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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

NORMA WHARTON

-v-

NEW YORK CITY TRANSIT AUTHORITY

INDEX NO. 401189/2009

MOTION DATE

MOTION SEQ. NO. 004

The following papers, numbered 1 to 4, were read on this motion to/for set aside a verdict

Notice of Motion/Order to Show Cause — Affidavits — Exhibits — No(s). 1-2

Answering Affidavits — Exhibits — No(s). 3

Replying Affidavits — No(s). 4

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants plaintiff's motion to set aside the jury's verdict pursuant to the accompanying decision. C.P.L.R. §§ 4404(a), 5501(c). The parties are to appear 6/12/13 at 9:30 a.m. in Part 46.

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

Dated: 5/6/13

Lucy Billings, J.S.C.
LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
----------x

NORMA WHARTON,

Plaintiff

- against -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant

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Index No. 401189/2009

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

The trial of this action proceeded before a jury March 6-19, 2012. On March 19, 2012, the jury rendered a verdict finding defendant 60% at fault for plaintiff's claimed injury, with 40% comparative fault on plaintiff's part, and awarding plaintiff $103,000.00 for past pain and suffering and $10,000.00 for future pain and suffering over 10 years. During the trial, the parties stipulated to award $97,000.00 to plaintiff for past lost earnings in the event the jury found defendant liable for plaintiff's injury.

Plaintiff now moves to set aside and increase the verdict for past and future pain and suffering on the ground that the awards are inadequate. After oral argument and unsuccessful attempts at settlement, the court grants plaintiff's motion to increase the award for past and future pain and suffering for the reasons explained below. C.P.L.R. §§ 4404(a), 5501(c).

II. THE EVIDENCE OF PLAINTIFF'S PAIN AND SUFFERING

On January 2, 2008, plaintiff's left leg was caught between a subway car and the platform when the car door closed on her, causing severely comminuted and displaced tibial and fibular fractures. Plaintiff underwent open reduction and internal fixation surgery January 8, 2008, which entailed the permanent installation of hardware in her left leg and left a surgical scar eight inches long on her leg. She was hospitalized for 10 days after the surgery, followed by extensive therapy and recovery at a rehabilitation facility and then physical therapy at home.

In April 2008, four months after her original injury, plaintiff fell when her left leg collapsed under her while she was using a walker. She sustained a severely comminuted pelvic fracture for which she was hospitalized and again received extensive physical therapy at a rehabilitation facility. After plaintiff left the rehabilitation facility this time, she moved in with her daughter for approximately a year and continued receiving home care from a visiting nurse service.

In July 2008, plaintiff's surgeon prescribed a bone stimulator for six months because her left leg fractures were healing abnormally slowly. Plaintiff continued to perform prescribed home exercises through the time of the trial.

Joel Teicher M.D., plaintiff's expert in orthopedic surgery, testified at a deposition videotaped January 16, 2012, and shown at the trial, that he examined plaintiff three times. Upon examination August 14, 2009, Dr. Teicher found plaintiff suffered

only a slight measured loss in range of motion, but her antalgic gait, left leg atrophy, and left knee tenderness required her to use a walker for more than short distances. Dr. Teicher testified that plaintiff had suffered a delayed union of her tibial fracture, which took eight instead of the normal three months to heal.

At an examination July 8, 2010, Dr. Teicher found plaintiff's gait pattern had improved, but she still required a walker. Although her atrophy also had improved, her range of motion had not, leading Dr. Teicher to conclude that plaintiff had reached maximal improvement in range of motion. Dr. Teicher's examination January 12, 2012, revealed that plaintiff no longer walked with an antalgic gait, but still needed a walker due to her atrophy and range of motion restrictions, both of which had not improved since his prior examination. Dr. Teicher found osteoporosis throughout her tibia and diagnosed post-traumatic arthritis.

On cross-examination, Dr. Teicher acknowledged that plaintiff reported only unsteadiness, not pain, and it was "a possibility" that physical therapy "would have helped" after the complete union of the bone. Aff. of Ira Navon Ex. B, at 74. He did not find that her atrophy had in fact improved as of January 2012, however, despite the unrebutted evidence that plaintiff had continued physical therapy at home.

Plaintiff and her adult son testified that because of her limitations in functioning caused by her injury, she no longer

can walk without assistance, prepare meals, perform other self-care functions, shop, travel around the city, or play with her grandchildren. Nor can she enjoy dancing, an activity she especially enjoyed before her injury. She also lost her job and its attendant social aspects. Plaintiff testified without objection or contradiction that she was diagnosed with throat cancer in June 2011, but that the cancer was in remission and did not contribute to her limitations in ambulation.

Plaintiff's loss of her job from her injuries demonstrates not only lost earnings, but also pain and suffering. James v. Farhood, 96 A.D.3d 503, 505 (1st Dep't 2012); Valentin v. City of New York, 293 A.D.2d 313, 314 (1st Dep't 2002); Crawford v. Williams, 198 A.D.2d 48, 49 (1st Dep't 1993). By stipulating to lost earnings, defendant conceded that plaintiff's loss of her job, up to when she had planned to retire, was attributable to her injury.

By not presenting any medical testimony on defendant's behalf, defendant left the jury with only plaintiff's expert, Dr. Teicher, on which to rely. Clotter v. New York City Tr. Auth., 68 A.D.3d 518, 519 (1st Dep't 2009); Reed v. City of New York, 304 A.D.2d 1, 6 (1st Dep't 2003). See Cabezas v. City of New York, 303 A.D.2d 307, 308 (1st Dep't 2003); Roux v. Caiola, 254 A.D.2d 182, 183 (1st Dep't 1998). Since Dr. Teicher reviewed plaintiff's treatment records and examined plaintiff, he was unquestionably competent to testify regarding plaintiff's medical condition and the limitations it caused. Singh v. Catamount Dev.

Corp., 21 A.D.3d 824, 826 (1st Dep't 2005); Easley v. City of New York, 189 A.D.2d 599, 600 (1st Dep't 1993). Nor did defendant object to or rebut the testimony by plaintiff and Dr. Teicher that her hip injury resulted from her leg injury.

To justify the modest award for future pain and suffering, defendant maintains that plaintiff's emaciated appearance and use of an oxygen tank provided the jury grounds to believe her life expectancy was short. While such a conclusion regarding her life expectancy may have warranted a low future pain and suffering award, the jury found plaintiff's life expectancy was at least 10 years, a finding neither party challenges. Nor did defendant object to plaintiff's testimony that her throat cancer was in remission or present any contrary evidence.

III. STANDARDS TO BE APPLIED

To set aside any component of the jury's verdict as inadequate, the court must conclude that the jury's award for that component of damages materially deviates from reasonable compensation. C.P.L.R. § 5501(c). Measuring material deviation from reasonable compensation requires analyzing awards at the appellate level based on analogous evidence and determining whether the current award departs substantially from those benchmarks. Wilson v. City of New York, 65 A.D.3d 906, 911 (1st Dep't 2009); Urbina v. 26 Ct. St. Assoc., LLC, 46 A.D.3d 268, 275 (1st Dep't 2007); Morsette v. The Final Call, 309 A.D.2d 249, 256 (1st Dep't 2003); Donlon v. City of New York, 284 A.D.2d 13, 14-15, 18 (1st Dep't 2001). Nonetheless, in no two actions are

"the quality and quantity" of damages, particularly for pain and suffering, identical. Morsette v. The Final Call, 309 A.D.2d at 257; Reed v. City of New York, 304 A.D.2d at 7. Their "evaluation does not lend itself to neat mathematical calculation." Reed v. City of New York, 304 A.D.2d at 7. See Morsette v. The Final Call, 309 A.D.2d at 256; Donlon v. City of New York, 284 A.D.2d at 15. The court must exercise caution and not simply substitute the court's view of the evidence for the six fact finders' judgment or modify the harshness of a verdict the court disagrees with, particularly on damages, when the jury's peculiar function is to evaluate damages. Po Yee So v. Wing Tat Realty, 259 A.D.2d 373, 374 (1st Dep't 1999). See New York City Tr. Auth. v. State Div. of Human Rights, 78 N.Y.2d 207, 217 (1991); Mazariegos v. New York City Tr. Auth., 230 A.D.2d 608, 609 (1st Dep't 1996); Brown v. Taylor, 221 A.D.2d 208, 209 (1st Dep't 1995); Evans v. St. Mary's Hosp. of Brooklyn, 1 A.D.3d 314, 315 (2d Dep't 2003).

It is incumbent on plaintiff, in seeking to increase the jury's award, to cite verdicts, including their fate on appeal, that assess injuries similar to plaintiff's, experienced for comparable periods. Morsette v. The Final Call, 309 A.D.2d at 256; Reed v. City of New York, 304 A.D.2d at 7; Donlon v. City of New York, 284 A.D.2d at 14, 18; Medina v. Chile Communications, Inc., 15 Misc. 3d 525, 532 (Sup. Ct. Bronx Co. 2006). Several recent Appellate Division decisions from the First Department support plaintiff's claim that the past and future pain and

suffering awards are inadequate.

Plaintiff cites Watanabe v. Sherpa, 44 A.D.3d 519, 520 (1st Dep't 2007), which increased a jury award for future pain and suffering from $100,000.00 to $300,000.00, but over 41.7 years in contrast to the period of 10 years here. The plaintiff there, however, sustained only a tibial fracture requiring one surgery and six days of hospitalization. Similarly to plaintiff here, uncontroverted evidence showed that the plaintiff's condition was permanent; caused ongoing pain, atrophy, ligamentous laxity, and limitations on physical activities; and was likely to degenerate and cause arthritis.

Plaintiff also cites Vasquez v. City of New York, 298 A.D.2d 187 (1st Dep't 2002), which restored a jury's future pain and suffering award of $950,000.00 over 39.6 years from the Supreme Court's reduction to $500,000.00, for tibial and fibular fractures that required open reduction and internal fixation surgery implanting hardware. The resultant ongoing condition also was similar: atrophy, weakness, pain, and limitation of activities.

Defendant cites Orellano v. 29 E. 37th St. Realty Corp., 4 A.D.3d 247, 248 (1st Dep't 2004), which only modified the Supreme Court's reduction of a jury award of $2.5 million and $3.5 million for past and future pain and suffering, respectively, to $300,000.00 for each, by increasing the award to $375,000.00 for each. The plaintiff, age 47 years, sustained comminuted tibial and fibular fractures requiring several surgeries, two months of

hospitalization, and extensive physical therapy, resulting in a permanent partial disability.

Keating v. SS&R Mgt. Co., 59 A.D.3d 176, 177 (1st Dep't 2009), upheld the Supreme Court's reduction of a jury award from $5 million to $500,000.00 for past pain and suffering and from $7 million to $600,000.00 for future pain and suffering over 31 years. The plaintiff also sustained tibial and fibular fractures, which never fully healed in a complete union. For this reason he underwent six surgeries and needed extensive physical therapy, but his residual effects were comparable to plaintiff's: scarring, continued pain, and lack of right ankle mobility.

Defendant also cites Ruiz v. New York City Tr. Auth., 44 A.D.3d 331, 332 (1st Dep't 2007), which reduced a jury's past pain and suffering award from $350,000.00 to $100,000.00 and future pain and suffering award from $750,000.00 to $200,000.00, for a right ankle fracture. Like plaintiff here, the plaintiff underwent open reduction and internal fixation surgery, but was hospitalized only one week and recovered with no complications, only occasional pain, and no functional limitations except in walking for long periods.

Plaintiff, too, cites the reduction of an award: a jury verdict of $2 million each, reduced to $1 million each, for past pain and suffering and future pain and suffering over 31 years by a plaintiff who sustained tibial and fibular fractures and underwent open reduction and internal fixation surgery with

implanted surgical hardware. Singh v. Gladys Towncars Inc., 42 A.D.3d 313, 314 (1st Dep't 2007). Although that plaintiff was hospitalized five weeks, rather than transferred to a rehabilitation facility as plaintiff was here, and suffered nerve damage, again the effects are comparable to plaintiff's atrophy, unsteadiness, and limited mobility.

Also in contrast to defendant's authority, Ferrer v. City of New York, 49 A.D.3d 396, 397 (1st Dep't 2008), reduced a jury's past pain and suffering award from $1,011,240.00 to $600,000.00 for a tibial fracture only, but with complications that required surgeries and the use of a leg brace and cane: reflecting a disability comparable to plaintiff's atrophy and unsteadiness that has required the use of a walker. Where the plaintiff, age 46 years, sustained a fracture accompanied by a quadriceps tendon rupture, requiring surgical repair and hospitalization, and resulting in a scar seven inches long and the inability to walk without a cane, the court reduced the jury's award of $1.2 million for past pain and suffering, and $1 million for future pain and suffering to $800,000.00 for each. Clotter v. New York City Tr. Auth., 68 A.D.3d at 519.

Like reductions, appellate affirmances of jury verdicts, upholding awards as inexcessive, stand only as determinations that the award fell within the range of awards justified by the evidence and thus do not indicate that lower verdicts would be below the lower limit of that range. On the other hand, the verdicts upheld also do not indicate that higher verdicts would

be above the upper limit of that range. Medina v. Chile Communications, Inc., 15 Misc. 3d at 532. The various recently sustained verdicts for similar injuries with comparable lasting effects nonetheless do, as a group, define the range of acceptable awards.

Hernandez v. Ten Ten Co., 102 A.D.3d 431, 433 (1st Dep't 2013), sustained a jury award of $1,000,000.00 for past pain and suffering and $2,166,666.67 over 25.8 years for future pain and suffering, for a plaintiff who suffered tibial and fibular fractures and underwent surgery including the installation of metal hardware. Like plaintiff here, he developed other physical impairments as a result of the original injury. Although resulting psychological disorders also contributed to his ongoing disability, his combined injuries similarly prevented him from performing household tasks, assisting in the care of his children, socializing, and engaging in intimate relations.

Bello v. New York City Tr. Auth., 50 A.D.3d 511, 512 (1st Dep't 2008), sustained a jury award of $750,000.00 each for past and future pain and suffering, again for a plaintiff who suffered tibial and fibular open fractures requiring the installation of pins. That plaintiff, however, required seven additional surgeries, which caused scarring, deformity, and a worsening limp, and was only seven years old.

Finally, defendant again points to an award for an ankle fracture, Uriondo v. Timberline Camplands, Inc., 19 A.D.3d 282, 283 (1st Dep't 2005), which affirmed the jury's award of

$25,000.00 for past pain and suffering and $290,000.00 for future pain and suffering over 28 years. The fracture required surgery and casting for three months, but the more significant pain and suffering were the ongoing complications, compensated by the future award: nerve damage involving loss of sensation and motion, an antalgic gait, and arthritis, which necessitated continuing physical therapy and further surgery.

V. INCREASING THE VERDICT FOR PAST AND FUTURE PAIN AND SUFFERING

Plaintiff has cited to verdicts sustained on appeal for plaintiffs who suffered fractures in the lower leg that required open reduction and internal fixation surgery with implantation of surgical hardware, required extensive physical therapy, and caused atrophy and restriction in activities, including continued difficulty in ambulation. These decisions thus provide a useful benchmark.

Defendant cites three decisions in opposition: Orellano v. 29 E. 37th St. Realty Corp., 4 A.D.3d at 248, where the Appellate Division increased the damages award that the Supreme Court had reduced, actually supports plaintiff. In Ruiz v. New York City Tr. Auth., 44 A.D.3d at 332, the plaintiff suffered no complications and minimal functional limitations from an ankle fracture.

Although the past pain and suffering award upheld in Uriondo v. Timberline Camplands, Inc., 19 A.D.3d at 283, also for an ankle fracture, was even lower than the jury's award to plaintiff here, the jury recognized the continuing complications and

limitations in the future pain and suffering award, which, even accounting for the longer period covered, exceeded the future award here by more than 10 times. Here, moreover, the past award must account for the unrebutted terror, to which plaintiff testified, that her leg would remain caught between the platform and the train when its doors closed and it started to pull away, as well as her subsequent pelvic injury.

Based on the evidence here and past verdicts based on comparable evidence, the jury's award of $103,000.00 for past pain and suffering and $10,000.00 for future pain and suffering over 10 years is inadequate, and the court grants plaintiff's motion to set aside the verdict on past and future pain and suffering. C.P.L.R. §§ 4404(a), 5501(c). The court orders a new trial on damages for past and future pain and suffering, unless the parties stipulate to increase the verdict before apportionment to $450,000.00 for past pain and suffering and to $150,000.00 for future pain and suffering. Keating v. SS&R Mgt. Co., 59 A.D.3d at 177; Watanabe v. Sherpa, 44 A.D.3d at 520; Orellano v. 29 E. 37th St. Realty Corp., 4 A.D.3d at 248; Vasquez v. City of New York, 298 A.D.2d 187. See Clotter v. New York City Tr. Auth., 68 A.D.3d at 519; Ferrer v. City of New York, 49 A.D.3d at 397; Singh v. Gladys Towncars Inc., 42 A.D.3d at 314.

The parties shall appear June 12, 2013, at 9:30 a.m., in Room 204, 71 Thomas Street, New York, New York, to schedule any

future proceedings. This decision constitutes the court's order. The court will mail copies to the parties' attorneys.

DATED: May 6, 2013

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
MAY 23 2013
COUNTY CLERK'S OFFICE
NEW YORK