SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 25

Present: HON. WILLIAM R. LaMARCA
Justice

MERRYL KIHL,

Plaintiff,

-against-

KARL O. PFEFFER and THE COUNTY OF NASSAU,

Defendants.

Motion Sequence # 012
Submitted January 27, 2005

INDEX NO: 23156/95

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Supplemental Affirmation in Opposition.....3
Reply Affirmation.....4
Supplemental Reply Affirmation.....5
Sur-Reply Affirmation.....6

Relief Sought

Defendant, COUNTY OF NASSAU (hereinafter referred to as the "COUNTY"), moves, pursuant to CPLR §4404(a), for an order granting it judgment notwithstanding the jury verdict on the issue of liability or, in the alternative, setting aside the jury verdict as contrary to the weight of the evidence and ordering a new trial on that issue. Additionally, the COUNTY seeks an order striking the damage award, or directing remittitur on the

ground of excessiveness. Plaintiff, MERRYL KIHL, opposes the motion which is determined as follows:

Background

Plaintiff was injured on January 13, 1995, when the car in which she was a passenger, driven by defendant, KARL O.PFEFFER, slid off Quaker Meeting Road in Farmingdale, New York, and hit a tree. In July 1995, plaintiff commenced the instant action and alleged negligent road design against the COUNTY and negligent driving against PFEFFER.

Two other actions, FURINO v. COUNTY OF NASSAU, 299 AD2d 519, 750 NYS2d 504 (2nd Dept. 2002) and ZAWACKI v. COUNTY OF NASSAU, 299 AD2d 452, 750 NYS2d 647 (2nd Dept. 2002), which had been commenced against the COUNTY alleging negligent road design in the two (2)separate accidents occurring at the same location, were affirmed on appeal upholding the jury verdicts which found the COUNTY's traffic studies at the subject location to be "plainly inadequate" and held the COUNTY liable. By Short Form Order dated August 26, 2004, the Court found that the "plainly inadequate" determination in FURINO and ZAWACKI, constituted a finding of negligence on the part of the COUNTY which was binding in the case at bar and directed that "the County is estopped from relitigating the issue of negligence except as to whether said negligence was a substantial factor in causing the accident. No liability will attach unless the ascribed negligence of the COUNTY in maintaining its roads in a reasonably safe condition is the proximate cause of the accident".

After a three (3) week trial, commencing on October 12, 2004, the jury unanimously determined that the COUNTY's negligence was a substantial factor contributing to the

accident and apportioned the liability between the COUNTY and PFEFFER 87% / 13%, respectively. The damages phase conducted before the jury, commenced on October 25, 2004, resulted in a verdict on November 4, 2004, which awarded the plaintiff as follows:

Past pain an suffering and loss of enjoyment of life	$625,000
Past medical expenses including medication	128,400
Past lost earnings	266,678

The above awards were unanimous.

Future pain and suffering and loss of enjoyment of life 46 years	$1,200,000
Future medical expenses other than medication 46 years	1,020,569
Future medication expenses 46 years	7,416,045
Future lost earnings 18.25 years	1,100,000
Future housekeeping services 46 years	374,436
Future patient care assistant 15 years	$ 673,612

The above monetary awards for future damages were reached by five (5) of the six (6) jurors and the time frames for said awards were unanimous.

The COUNTY contends that the jury's verdict as to apportionment was against the weight of the evidence and should be set aside. Additionally, COUNTY urges that the damages award is not supported by the evidence and is so excessive that it can not be sustained. The COUNTY states that their expert presented objective evidence that the car was traveling in excess of the thirty mile per hour speed limit in that the critical speed that

a car would slide off the roadway was between 33 and 37 mile per hour. It is the COUNTY's position that a violation of the speed limit is negligence, *per se*, and that an apportionment of only 13% to the driver of the car is not supported by the evidence. As to damages, the County states that the components of the damages award – for medical expenses, loss of earnings, medications, housekeeping, patient assistance, pain and suffering and loss of enjoyment of life – are not supported by documentary evidence and are so disparate with comparable cases as to be excessive. The COUNTY claims that the awards are speculative and not supported by competent evidence.

In opposition to the motion, the plaintiff points out that in *FURINO, supra*, the Second Department has already affirmed a jury determination finding the COUNTY 70% liable in an accident at the same location and that in the case at bar there was greater reason for a finding of greater liability. Plaintiff states that the jury rejected the COUNTY's expert's findings as to a .21 co-efficient of friction on the road and a 33-37 critical speed, which was based on a 1988 Survey, and credited plaintiff's expert's testimony describing a reduction in the co-efficient of friction to .16 with a critical speed of 27-28 miles per hour. Indeed, after the FURINO accident, the COUNTY studied the area of the roadway and determined that there was a need for changes to make it safe, including re-banking, an improvement in the signage and the removal of trees which constituted an unacceptable hazard, but none of the findings were implemented. Testimony at trial revealed that the COUNTY's own expert testified that the "service life" of the roadway had long expired and evidence was presented of the numerous accidents that occurred at the subject location, some fatal. Plaintiff asserts that there were strong reasons for imposing more liability on the COUNTY and that there was ample evidence to support the jury's apportionment of

liability and the finding that the driver, PFEFFER, was driving within the speed limit, as he and others testified.

As to damages, counsel for plaintiff asserts that the jury awards are appropriate given the extent of plaintiff's devastating injuries which have left her totally disabled, with persistent and ravaging pain which has required the surgical implantation of a morphine pump into her body and 10-12 operative procedures to date, with 9-10 surgical procedures expected in the future. Plaintiff points out that the cases cited by the COUNTY reflecting lower awards are inapposite herein as the injuries are not comparable to plaintiffs. Furthermore, counsel urges that plaintiff's testimony, together with the testimony of plaintiff's treating pain management specialist, her orthopedic surgeon and an expert economist and vocational treatment specialist, about her devastating injuries and intractable pain, her inability to work and her lost wages, the costs of future medications and the need for housekeeping and other medical assistance, amply supports the jury awards. Plaintiff notes the COUNTY's failure to provide any contrary expert testimony.

The Law

CPLR §4404(a) provides:

> 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.

It is axiomatic that a jury verdict is entitled to the benefit of every fair and reasonable inference which can be drawn from the evidence and that it is the function of the jury, not

the Court, to make credibility determinations. However, it has often been observed that "whether a jury verdict is against the weight of evidence is essentially a discretionary and factual determination which is to be distinguished from the question of whether a jury verdict, as a matter of law, is supported by sufficient evidence". *Nicastro v. Park*, 113 AD2d 129, 495 NYS2d 184 (2nd Dept. 1985). In addition, "[a]lthough these two inquiries may appear somewhat related, they actually involve very different standards and may well lead to disparate results". *Cohen v. Hallmark Cards*, 45 NY2d 493, 410 NYS2d 282, 382 NE2d 1145 (C.A. 1978).

To sustain a determination that a jury verdict is not supported by sufficient evidence as a matter of law, there must be "no valid line of reasoning and permissible inference which could possibly lead reasonable men to the conclusion reached by the jury on the basis of the evidence presented at trial". *Cohen v. Hallmark Cards*, *supra; Nicastro v. Park, supra.* As stated in *Nicastro*, "[t]he criteria for setting aside a jury verdict as against the weight of the evidence are necessarily less stringent . . . [and] whether a jury verdict should be set aside as against the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors [citations omitted]. The rule has been stated as requiring that a jury verdict be set aside where "the jury could not have reached a verdict on any fair interpretation of the evidence". *Nicastro v. Park, supra; see also, Burney v. Raba,* 266 AD2d 174, 697 NYS2d 329 (2nd Dept. 1999); *Licker v. Brangan,* 177 AD2d 547, 576 NYS2d 288 (2nd Dept. 1991).

Discussion

After a careful reading of the submissions herein and the cases cited in support of the parties positions, it is the Court's judgment that there is no basis on which to overturn,

reduce or otherwise disturb the jury's determination. Considering the record before the Court in the light most favorable to the plaintiff (see, *Kornblum Metals Co. v. Intsel Corp.*, 38 NY2d 376, 379 NYS2d 826, 342 NE2d 591[C.A. 1976]; *Sawtelle v. Southside Hospital*, 305 AD2d 659, 760 NYS2d 206 [2nd Dept. 2003]; *Miglino v. Supermarkets General Corp.* 243 AD2d 451, 662 NYS2d 818 [2nd Dept. 1997]), the Court finds the apportionment of liability and the damages award to be a fair interpretation of the evidence and that a jury could rationally reach such a conclusion. The jury is free to accept or reject whatever expert testimony it wished (see, *Landau v. Rappaport*, 306 AD2d 446, 761 NYS2d 325 [2nd Dept. 1999]; *Zapata v. Dagostino*, 265 AD2d 324, 696 NYS2d 194 (2nd Dept. 1999]; *Yellitz v. Brooklyn Union Gas Co.*, 242 AD2d 270 661 NYS2d 36 [2nd Dept. 1991]), and the plaintiff's testimony, even without documentary proof, was sufficient to support the jury's award as to lost wages. *Kane v. Coundorous*, 11 AD3d 304, 783 NYS2d 530 (1st Dept. 2004).

Conclusion

The COUNTY's motion to set aside the jury verdict and for a new trial is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 11, 2005

WILLIAM R. LaMARCA, J.S.C.

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