving collided with the horses, causing serious damage to Mr. Torto's vehicle.

The issue of liability for whatever damages and injuries Mr. Torto suffered as a result of the accident was decided by the then assigned Justice on motion some months before the trial.[2] Consequently, the parties tried and submitted to the jury the issue of damages.[3]

The plaintiff now moves to set aside the verdict as it was "*against the weight of the evidence, and ... no reasonable jury could have come to the decision that no injury whatsoever was sustained*" (Benjamin affirmation at ¶11 dated February 3, 2005). The plaintiffs' moving papers refer to some specific aspects of the trial to support the motion.

Plaintiffs point out that there was no serious injury threshold applicable here. In other

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[1] Mr. Torto was an avid and skilled bowler.

[2] The parties actually stipulated that liability was not an issue, as a motion by the plaintiff on this issue was pending.

[3] The claims included Mrs. Torto's loss of consortium claim in addition to Mr. Torto's claim for damages as a direct result of the accident.

words, Mr. Torto did not have to show that his injury was of a particular magnitude before he was entitled to damages. Rather, he had only to show that he suffered some damage at which point, he asserts, damages in some amount would necessarily be awarded to him.

This point is well taken. Even though Mr. Torto was driving an automobile on a public highway when his vehicle hit the horses, causing his alleged injuries, he was not required to show that he suffered a *serious injury* as that term is defined in New York State Insurance Law §5102(d) (*see Walsh v. Durkin*, 981 FSupp 267 [SDNY 1997] [noting that the no-fault insurance law only applies to actions between "covered persons" and thus would not apply where there was no basis upon which to find that defendants were "covered persons" under the law – even where the plaintiff was clearly a "covered person"]; *see also* Insurance Law §5102(j)). In this situation, then, the plaintiffs were entitled to recover some measure of damages if they could prove any compensable damages.

The overwhelming bulk of the evidence at trial dealt with plaintiffs' claim that Mr. Torto suffered an injury to his back. The testimony of every witness focused on this aspect of his claim. For example, extensive testimony was offered to show that Mr. Torto was a skilled, talented, and avid bowler prior to the accident and that after the accident he was far less able to perform at the level he had prior to the accident. This, plaintiffs asserted, prevented Mr. Torto from continuing to enjoy this activity as he had in the past and prevented any realistic opportunity he had to compete on the senior professional bowling circuit.

During deliberations, the jury raised a question regarding a document that was a part of Mr. Torto's personnel file admitted into evidence.[4] This exhibit and all of the other exhibits were placed in the jury room immediately prior to deliberations so that they would be available

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[4] The personnel file was introduced by the plaintiff and consisted of a manila folder with numerous documents from Mr. Torto's twenty plus year career with the New York State Department of Transportation.

to the jurors during their deliberations.[5] That document disclosed a prior back injury that caused Mr. Torto to lose time from work many years prior to the October 2, 1998 accident. In response to the jury's questions about the document, and after discussion with counsel,[6] the Court told the jurors that there was no testimony or evidence presented regarding a prior or pre-existing condition and that the issue had not been raised. After continuing their deliberations, the jury returned a verdict declining to award any damages to the plaintiffs.

The defendants assert that the record amply supports the jury's verdict finding of no damages for plaintiffs. They point out that their expert witness, Dr. Farouq Al-Khaladi, testified that Mr. Torto's injuries were likely attributable to a later incident disclosed in his medical records in which Mr. Torto stated that he stepped out and down from a vehicle and felt pain in his back. In addition, Dr. Al-Khaladi explained the natural degeneration of the back, spine, and discs over time, to which he also attributed Mr. Torto's symptoms and complaints.

When presented with a motion to set aside a verdict, the court is required to view the evidence in a light most favorable to the party prevailing at trial (*see Campbell v. City of Elmira*, 198 AD2d 736, 737 [3d Dept1993], *affd* 84 NY2d 505 [1994]). "It has often been stated that a jury verdict must be accorded great deference" (*id.*). Thus viewed, in order to grant the motion to set aside the verdict, the court must "conclude that there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*id.*, *quoting Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493 [1978]). In other words, the court must find that "the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v. Big V Supermarkets, Inc.*, 86 NY2d

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[5] It was plaintiffs' counsel who requested that the documents be placed in the jury room.

[6] Out of the presence of the jury.

744, 746 [1995], *quoting Moffatt v. Moffatt*, 86 AD2d 864 [2d Dept 1982] *affd* 62 NY2d 875 [1984]).

It is clear that throughout the trial the cause, scope, and magnitude of the injury suffered by Mr. Torto was contested and evidence was offered both for and against his claim of entitlement to damages. Simply put, Mr. Torto offered evidence that he suffered compensable damage in the form of a back injury as a result of the accident and defendants offered evidence that any back problems he was experiencing were not the result of the accident or were not significant.

While plaintiff would have the Court focus on the question posed by the jury during the course of their deliberations as proof that improper factors or consideration entered into their evaluation of the claim, that is by no means clear. There is ample evidence in the record to support the jury's conclusion that Mr. Torto either did not suffer an injury to his back as a result of the accident or that whatever injury he did suffer was the result of other causes.[7]

Plaintiff makes a good point in that it is undisputed that the collision between Mr. Torto's car and the horses did occur and the defendants bear liability for that. It is only damages that are at issue. While the injury to Mr. Torto's back was in serious dispute, the facts that he was in the vehicle during a significant collision and that defendants are liable for any resulting damages were not.

There is undisputed testimony that Mr. Torto suffered bruises and cuts as a result of the collision. Mr. Torto testified, without contradiction, that he suffered cuts and bruises and, in

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[7] In this regard, the evidence did show that Mr. Torto's claims of injury to his back did not immediately manifest themselves and it was only weeks after the accident that he consulted a doctor about them. Was this just a delay in the occurrence of symptoms, or caused by an intervening incident or incidents, or was it proof that there was no injury as a result of the accident, or was Mr. Torto attempting to tough it out, hoping it would get better without medical treatment? That is what juries decide.

particular, had small pieces of glass lodged in his skin resulting from contact with the vehicle's window from the collision. These damages are clear and undisputed.

The Court is convinced that the jury, in the process of considering the issues surrounding the claimed back injury (which was the main topic of the testimony) neglected to award any damage for the immediate injuries. While, according to the testimony, these injuries were somewhat minor, not permanent, and healed soon after the accident, they are compensable.

The jury's verdict does not constitute a finding of no liability, as that issue was not before them. The verdict is a finding that Mr. Torto did not suffer ***any*** damage as a result of the accident. Here, the jury did not award any damages for the bumps, bruises, scrapes, and cuts that Mr. Torto suffered as a result of the accident.

New York Civil Practice Law and Rules §5501(c) provides that where an award is inadequate, a court may grant a new trial unless the opposing party agrees to a different award. The language of this section explicitly applies to appellate courts. The Appellate Division, Third Department has held that the standards in this section govern trial judges as well (*see Cochetti v. Gralow*, 192 AD2d 974 [3d Dept 1993]). In accordance with the standard provided by CPLR 5501(c), damages awarded by a jury may be set aside and a new trial ordered if they "deviate materially from what would be reasonable compensation" (*see Plante v. Hinton*, 294 AD2d 679, 680 [3d Dept 2002]).

That Mr. Torto suffered some, albeit minor, injuries is clear. He is thus entitled to reasonable compensation for them. In the typical circumstance, the so-called "No-Fault" law would prevent a case like this from making its way into the courts because it would be subject to the requirement of the plaintiffs making a threshold showing of a "serious injury." That is not the case here – no such showing is required. It is difficult to find guidance on what level of compensation is reasonable in this instance. There were no medical procedures, inpatient

hospitalization, or medical expense evidence on the damages that this Court finds to be compensable. The amount of damages for the soreness and small cuts Mr. Torto testified that he suffered is by all standards subjective.

The reasonable compensation in a personal injury action is not calculable using a formula or with precise certainty. It involves a multitude of considerations, some of which are imprecise. Looking to prior precedents can provide some guidance. In *Lolik*, the Court held that an award of $10,000.00 for past pain and suffering[8] and $10,000.00 for future pain and suffering was reasonable compensation[9] (*see id.*, 266 AD2d at 759). In *Hornicek v. Yonchik*, the plaintiff, who was bitten by a dog, was awarded $750.00, which was upheld as reasonable compensation[10] (*see id.*, 284 AD2d 895 [3d Dept 2001]).

The reasonable compensation for the bumps, bruises, and cuts suffered by plaintiff in this case lies somewhere in between the cases cited above. Considering all of the evidence, the motion for a new trial is granted on the issue of damages arising out of the accident (other than the claimed back injury) unless the defendants file a stipulation, within 30 days of service of a copy of this Decision and Order with Notice of Entry, agreeing to payment of $7,500.00 to the plaintiffs.[11]

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the

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[8] This award was for the time period between a second and third trial of the matter.

[9] The plaintiff there, 74 years old by the time of the third trial, fell and suffered a knee injury.

[10] There the plaintiff suffered scarring that required stitches to repair, but he was initially unaware that he had been bitten by the dog.

[11] The Court is aware that a difference of $7,500.00 between a jury award and the Court's view of what is "reasonable compensation" would normally not be significant nor would it justify overturning a jury's award. However, when the jury makes no award when liability is not an issue and the question is whether plaintiff suffered ***any*** damages, it becomes significant.

Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: August 10, 2005
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice

The following papers were file with the Clerk of the County of Broome:

- Notice of Motion of Law Office of Ronald R. Benjamin dated February 4, 2005
- Attorney Affirmation of Ronald R. Benjamin, Esq. dated February 3, 2005
- Affidavit in Opposition of Allan C. VanDeMark, Esq. sworn to February 28, 2005
- Affidavit of Service of Katrina M. Klee sworn to March 1, 2005