

<b>McConnell v Santana</b>
2008 NY Slip Op 31598(U)
June 9, 2008
Supreme Court, Richmond County
Docket Number: 0119452/0021
Judge: Anthony Giacobbe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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GERALDINE CARR MCCONNELL, Individually  
and as Administratrix of the Estate of  
GEREMY MCCONNELL, Deceased Infant,

Trial Part 9  
Present:  
Hon. Anthony I. Giacobbe

Plaintiff,

-against-

Decision and Order  
Index No. 11945/02

HIRAM SANTANA, NEW YORK CITY TRANSIT  
AUTHORITY and METROPOLITAN TRANSIT  
AUTHORITY,

Defendants.

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The following papers, numbered 1 to 3, were submitted on this motion this 15<sup>th</sup> day of April, 2008:

Notice of Motion with supporting papers (dated March 11, 2008)	1
Affirmation in Opposition with supporting papers (dated April 3, 2008)	2
Reply Affirmation (dated April 10, 2008)	3

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Upon the foregoing papers and due deliberation thereon, defendants' motion to set aside the jury's verdict and for related relief is denied.

This is an action to recover compensatory damages allegedly arising from defendant/bus driver Santana's negligence that resulted in decedent/bicyclist Geremy McConnell's death. The basis of plaintiff's complaint against defendant encompasses the negligent operation of a New York City bus. Upon a unified trial of all issues, the jury returned a verdict in plaintiff's favor.

Defendants now move “for an Order:

- A. pursuant to Rule 4404(a) of the CPLR setting aside the verdict rendered on January 22, 2008 in the total amount of \$520,000, upon the grounds that the verdict is unsupported by the testimony and against the weight of the evidence, and is excessive, and further, setting aside the verdict with respect to the jury’s findings that the decedent’s negligence was not a substantial factor in causing the accident as against the weight of the evidence and directing that this verdict be vacated, or that there b[e] substantial *remit[tu]r* thereof; and
- B. In the alternative directing a new trial;
- C. Granting a stay of enforcement of judgment of this matter pending resolution of this application, and
- D. For such other and further relief as the Court may deem just and proper.”<sup>1</sup>

In the instant case, the jury returned a verdict assessing defendant Santana’s liability at 100%. Although the jury found that the decedent was negligent, it determined that his negligence was not a substantial factor in causing the accident which resulted in his death (Verdict Sheet Questions 3 and 4).<sup>2</sup> Defendants move to set aside the jury’s verdict on the issue of decedent’s comparative fault, arguing that no rational jury could have found no liability on decedent’s part based on the evidence adduced at trial.

“It is well settled that a jury verdict should not be disturbed unless there is no fair

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<sup>1</sup> The Court notes that there is no challenge to the jury’s determination that defendant Santana was negligent, or that his negligence was a substantial factor in causing the accident (Verdict Sheet Questions 1 and 2). In any event, such determination is amply supported by the evidence.

<sup>2</sup> Parenthetically, a true copy of the Verdict Sheet is not annexed to the moving papers. However, the jurors’ responses to the Verdict Sheet Questions are transcribed in the minutes of the trial proceedings (*see*, Defendants’ Affirmation in Support, Ex. A).

interpretation of the evidence by which the jury could have reached its conclusion ... .” *LaGana v. Fox*, 6 AD3d 583 (2<sup>nd</sup> Dept. 2004) (citations omitted). The power of the trial court to set aside a jury verdict pursuant to CPLR 4404(a) is a “broad one intended to ensure that justice is done.” *DeGiglio v. Williams*, 166 AD2d 499 (2<sup>nd</sup> Dept. 1990). However, it is not without its limits, and there must be an articulable basis for the exercise of the court’s discretion. *See, generally, Nicastro v. Park*, 113 AD2d 129 (2<sup>nd</sup> Dept. 1985).

Apportionment of liability is a question of fact for the jury, and unless unsupportable by any reasonable interpretation of the evidence, it should not be disturbed. The test is not whether the jury erred in weighing the evidence presented, but whether any viable evidence exists to support the verdict. *See, e.g., Kozlowski v. City of Amsterdam* 111 AD2d 476 (3<sup>rd</sup> Dept. 1985). When there is some evidence to support a verdict, a court should not substitute its conclusion as to the correct proportion of liability for that of the jury.

In this case, the jury could have concluded, on a fair interpretation of the evidence, that the decedent’s negligent conduct did not rise to the level of being a substantial factor in causing the collision between the bus and the bicycle, and that only defendant Santana’s negligent actions, in combination with a lack of due care in operating his bus up to and including the location where the accident occurred, was the sole substantial factor causing the accident. Here, it is not implausible, unreasonable, irrational or logically impossible, based upon the trial evidence, for the jury to have found that, although decedent was negligent, his negligence was not a substantial factor in causing the accident. Furthermore, here, it cannot be said there is no “valid line of reasoning and permissible inferences which could lead rational people to the

conclusion reached by the jury based on the evidence presented at trial ... [and moreover], the verdict was supported by a fair interpretation of the evidence ... .” *Blanar v. Dickinson*, 296 AD2d 431 (2<sup>nd</sup> Dept. 2002). Simply put, the evidence adduced at trial is not so preponderated in favor of defendants that the jury could not have reached a verdict in favor of plaintiff on any fair interpretation of the evidence.

In addition, there is no indication that the jury was substantially confused or unable to make a proper determination after the Court’s charge, in weighing all of the evidence. The jury’s answers were clear, and are supported by record evidence. In the Court’s view, the jurors’ responses were not the result of substantial confusion, nor is there is any degree of internal inconsistency in their findings, as would warrant a new trial. *See, generally, Barry v. Manglass*, 55 NY2d 803 (1981), *rearg denied*, 55 NY2d 1039 (1982); *Palmer v. Walters*, 29 AD3d 552 (2<sup>nd</sup> Dept. 2006); *Ferrante v. County of Nassau*, 301 AD2d 565 (2<sup>nd</sup> 2003); *Brezinski v. Island Medical Care*, 291 AD2d 366 (2<sup>nd</sup> Dept. 2002); *Borovskaya v. Herskovic*, 2001 WL 1359846 (Sup. Ct. Kings Co.), *aff’d*, 300 AD2d 331 (2<sup>nd</sup> Dept. 2002); *Ledogar III v. Giordano*, 122 AD2d 834 (2<sup>nd</sup> Dept. 1986).

Following the jury’s liability findings, it next assessed damages against defendants for past and future pecuniary losses in the amounts of \$20,000.00 and \$500,000.00, respectively (Verdict Sheet Questions 6 and 7).<sup>3</sup> The Court notes that while the amount of damages to be awarded for personal injuries is primarily a question for the jury, a trial court has “the power, on motion of the parties or on its own motion, to review the question of whether the jury’s verdict

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<sup>3</sup> The jury also considered the issue of “pre-impact terror,” and did not make any award for this item of alleged damages (Verdict Sheet Question 9).

on the issue of damages was against the weight of the evidence ... and to set it aside if it found that the verdict deviated materially from what would be reasonable compensation ... .” *Ashton v. Bobruitsky*, 214 AD2d 630, 631 (2<sup>nd</sup> Dept. 1995). However, a trial court lacks the power to simply substitute its own determination for the jury’s as to what an appropriate award should be in a particular case, and proper procedure would require a court to grant a new trial on the issue of damages, absent an agreement between the parties as to a modification of the amount awarded. *Ashton v. Bobruitsky*, *supra* at 631-632.

Here, upon a thorough review of the record herein and of reported cases involving similar types of awards, including those cases cited by the parties<sup>4</sup> -- bearing in mind that “while review of verdicts in other cases is useful in determining what constitutes reasonable compensation, each case must be evaluated on its own facts [as a] ‘[m]odification of damages, which is a speculative

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<sup>4</sup> See, e.g., *Gonzalez v. New York City Housing Authority*, 77 NY2d 663 (1991); *DeLong v. County of Erie*, 60 NY2d 296 (1983); *Parilis v. Feinstein*, 49 NY2d 984 (1980); *Krumenacker v. Gargano*, 276 AD2d 750 (2<sup>nd</sup> Dept. 2000); *Johnson v. Queens-Long Island Medical Group, P.C.*, 272 AD2d 524 (2<sup>nd</sup> Dept. 2000); *Davis v. City of New York*, 264 AD2d 379 (2<sup>nd</sup> Dept. 1999); *Altman v. Alpha Obstetrics and Gynecology, P.C.*, 255 AD2d 276 (2<sup>nd</sup> Dept. 1998), *lv denied*, 93 NY2d 801 (1999); *Donofrio v. Montalbano*, 240 AD2d 617 (2<sup>nd</sup> Dept. 1997); *Marigliano v. City of New York*, 196 AD2d 533 (2<sup>nd</sup> Dept. 1993); *Dontas v. City of New York*, 183 AD2d 868 (2<sup>nd</sup> Dept. 1992); *Sullivan v. Locastro*, 178 AD2d 523 (2<sup>nd</sup> Dept. 1991), *lv denied*, 81 NY2d 701 (1992); *Chazon v. Parkway Medical Group*, 168 AD2d 660 (2<sup>nd</sup> Dept. 1990); *Stringile v. Rothman*, 142 AD2d 637 (2<sup>nd</sup> Dept. 1988), *app after remand*, 175 AD2d 281 (1991), *lv denied*, 79 NY2d 753 (1992); *Coffey v. Callichio*, 136 AD2d 673 (2<sup>nd</sup> Dept. 1988); *Kavanaugh v. Nussbaum*, 129 AD2d 559 (2<sup>nd</sup> Dept. 1987), *aff’d as modified*, 71 NY2d 535 (1988); *Regan v. LIRR Co.*, 128 AD2d 511 (2<sup>nd</sup> Dept. 1987); *Ledogar III v. Giordano*, *supra*; *Brookman v. Public Service Tire Corp.*, 86 AD2d 591 (2<sup>nd</sup> Dept. 1982); *Burger v. LIRR Co.*, 28 AD2d 871 (2<sup>nd</sup> Dept.), *app dismissed*, 21 NY2d 716 (1967); *Hackworth v. WDW Development, Inc.*, 224 AD2d 265 (1<sup>st</sup> Dept. 1996); *Gillard v. New York City Health and Hospitals Corp.*, 77 AD2d 532 (1<sup>st</sup> Dept. 1980); *Freeman v. Corbin Avenue Bus Co.*, 60 AD2d 824 (1<sup>st</sup> Dept.), *lv denied*, 44 NY2d 649 (1978); *Lang, Sr. v. Bouju*, 245 AD2d 1000 (3<sup>rd</sup> Dept. 1997); *Hanson v. County of Erie*, 120 AD2d 135 (4<sup>th</sup> Dept. 1986); *Windus v. Baker*, 67 AD2d 833 (4<sup>th</sup> Dept. 1979); *Phelan v. State of New York*, 11 Misc3d 151 (Court of Claims 2005).

endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible” (see, *Weigl v. Quincy Specialties Co.*, 190 Misc2d 1, 4-5 [Sup. Ct. New York Co. 2001], citing *So v. Wing Tat Realty, Inc.* 259 AD2d 373, 374 [1<sup>st</sup> Dept. 1999]; see also, *Liubowsky v. State*, 260 AD 416, 418 [3<sup>rd</sup> Dept.1940], *aff’d*, 285 NY 701 [1941]; *Franchell v. Sims*, 73 AD2d 1, 6 [4<sup>th</sup> Dept. 1980]) -- it is the opinion of this Court that, under the unique facts and circumstances of this case, the jury’s damages award is not against the weight of the evidence and does not deviate materially from what would be reasonable compensation. See, generally, *Ashton v. Bobruitsky*, *supra*; *Senko v. Fonda*, 53 AD2d 638 (2<sup>nd</sup> Dept. 1976).

In short, for all the foregoing reasons, the application pursuant to CPLR 4404(a) for an order setting aside the verdict is denied.

Accordingly, it is

ORDERED that motion is denied in its entirety; and it is further

ORDERED that the jury's verdict shall not be disturbed.

ENTER

Dated: June 9, 2008

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J.S.C.