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| <b>Lewis v New York City Tr. Auth.</b>                                                                                                                                                                                                                           |
| 2013 NY Slip Op 33280(U)                                                                                                                                                                                                                                         |
| December 19, 2013                                                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 115066/06                                                                                                                                                                                                                                         |
| Judge: Paul Wooten                                                                                                                                                                                                                                               |
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
Justice

**PART 7**

**STELLA LEWIS and AUDREY LEWIS,**  
Plaintiffs,

INDEX NO. 115066/06

- against -

MOTION SEQ. NO. 004

**NEW YORK CITY TRANSIT AUTHORITY,  
MANHATTAN AND BRONX SURFACE TRANSIT  
AUTHORITY & ALVIN WELLINGTON,**  
Defendants.

**FILED**

**DEC 20 2013**

The following papers were read on this motion by defendants to set aside the verdict.

COUNTY CLERK'S OFFICE  
NEW YORK

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

**Cross-Motion:** ☐ Yes ☒ No

This is a personal injury action brought by plaintiff Stella Lewis (plaintiff) on October 12, 2006 to recover damages for injuries sustained on February 7, 2006 when she was struck by a New York City Transit Authority (Transit Authority) Bus operated by the defendant Alvin Wellington while crossing the street at the intersection of 34<sup>th</sup> street and Broadway and 6<sup>th</sup> Avenue, in New York County, New York. Plaintiff's husband Audrey Lewis asserts a derivative claim for loss of consortium. As a result of the accident, the plaintiff was struck in the head by the bus and her left foot was trapped below the right front tire of the bus requiring New York Emergency Service personnel to free her foot. Plaintiff suffered permanent serious injuries, including, extreme pain, traumatic brain injury, cognitive mental deficiencies, loss of memory, the loss of three digits to her foot, and crippling foot disfigurement. In a Decision and Order dated March 23, 2010, Justice Michael Stallman granted the City of New York's motion for summary judgment and they were dismissed from the case (Motion

sequence 003).<sup>1</sup>

A seventeen-day jury trial, commencing on January 20, 2012, was held before this Court. Both parties presented extensive medical evidence and witnesses, including medical experts, *inter alia*, in the area of clinical and neuropsychology, physiatry medicine and rehabilitation, pain management, an economist and a professional engineer. On February 17, 2012, the jury returned a verdict finding that plaintiff was 20% at fault and that the bus driver and Transit Authority was 80% at fault. The jury awarded plaintiff a total of \$4,889,00.00, which included (1) lost wages for the injury sustained in the amount of \$ 325,000.00; (2) future lost wages for the injury sustained in the amount of \$350,000 for a period of 5.37 years; (3) \$1,750,000 for past pain and suffering and loss of enjoyment of life; (4) \$1,750,000 for future pain and suffering over a life expectancy of an additional 10 years; (5) \$ 700,000 for future medical expenses for a 23 year-period; (6) \$14,000.00 to plaintiff Audley Lewis for the loss of household services and companionship up to the date of the verdict; and (7) \$65,000.00 to plaintiff Audley Lewis for future loss of household services and companionship over 16.75 years. The parties further stipulated to an additional damage award for past medical expenses.

Now before the Court is a motion by the Transit Authority for an order to set aside the verdict on the grounds that: (1) on any fair interpretation of the evidence adduced at trial, the jury's finding that the bus operator acted negligently or failed to use reasonable care is against the weight of the evidence or that the percentage of liability assessed against the defendants by the jury was against the weight of the evidence; (2) that, as a matter of law, the bus operator did not owe a duty to the plaintiff; (3) that, as a matter of law, the bus operator's conduct was not unreasonable given the fact that the danger of injury to the plaintiff was not foreseeable; (4) that, as a matter of law, the bus

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<sup>1</sup> Justice Stallman found "The City of New York establishes a prima facie case for summary judgment dismissing the action as against the City. It is undisputed that the NYPD traffic enforcement agents were exercising Government functions, "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate special duty owed to the plaintiff, apart from any duty to the public in general" (*McLean v City of New York*, 12 NY3d 194, 203 [2009]) (motion sequence 003).

operator's conduct was not a substantial factor in causing the plaintiffs injury; and (5) that the Court gave a number of improper and prejudicial evidentiary and legal rulings. Plaintiff is in opposition to defendants' motion.

### DISCUSSION

CPLR 4404 provides in relevant part:

**(a) Motion after trial where jury required.** After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

"A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached its verdict by any fair interpretation of the evidence" (*Christ v Law Offs. of William F. Levine & Michael B. Grossman*, 72 AD3d 721, 723 [2d Dept 2010]; *Lolik v Big v Supermarkets*, 86 NY2d 744 [1995]; *Grassi v Ulrich*, 87 NY2d 955, 956 [1996]; *Bertelle v New York City Tr. Auth.*, 19 AD3d 343, 343 [2d Dept 2005] ["A jury verdict should not be set aside as against the weight of the evidence unless the evidence so preponderates in favor of the moving party that the verdict could not have been reached on any fair interpretation of the evidence"]). "It is for the trier of fact to make determinations as to the credibility of the witnesses, and great deference is accorded to the factfinders, who had the opportunity to see and hear the witnesses" (*Christ*, 72 AD3d at 723; *Bonny v Pierre*, 91 AD3d 694 [2d Dept 2012]; *Palermo v Original California Taqueria, Inc.*, 72 AD3d 917, 918 [2d Dept 2010] ["It is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses"]). "[A] successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence" (*Bertelle*, 19 AD3d at 344).

Contrary to the contentions of the defendant, there was a fair interpretation of the evidence supporting the jury's determination that bus operator Alvin Wellington acted negligently or failed to use reasonable care and that his negligence was the proximate cause of plaintiff's injury (see e.g. *Williams v City of New York*, 109 AD3d 744, 745 [1st Dept 2013] [motion court correctly determined that the jury's verdict was not against the weight of the evidence]; *Christ*, 72 AD3d at 723 [jury's determination was supported by a fair interpretation of the evidence]; *Palermo*, 72 AD3d at 918). Moreover, nothing submitted by the defendant in support of this motion overcomes the presumption that the jury adopted a reasonable view of the evidence (see e.g. *Bertelle*, 19 AD3d at 344). Accordingly, the Court will not set aside the verdict as against the weight of the evidence

Moreover, the Court denies the portion of defendant's motion seeking to set aside the verdict due to improper evidentiary rulings by this Court, and in doing so, relies on the record, which clearly sets forth the basis for the rulings challenged herein. However, the Court is compelled to address more fully defendant's application to set aside the verdict on the basis that the Court improperly charged the jury with PJI 1:62 (see *Noseworthy v City of New York*, 298 NY 76 [1948]). It is the Court's contention that the defendant waived its objection to plaintiff's request for the *Noseworthy* charge. Defendant first objected to plaintiff's request for the *Noseworthy* charge after plaintiff raised the issue during his summation to the jury. Defendant was put on notice that plaintiff was requesting the *Noseworthy* charge in her Requested Jury Charge, which was first sent to the defendant on January 18, 2012 (see Plaintiff's Request to Charge, Court Exhibit VII, with attached affidavit of service). Additionally, the Court held a jury charge conference with counsel for each party prior to summations, and the defendant did not raise any objection to the charge at the conference or prior to the conference after receiving plaintiff's requested charges. However, even assuming *arguendo* that defendant did not waive its objection to the charge, the Court properly applied the *Noseworthy* charge to the jury based upon plaintiff's trial testimony and the testimony of her medical experts, including Dr.

Stein and Dr. Bowen. Moreover, the Court notes that defendants' reliance upon *Williams v Hooper* (82 AD3d 448 [1st Dept 2011]) is misplaced, as the facts of that case are distinguishable from the ones herein.

### CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion to set aside the verdict is denied; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

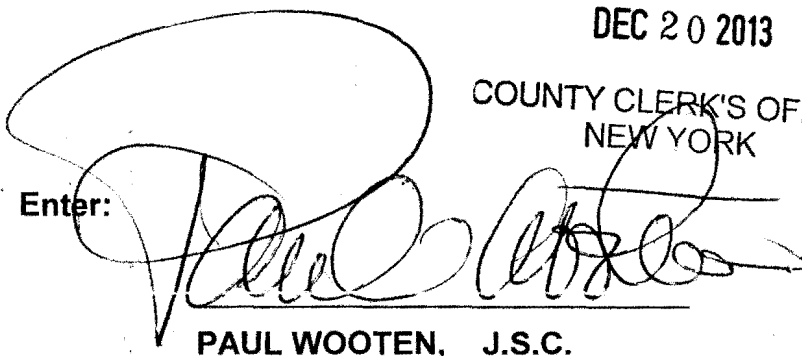
**FILED**

DEC 20 2013

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Dated: 12/19/13

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PAUL WOOTEN, J.S.C.

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