

<b>Belmer v HHM Assoc.</b>
2009 NY Slip Op 32361(U)
October 13, 2009
Supreme Court, New York County
Docket Number: 116906/04
Judge: Cooper
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: HON. MATTHEW F. COOPER

PART 52

Index Number : 116906/2004  
**BELMER, YOLANDA**  
 vs.  
**HHM ASSOCIATES**  
 SEQUENCE NUMBER : 010  
 OTHER RELIEFS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

is 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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

**FILED**  
OCT 15 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

HON. MATTHEW F. COOPER

Dated: 10/9/09

MP

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

-----X

YOLANDA BELMER,  
Plaintiff,

Index No. 116906/04

DECISION AND ORDER

-against-

HHM ASSOCIATES,  
Defendant.

-----X

HON. MATTHEW F. COOPER, J.C.C.

Recitation, as required by C.P.L.R. §2219(a), of the papers considered in the review of this motion by plaintiff to increase jury verdict and cross-motion by defendant to set aside the verdict and to reduce award :

Papers	Numbered
Notice of Motion and Affirmation .....	1
Notice of Cross-Motion and Affirmation.....	2
Reply Affirmation and Opposition to cross-Motion.....	3
Reply affirmation.....	4

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This is an action to recover damages for injuries arising from an accident that occurred when plaintiff, a New York City bus driver, hit an open hole in the road with the front wheel of her bus. Following an almost three-week trial, the jury rendered a verdict in which it found defendant liable for the accident. The jury awarded plaintiff the following: \$50,000 for past pain and suffering; \$50,000 for future pain and suffering; \$100,000 for future medical, hospital and physical therapy expenses over 35 years; \$140,000 for past loss of earnings; and \$1,335,174 for future loss of earnings over 12.5 years. The jury, however, made no award to plaintiff for past medical, hospital, and physical therapy expenses.

Plaintiff now moves pursuant to CPLR 4404(a) to increase the jury verdict as concerns past medical expenses, past pain and suffering, and future pain and suffering. Defendant cross-moves pursuant to CPLR 4404(a) and, for reasons that are unclear, CPLR § 5501 (“Appeals Generally – Scope of Review”), to set aside the jury’s verdict as to liability and to reduce the amount of damages

awarded for future lost earnings and future medical expenses.

Inasmuch as defendant is challenging the jury's verdict in its entirety and seeks to have the verdict set aside, the court will deal first with defendant's cross-motion. In so doing, the court must be mindful that "the discretionary power to set aside a jury verdict and order a new trial must be exercised with considerable caution, for in the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict." *Teneriello v. Travelers Companies*, 264 AD2d 772, 772 (2<sup>nd</sup> Dept 1999), quoting *Nicastro v. Park*, 113 AD2d 129, 133; see also *Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493 (1978).

Defendant's primary argument for setting aside the verdict as to liability concerns the issue of whether defendant owed a duty of care to plaintiff. Defendant contends that it had no such duty because it was not actually working in the area during the time period when plaintiff's accident occurred. Defendant, while having failed previously to move for summary judgment, made this lack of duty argument both immediately prior to trial, in the form of a motion *in liminae*, and then during the course of the trial as a motion for a directed verdict. Both times, the court, for the reasons stated on the record, denied defendant's application and refused to dismiss the case as a matter of law. The court sees no reason to now change those rulings and grant defendant the relief it seeks. In addition, the court finds that was sufficient evidence – including the strength of plaintiff's testimony and inconsistencies between the testimony of defendant's own witnesses – on which the jury could conclude that defendant had created the condition that resulted in plaintiff's accident, thus making it liable for her injuries. Under the circumstances, there is no basis to set aside the jury's verdict as to defendant's liability as being against the weight of the credible evidence.

Similarly, the court finds that there is no basis to reduce the amount of damages awarded for lost future earnings and future medical expenses. Although the court was somewhat surprised by the

size of the award for future lost earnings, it nevertheless, after a careful review of the record and the submissions, declines to reduce that award. It is well settled that the amount of damages to be awarded for personal injuries is primarily a question of fact for the jury.” *Rodriquez v. City of New York*, 191 AD2d 420, 421 (2<sup>nd</sup> Dept 1993). In light of the testimony given by plaintiff’s vocational economic expert, as well as by defendant’s own vocational rehabilitation expert, coupled with the medical evidence given and the evidence presented concerning plaintiff’s particular life-situation, the court cannot substitute its judgment for that of the jury and find that the damages awarded for loss of future earnings deviated materially from what could be considered reasonable compensation under the circumstances.

Nor can the court conclude, as defendant argues, that the amounts awarded by the jury for loss of future earnings or for future medical expenses are “inconsistent and impossible to reconcile with the jury’s findings as to plaintiff’s past and future pain and suffering.” The court does not find any inherent inconsistency, and it rejects defendant’s attempt to enter into speculation as to what was in the minds of the jury when it rendered its verdict. It is noted, however, that contrary to defendant’s assertions, logic does not dictate that plaintiff’s loss of future earnings and her need for future medical expenses must correlate directly to plaintiff’s overall level of pain and suffering. Plaintiff’s loss of earnings stems from her physical inability to perform specific functions required by her former job as a bus driver, such as pushing the floor pedals, and her lack of a skill set necessary for her to obtain new employment. Plaintiff’s future medical expenses can be derived from a determination as to what services she will medically need to treat her condition, not from the strict viewpoint as to what services she will need to alleviate her pain.

With regards to plaintiff’s motion for an *additur*, the court finds only the argument with regards to past medical expenses to be persuasive. Under the circumstances presented, and in view of the

record as a whole, it cannot be concluded that the awards the jury made for past and future pain and suffering deviated materially from what is reasonable compensation. The copies of the decisions that plaintiff annexes to her moving papers offer little guidance and, in any event, in no two actions are the "quality and quantity" of damages, particularly for pain and suffering, identical. *See Reed v. City of New York*, 304 AD2d 1 (1<sup>st</sup> Dept 2003).

Plaintiff, however, is entitled to an *additur* for past medical expenses. Although the jury failed to award any compensation for these expenses, the undisputed evidence, in the form of the medical bill from St. Vincent's Hospital Center, established that the cost for her surgery and hospitalization was \$22,000. Because there was no dispute that the charges were incurred, no reasonable interpretation of the evidence supports anything other than an award of the \$22,000 to plaintiff for past medical expenses.

In light of the foregoing, it is ORDERED that plaintiff's motion is granted to the extent that the award for past medical expenses is increased to \$22,000; and it is further

ORDERED that plaintiff's motion is otherwise denied in all respects; and it is further

ORDERED that defendant's cross-motion is denied in all respects; and it is further

ORDERED that in accordance with the jury verdict rendered January 27, 2009, and in accordance with this decision, judgment shall be entered in favor of plaintiff and against defendant in the sum of \$1,697,174, representing \$22,000 for past medical expenses, \$50,000 for past pain and suffering, \$50,000 for future pain and suffering, \$140,000 for past loss earnings, \$1,335,174 for future loss earnings, and \$100,000 for future medical, hospital and physical therapy expenses.

This constitutes the decision and order of the court.

Dated: October 13, 2009

Enter:   
MATTHEW F. COOPER, J.C.C.

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