Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE **IA Part 6**
Justice

HERMENEGILDO REYES,
Plaintiff,

-against-

MARKETING WERKS, INC. and OSCAR LEE GARCIA,
Defendants.

Index Number 32450/09

Motion Date September 25, 2012

Motion Cal. Number 35

Motion Seq. No. 2

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Upon the foregoing papers it is ordered that the motion is denied.

This action is based upon an automobile accident wherein plaintiff was struck by a truck owned and operated by defendants. Following a trial, the jury found in favor of plaintiff on liability and awarded him $1,800,000 for past pain and suffering, $4,500,000 for future pain and suffering and $412,102 for future medical expenses. Defendants move to set aside the verdict on various grounds as noted below. Plaintiff opposes the motion.

A defendant's motion pursuant to CPLR 4401 should be granted only when, accepting the plaintiff's evidence as true, and according that evidence the benefit of every favorable inference that can reasonably be drawn from it, "there is no rational process by which the jury could find for the plaintiff against the moving defendant" (*Wong v Tang*, 2 AD3d 840, 840 [2003]; *see DiGiovanni v Rausch*, 226 AD2d 420 [1996]). In considering the motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *see Bryan v Staten Is. Univ. Hosp.*, 54 AD3d 793,

793-794 [2008]; *Hand v Field*, 15 AD3d 542, 543 [2005]).

First, defendants contend that the court erred in granting plaintiff's application for a unified trial. As a general rule, questions of liability and damages in a negligence action represent distinct and severable issues which should be tried and determined separately *(see,* CPLR 603; *Martinez v Town of Babylon,* 191 AD2d 483 [1993]; *Armstrong v Adelman Automotive Parts Distrib. Corp.,* 176 AD2d 773 [1991]; *Parmar v Skinner,* 154 AD2d 444, 445 [1989]). Where, as here however, the nature of the injuries has an important bearing on the issue of liability a joint trial on both issues should be held *(see Perez v Madoff,* 69 AD3d 821 [2010]; *Carbocci v Lake Grove*, 64 AD3d 531 [2009]; *Barrera v Skaggs-Walsh*, 279 AD2d 442 [2001]; *Dulin v Maher*, 200 AD2d 707 [1994]; *Amato v Hudson Country Montessori School,* 185 AD2d 803 [1992]; *DeGregoria v Lutheran Med. Ctr.,* 142 AD2d 543 [1988]). In the case at bar, plaintiff claims that he was struck by the front end of the defendants' vehicle while the defendants claim that the plaintiff walked into the side of the automobile. Plaintiff contends that medical evidence concerning the nature of his injuries was necessary in order to corroborate his version of how the accident happened. Plaintiff's pathology expert, Dr. Roh testified to the effect that the manner in which plaintiff's leg was shattered was consistent with a head-on blunt force trauma, rather than a sideswipe accident, as claimed by the defendants.

The decision whether to conduct a bifurcated trial rests within the discretion of the trial court, and should not be disturbed absent an improvident exercise of discretion (*see Wright v New York City Hous. Auth.*, 273 AD2d 378, 378 [2000]; *Lind v City of New York*, 270 AD2d 315, 316 [2000]; *McIver v Canning*, 204 AD2d 698, 699 [1994]). Here, the court determined that it providently exercised its discretion in conducting a unified trial, since plaintiff's injuries had a bearing on the issue of liability (*see Roman v McNulty*, 99 AD2d 544 [1984]).

Furthermore, disclosure produced different and contradictory versions of how the accident occurred. Because the nature of the plaintiff's injuries was probative of the happening of the accident, a unified trial on the issues of liability and damages was warranted (*see Vasquez v Costco,* 17 AD3d 350 [2005]; *Lind v City of New York*, 270 AD2d 315, 316 [2000]; *DiGregorio v Lutheran Med. Ctr.*, 142 AD2d 543 [1988]; *Roman v McNulty*, 99 AD2d 544 [1984]; *see also Vazquez v Costco Cos., Inc.*, 17 AD3d 350 [2005]; *DeGregorio v Lutheran Med. Ctr.*, 142 AD2d 543, 544 [1988]).

The court does not agree with defendants' contention that plaintiff's expert, Dr. Roh, was unqualified to testify about the mechanism and etiology of plaintiff's injury, and thus should not have been allowed to testify as to the same. An expert's qualifications go to the weight rather than the admissibility of his testimony (*see Hill v New York Hosp.*, 277 AD2d 117 [2000]). Dr. Roh itemized his training, experience and continuing medical education and how that qualified him to render an opinion about how the accident took place. Significantly, Dr. Roh's training and practice as a forensic pathologist has involved the performance of autopsies, the evaluation of crime scenes, the evaluation of medical records and information to determine the cause of injury to patients. Therefore, the fact that he has no formal training in accident reconstruction

only goes to the weight of his testimony, not as to its admissibility.

Defendants also seek an order setting aside the jury verdict as against the weight of the evidence and directing a new trial on the ground that there was no evidence linking plaintiff's traumatic brain injury to the subject accident. It is well established that a jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (*see Baldwin v City of New York,* 290 AD2d 465 [2002]). The record in this matter reflected a sharp contrast in the evidence on the issue of whether plaintiff's traumatic brain injury was caused by the subject accident, which in turn rested on the credibility of the witness presented. Determinations regarding the credibility of witnesses are for the jury, which had the opportunity to see and hear the witnesses, and its resolution of the issues of credibility should be afforded great deference (*see Raymond v Henry,* 306 AD2d 336 [2003]).

For a court to conclude that a jury verdict is not supported by legally sufficient evidence, there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial (*see Mitchell v. Wu,* 38 AD3d 507 [2007]). In considering such a motion, the court must view the evidence in a light most favorable to the nonmoving party (Id. at 508). Here, contrary to defendants' contention, the jury determination regarding plaintiff's traumatic brain injury is supported by legally sufficient evidence. Dr. Shea, plaintiff's neuropsychology expert testified that plaintiff was suffering from attention deficits, concentration deficits, memory problems and depression, all related to his traumatic brain injury. Dr. Shea also testified that plaintiff was illiterate and had a moderate level of intelligence, with low scores for vocabulary and matrix reasoning. Dr. Shea also testified that he performed some tests where plaintiff scored in the bottom 2 % or 3 %, stating that "overall, when you aggregate all of this stuff, his scores are woeful, they really are quite bad . . . the more information he gets, the more confused he gets." Dr. Shea classified plaintiff's injury as "mild traumatic brain injury", and recommended that plaintiff receive additional psychological treatment in the future, including two years of intensive therapy and then therapy on an outpatient basis afterwards. With regards to causation, Dr. Shea testified that "the neurocognitive findings that I found on that day are related to the accident, including plaintiff's depression." It was also Dr. Shea's opinion that plaintiff could no longer be employed as a dishwasher in a restaurant because he would be too slow - his ability to "sustain attention to a particular task is dramatically decreased."

The fact that defense expert, Dr. Edward Weiland, a neurologist who performed an IME on plaintiff, disagreed with plaintiff's experts and opined that plaintiff had no neurological abnormalities and did not suffer a brain injury only creates a conflict in the opinions of experts. The conflicting testimony presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for its resolution (*see Stoves v City of New York,* 293 AD2d 666 [2002]; *Halkias v Otolaryngology-Facial Plastic Surgery Assoc.,* 282 AD2d 650 [2001]).

Defendants' contention that testimony regarding plaintiff's inability to support his family

in light of his injuries substantially prejudiced the jury into awarding an excessive verdict award, is without merit and otherwise waived. Of the four times that the issue came up during the six days of testimony, defendants objected only once and the court sustained the objection, albeit no curative instruction was given. Defendants' failure to object to the allegedly prejudicial comments made by plaintiff and or his experts, or to move for a mistrial, constitutes a waiver of the claim (*Picciallo v Norchi,* 147 AD2d 540 [1989]; *Matter of Giacalone,* 143 AD2d 749 []. "[W]hen a timely objection is not made, the testimony offered is presumed to have been unobjectionable and any alleged error [of law] considered waived" *(Horton v Smith*, 51 NY2d 798, 799 [1980]).

The court now turns to defendants' motion to reduce the amount of damages awarded to plaintiff. As an initial matter, defendants assert that there is insufficient evidence to support a finding that plaintiff sustained a brain injury at all. This court finds defendants are incorrect. Plaintiff submitted evidence that he was diagnosed with a mild traumatic brain injury by his expert. Defendants submitted their own expert testimony, to the contrary. As with other expert testimony, the jury was free to determine which experts' testimony to accept. It apparently found the testimony submitted by plaintiff's expert more convincing. That testimony is a sufficient basis for the jury to conclude that plaintiff sustained a traumatic brain injury.

As to damages, courts have held that awards of between $1 million and $4.75 million are reasonable for traumatic brain injuries (s*ee Sadhwani v New York City Transit Auth.,* 66 AD3d 405 [2009] (award of $1.9 million over 10 years for brain injury was upheld as reasonable); *Hernandez v Vavra,* 62 AD3d 616 [2009] ($1.75 million jury award over 15 years for brain injury upheld as reasonable); *Cintron v New York City Transit Auth.,* 50 AD3d 466 [2008] (award modified to $4.75 million for past and future pain and suffering of 14–year–old boy who sustained brain injury and hip fracture); *Paek v. City of New York,* 28 AD3d 207 [2006] (award for future pain and suffering due to brain injury reduced to $3 million over 40 years); *Reed v City of New York,* 304 AD2d 1 [2003] (upheld award of $2.5 million for pain and suffering as a result of brain injury over 30 years). The cases cited by defendants involve ankle or leg injuries only, not traumatic brain injuries, and are therefore inapposite.

Finally, defendants argue that the award for future medical care was unreasonable. The award to the plaintiff for future medical expenses is supported by a rational basis in the evidence (*see Smith v Staten Theatre Group,* 276 AD2d 785 [2000]; *Ward v Mehar,* 264 AD2d 515, 516 [1999]). Here, Dr. Richter and plaintiff's economist expert, along with Dr. Blum and Dr. Hausknecht each offered sufficient testimony to establish a claim for future medical expenses. It is noted that defendants did not call any experts to refute Dr. Richter or the economist's testimony that plaintiff would require future medical care in the form of physical therapy and neuropsychological care or EMGs, MRIs and medicines. Drs. Baum, Hausknecht and Richter all testified about the need for future medication. The economist testified that it would cost about $30,343. Drs. Richter and Hausknecht both testified about the medical necessity for an EMG to re-evaluate plaintiff's neuropathy, which cost $1,500. Dr. Richter and Dr. Shea testified about the necessity for future neuropsychological care, which costs approximately $5700 per year.

With regard to physical therapy sessions, Dr. Richter testified that plaintiff would require 30 visits per year at $125 per visit. Dr. Hausknecht opined that plaintiff's neuropathy would get more severe and will require future medical treatment. The economist testified that the total cost would be approximately $278,413.

Dr. Richter also opined that plaintiff would require 304 orthopedic visits per year at the cost of $150 per visit. Per the economist, this would amount to $43,223. In addition, Dr. Richter also recommended five visits per year to an neurologist, at a cost of $150 per visit. The total calculated by the economist is $61,833. Based upon these figures, the jury's award of $412,102, is neither excessive nor against the weight of the evidence. The court further notes defendants' failure to contravene plaintiff's medical evidence with expert evidence of its own (*see Roux v Caiola,* 254 AD2d 182, 183 [1998], *lv denied* 93 NY2d 803 [1999]).

Accordingly, the motion to set-aside the verdict is denied.

Dated: January 30, 2013

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Howard G. Lane, J.S.C.