Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

AGNES McDONALD,

Plaintiff,

-against-

SARA KOHANFARS and FARIBURZ KOHAN,
Defendants.

Index No. 15338/07

Motion
Date August 3, 2010

Motion
Cal. No. 15

Motion
Sequence No. 3

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Upon the foregoing papers it is ordered that the branch of the motion by defendants Sara Kohanfars and Fariburz Kohan pursuant to CPLR 4404(a) directing that judgment be entered in defendants' favor as a matter of law on the issue of serious injury, or in the alternative, setting aside the jury verdict and ordering a new trial on the ground that the verdict was against the weight of the evidence is hereby determined as follows:

The question of whether a jury verdict should be set aside as against the weight of the evidence pursuant to CPLR 4404(a) is essentially a discretionary and factual one (*Nicestro v. Park*, 113 AD2d 129, 133 [2d Dept 1985]). Generally, a trial court should exercise considerable caution in utilizing its discretionary power to set aside a jury verdict and grant a new trial (*see, Higbie Constr., Ltd. v. IPI Indus.*, 159 AD2d 558, 559 [2d Dept 1990]; *Nicastro v. Park*, 113 AD2d 129, 133 [2d Dept 1985]). Defendant seeks to set aside the verdict as against the weight of the evidence pursuant to CPLR 4404. If a verdict for a plaintiff is based on a fair interpretation of the evidence, it should not be set aside as being against the weight of the evidence (*Brosnam v. Pratt*, 37 AD3d 388 [2d Dept 2006]). To set aside a verdict as against the weight of the evidence, a court must determine that "the jury could not have reached the verdict on any fair interpretation of the evidence" *(Nicastro v. Park*, 113 AD2d 129, 134 [1985] [internal quotation marks omitted]). "In making this determination, the court must proceed 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"' (*McDermott v. Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004], quoting *Nicastro v. Park*, 113 AD2d 129 at 133).

In determining a CPLR 4404 motion, the trial court must afford the opposing party every inference which may properly be drawn from the facts presented, considering those facts in a light most favorable to the nonmovant *(Szczerbiak v. Pilat*, 90 NY2d 553, 556 [1997]).

Moreover, a court cannot set aside a jury verdict merely because of disagreement with it, but must cautiously balance the deference due to a jury determination, and its obligation to ensure that a verdict is fair and supported by the evidence (*McDermott v. Coffee Beanery, Ltd.*, 9 AD3d at 206). It is for the jury to make credibility determinations and to draw inferences, where facts give rise to conflicting inferences (Siegel, New York Practice § 406, at 687 [4th ed]).

On a motion to set aside a jury's verdict as against the weight of the evidence, the standard is whether the evidence "so preponderated in favor of the other side that the verdict could not have been reached on any fair interpretation of the evidence." (*Lolik v. Big V Supermarkets, Inc.*, 86 NY2d 744, 746 [1995]; *Voiclis v. International Association of Machinist and Aerospace Workers*, 239 AD2d 339 [2d Dept 1997]). A verdict would not be against the weight of the evidence "unless it is palpably wrong and there is no fair interpretation of the evidence to support the jury's conclusion." *(Sperduti v. Mezger*, 283 AD2d 1018 [4th Dept 2001]).

In the instant case, the jury verdict regarding past and future pain and suffering, past and future medical expenses, and past and future household expenses was based upon a fair interpretation of the evidence (*see, Lolik v. Big V. Supermarkets*, *supra; see also*, *Nicastro v. Park, supra*). However, the jury verdict regarding past and future lost earnings was not based upon a fair interpretation of the evidence, as there was no evidence in the record to support an award for either past or future earnings. There was no testimony from a physician regarding either past lost earnings or future lost earnings. "Unless a claimed disability is observable and appreciated by laypersons, a lost earnings claim requires 'medical testimony connecting plaintiff's injuries to plaintiff's claimed inability to work.'" (*Miah v. Private One of New York LLC*, 889 NYS2d 883 [Sup Ct, Kings County 2009], *citing Razzaque v. Krakow Taxi, Inc.*, 238 Ad2d 161 [1st Dept 1997]; *Synalo v. Barretti Carting Corp.*, 304 AD2d 558 [2d Dept 2003]; *Easley v. City of New York*, 189 AD2d 599 [1st Dept 1993]). Accordingly,

that branch of the motion setting aside the jury's award for past and future lost earnings in the amounts of $75,000 and $75,000 respectively, is granted.

That branch of defendants' Sara Kohanfars and Fariburz Kohan's motion setting aside as a matter of law, as against the weight of the evidence and/or as excessive, the jury's awards for: past and future pain and suffering; past and future medical expenses; and past and future household expenses is hereby decided as follows:

With respect to damages, "an award is excessive or inadequate if it deviates materially from what would be reasonable compensation," (*see,* CPLR 5501[c]) and a trial court may set aside a jury's award of damages and grant a new trial if it materially deviates from what would be reasonable compensation (*Inya v. Ide Hyundai, Inc.*, 209 AD2d 1015 [4th Dept 1994]). However, the exercise of such discretion should be employed sparingly (*Shurgen v. Tedesco*, 179 AD2d 805 [2d Dept 1992]). "The amount of damages to be awarded to [a plaintiff] for personal injuries is a question for the jury, and its determination will not be disturbed unless the awards deviate materially from what would be reasonable compensation." (*Firmes v. Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 28 [2d Dept 208; *see, Vasquez v. Jacobwitz*, 284 AD2d 326 [2d Dept 2001] [holding that the amount of damages to be awarded for personal injuries is primarily a question for the jury, and great deference is given to its interpretation of the evidence and findings of fact, provided there is sufficient credible evidence to support the findings]).

"Although economic awards are quantifiable, awards for pain and suffering, or for loss of services and society, do not lend themselves as easily to computation'." (*Okraynetes v. Metropolitan Tr. Auth.*, 555 F Supp 2d 420, 435 [SDNY 2008]). "Prior awards are regarded as instructive, but not binding, by courts performing § 5501(c) review." (*Id.* 436 [citing, inter alia, *Senko v. Fonda*, 53 AD2d 638, 639 [2d Dept 1976]). Even where a jury damages verdict is in the upper range for comparable injuries, the inherently factual findings of damages for pain and suffering is generally left to a jury's common sense and judgment in light of its common knowledge and experience, and with due regard to the evidence at trial (*Apuuzzo v. Ferguson*, 20 AD3d 647 [3d Dept 2005]).

In the instant case, based on all the testimony in the case, the jury's awards for past and future pain and suffering; past and future medical expenses, and past and future household expenses are not excessive, as they did not deviate materially from what would be reasonable compensation (*see, Cotto v. Coyle*, 258 AD2d 554 [1999]; *see also, Chase v. City of New York*, 233

AD2d 474 [1996]; *Cranston v. Oxford Resources Corp.*, 173 AD2d 757 [1991]). As discussed above, there was no basis for the jury to reach any award regarding past and future lost earnings.

That branch of the motion by defendants Sara Kohnafars and Fariburz Kohans for an order directing that a collateral source hearing be held to determine the amount of offset defendants are entitled to for payments from collateral sources is hereby granted.

CPLR 4545(c) provides that where a plaintiff seeks to recover the cost of medical care, the court shall reduce the amount of the plaintiff's award where the expense was paid by a collateral source, except where there is a lien against the plaintiff's recovery. Plaintiff does not oppose this branch of the motion. Accordingly, a collateral source hearing shall be held on Tuesday, January 25, 2011, 11:00 A.M., IAS Part 6, courtroom 21, 88-11 Sutphin Blvd., Jamaica, New York. The parties are directed to contact the clerk of Part 6 at (718) 298-1210 on Friday, January 24, 2011 to ascertain the availability of the court.

That branch of the motion by defendants Sara Kohanfars and Fariburz Kohan for an order reducing the jury's verdict by $50,000 in accordance with Insurance Law § 5102(a) is hereby granted. Insurance Law § 5104 provides in pertinent part that "there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss." Pursuant to Insurance Law § 5102(a)(1), basic economic loss is defined as "up to fifty thousand dollars per person of the following combined items . . . All necessary expenses incurred for:(i) medical, hospital . . . surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services; (ii) psychiatric, physical therapy . . . and occupational therapy and rehabilitation . . ." Plaintiff contends that defendants have not submitted proof as to the amount of no-fault benefits that plaintiff has already received in connection with her medical expenses and lost wages, if any and that there is no evidence as to the balance, if any, of the statutory $50,000 of basic economic loss that remains.

It is well-established law that the first $50,000.00 in medical expenses and lost earnings constitutes basic economic loss, which, as a matter of law, is not recoverable under Insurance Law § 5104(a) (*Hutchinson v. Clare Rose of Nassau, Inc.*, 40 AD3d 702 [2007]; *Sanchez v. Kronegold*, 33 AD3d 607 [2d Dept 2006]; *Acerra v. Gutmann*, 294 AD2d 384 [2d Dept 2002]; *Lloyd v. Russo*, 273 AD2d 359 [2d Dept 2000]; *Miller v. Santoro*, 227 AD2d 534 [2d Dept 1996]; *Ellis v. Johnson Motor Lines, Inc.*, 198 AD2d 258 [2d Dept 1993]. Therefore, the cumulative amount of the jury's award must for medical expenses and lost earnings must be

reduced by $50,000.00.

Plaintiff's cross-motion for an Order pursuant to CPLR 4404(a), setting aside the jury's award for past and future pain and suffering and ordering a new trial on damages, unless defendants stipulate to the increase the award for past pain and suffering from $100,000 to $400,000 and for future pain and suffering from $100,000 to $550,00, upon the ground that the jury's award for past and future pain and suffering was inadequate and against the weight of the credible evidence is denied.

As aforesaid, based on all the evidence admitted at trial, the jury's awards for past pain and suffering and future pain and suffering are not excessive, as they did not deviate materially from what would be reasonable compensation (*see, Cotto v. Coyle*, 258 AD2d 554 [1999]; *see also, Chase v. City of New York*, 233 AD2d 474 [1996]; *Cranston v. Oxford Resources Corp.*, 173 AD2d 757 [1991]).

The companion motion number 15 by defendants, Sara Kohanfars and Fariburz Kohan for an order staying the entry of plaintiff's proposed judgment dated June 22, 2010 and that branch of the motion by defendants, Sara Kohanfars and Fariburz Kohan for an order staying defendants' time to submit a proposed counter-judgment is stayed pending a decision being rendered on the collateral source hearing.

This constitutes the decision and order of the Court.

Counsel for defendants, Sara Kohanfars and Fariburz Kohan, is directed to serve a copy of this order with notice of entry upon plaintiff and the Queens County Clerk.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: November 22, 2010

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Howard G. Lane, J.S.C.