Glynn v Altobelli
2017 NY Slip Op 33204(U)
June 30, 2017
Supreme Court, Westchester County
Docket Number: 50517/2015
Judge: Sam D. Walker
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To commence the statutory
time for appeals as of right
(CPLR 5513[a]), you are
advised to serve a copy
of this order, with notice
of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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MARTIN GLYNN,

Plaintiff,

-against-

DECISION & ORDER
Index No: 50517/2015
Seq# 4 & 5

THOMAS J. ALTOBELLI

Defendant.

---x

Plaintiff Martin Glynn and Defendant Thomas J. Altobelli both move this Court pursuant to CPLR 4404 to set aside the liability and damages verdicts directing judgment as a matter of law or in the alternative, for new trials as to liability and damages.

The following papers were read on Plaintiff Martin Glynn's and Defendant Thomas J. Altobelli's motions:

PAPERS	NUMBERED
Notice of Motion/Affirmation in Support/Exhibits A-F	1-8
Affirmation in Opposition/Exhibits A-H	9-16
Memorandum of Law in Opposition	17
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FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Martin Glynn ("Glynn") commenced this action to recover damages arising from a motor vehicle/bicycle accident with Defendant, Thomas J. Altobelli ("Altobelli") alleging that Defendant Altobelli was negligent in operating his motor vehicle causing a

collision with Plaintiff Glynn on his bicycle resulting in personal injuries. On December 4, 2013, Plaintiff Glynn was travelling via bicycle on Batton Road, which runs north–south intersecting with Route 129, which is a two-way road traveling east-west. Batton Road is governed by a stop sign where it intersects with Route 129. What happened next is highly contested, but Plaintiff Glynn claims that before entering the road he came to a stop and looked left to make sure there was no oncoming traffic so he could safely enter the two way intersection. There is a dispute as to whether or not Plaintiff Glynn came to a proper stop before proceeding into the intersection, but at some point in the process of the Plaintiff entering the intersection, Defendant Altobelli's vehicle approached the intersection while speeding. Defendant crossed the double yellow line into oncoming traffic, and Plaintiff's bicycle collided with the passenger side of the Defendant's vehicle resulting in the Plaintiff sustaining a fracture to the thumb. The Plaintiff had to have two surgeries to repair the fracture (one to insert pins and the other to remove them), he had to wear a cast for several weeks, and he underwent physical therapy. Plaintiff filed this action to recover for past and future pain and suffering as well as lost earnings for the period he was unable to work to his fullest capacity due to the injury.

Defendant Altobelli moved for summary judgment, pursuant to CPLR 3212, which was denied by the Court (Lubell, J.), finding that Plaintiff raised some material questions of fact warranting the denial of the motion including, but are not limited to, whether Plaintiff came to a stop at the subject intersection before proceeding." (*See* Decision and Order dated Sept. 22, 2016 [Lubell, J.]).

The case proceeded to a bifurcated trial before this Court. On the issue of liability, the jury found both Plaintiff and Defendant to be negligent, but found that only Defendant's

negligence was a proximate cause and substantial factor in causing the accident. Regarding the issue of damages, the jury awarded Plaintiff $67,000 for loss of earnings, $24,000 for past pain and suffering and $334,000 for future pain and suffering.

Defendant now files the instant motion pursuant to CPLR 4404 to set aside both the liability verdict and damages verdict directing judgment in favor of Defendant Altobelli as a matter of law or in the alternative, for a new trial as to liability and damages. Defendant argues that a finding that Plaintiff's negligence was not a proximate cause of the accident is inconsistent and contrary to the weight of the evidence; that the damages verdict should be set aside as excessive, inconsistent and contrary to the weight of the evidence; that the damages verdict should be set aside since Plaintiff's attorney used inflammatory and highly prejudicial language during opening statements; and that the award for lost earnings should be reduced by amounts awarded by no fault benefits, and reduced to $10,962.

Plaintiff argues that Defendant is not entitled to judgment as a matter of law due to there being issues of fact for the jury to resolve; that the jury verdict for liability is consistent with the weight of the evidence; that the jury award for damages was appropriate and consistent; that Plaintiff's comments do not warrant a new trial; and that the award for lost earnings should not be reduced.

Plaintiff also files his own motion pursuant to CPLR 4404 to set aside the award for past pain and suffering because it materially deviates from what would be reasonable compensation and argues that the Court erred in precluding the testimony of Glynn and his wife Kate with respect to mental and emotional suffering. Defendant opposes, arguing that Plaintiff's motion was made in bad faith, that Plaintiff's motion with respect to

admissibility of testimony must be raised on appeal, and the award for past pain and suffering was a reasonable compensation.

DISCUSSION

CPLR 4404(a) states, in relevant part, that:

> [a]fter 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 motion pursuant to CPLR 4404(a) to set aside a jury verdict and for judgment as a matter of law will be granted where there is 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." (*Doobay v Girardi*, 104 AD3d 726, 728 [2d Dept. 2013], *quoting Vittiglio v Gaurino,* 100 AD3d 987, 987-988). In order to establish entitlement to relief, the proponent of a motion to set aside the jury verdict as not supported by legally sufficient evidence must demonstrate this. (*Rosenfeld v Baker,* 78 AD3d 810, 811 [2d Dept. 2010]). Indeed, the prevailing party is "entitled to the benefit of every favorable inference which can reasonably be drawn from the facts." (*Taype v City of New York*, 82 AD2d 648, 651 [2d Dept. 1981]). The standard for determination is whether a verdict could not have been reached on any fair interpretation of the evidence." (*Lolik v Big V Supermarkets, Inc.*; 655 NE2d 163, 165 [N.Y. 1995]).

Upon review of the facts and the relevant case law, the Court holds that judgment as a matter of law for Defendant on liability is denied request for new trial on liability is

denied because the jury's verdict on liability is consistent with the weight of the evidence. However, the jury verdict is set aside and new trial is granted as to the past pain and suffering as well as the future pain and suffering damages awards because the future pain and suffering award was excessive and inconsistent with the weight of the evidence. Defendant's request to reduce the award for lost earnings is denied.

Judgment as a Matter of Law on Liability

Defendant argues that Plaintiff's alleged violation of the Vehicle and Traffic Law constituted negligence per se making Defendant entitled to judgment as a matter of law. Upon reviewing the facts and applicable case law, this Court finds that Defendant has not met the burden required to establish entitlement to judgment as a matter of law. Defendant relies on four cases to support his argument; however, these cases are distinguishable from the present case because there were no issues of fact to be decided by the jury in those matters.

The Court's determination that upon review of the evidence there were still issues of fact to go before the jury is part of the doctrine of law of the case. The Second Department has stated,

> The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding (*see Bellavia v Allied Elec. Motor Serv.*, 46 AD2d 807). The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision (*see Gay v. Farella*, 5 AD3d 540). The doctrine may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence (*see Foley v Roche*, 86 AD2d 887; *Brownrigg v New York City Housing Authority*, 29 AD3d 721, 722 [2d Dept. 2006]).

Here, Defendant moved for summary judgment based on the depositions of Plaintiff and Defendant, and the Court made a determination based on the evidence and papers submitted that there were still issues of material fact as to whether or not Plaintiff

came to a stop and failed to look for or yield to oncoming vehicles before crossing the roadway, warranting the denial of the Defendant's motion for summary judgement. Defendant once again moved for judgment as a matter of law at the close of trial but the motion was denied. Here, Defendant once again moves for judgment as a matter of law based on the trial testimonies which were identical to the depositions used to support the motion for summary judgment. Since the Defendant's present motion for judgement as a matter of law is not based on an extraordinary circumstance like new evidence or a change in law, it is inappropriate to disturb the doctrine of law for this case that the deposition evidence identical to the trial testimony presented issues of material fact to go before the jury. Accordingly, the first branch of the Defendant's motion requesting judgment as a matter of law on liability is denied.

New Trial Liability Verdict

In the alternative, Defendant seeks a new trial on the issue of liability alleging the jury's verdict should be set aside because the finding that Plaintiff Glynn's negligence was not a proximate cause of the accident is wholly inconsistent and against the weight of the evidence. Upon review of the relevant case law and the record, the Court denies this portion of Defendant's motion.

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. (*Brucaliere v Garlinghouse*, 304 AD2d 782, 782 [2d Dept. 2003]; *see also Nicastro v Park*, 113 AD2d 129, 134 [2d Dept. 1985]). Further, a finding of negligence is not always inconsistent with a finding of no proximate cause as a person may have acted negligently but was not a proximate cause of the injury. (*Pimpinella v*

McSwegan, 213 A.D. 2d 232, 233 [1st Dept. 1995]. "'A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause'" (*Stewart v Marte*, 91 AD 3d 754, 755 [2d Dept 2012], *quoting Garrett v Manaser*, 8 AD 3d 616, 617 [2d Dept 2004]). Additionally, "[w]here the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Bonomo v City of New York*, 78 AD3d 1094, 1094-95 [2d Dept 2010], *quoting Barnett v Schwartz*, 47 AD3d 197, 205 [2007] [citations omitted]).

In the present case, the issues of negligence and proximate cause are not so inextricably interwoven that the jury could have found Plaintiff negligent without also finding that he was the proximate cause of the accident. Defendant Altobelli cites the trial court decision in *Yondola v. Trabulsy*, which was affirmed by the Second Department, as the main support for his motion for a new trial on liability because the jury's finding of negligence without proximate cause was so contrary to the weight of the evidence. In *Yondola*, the issue before the jury was whether or not the defendant saw and yielded to oncoming traffic after legally stopping at the stop sign. The jury returned a verdict after trial finding that the defendant was negligent but not a proximate cause of the accident The Appellate Court granted a new trial finding that the issues of negligence and proximate cause were so inextricably interwoven that a finding of negligence without proximate cause was wholly inconsistent and contrary to the weight of the evidence.

In contrast, a finding that Plaintiff Glynn was negligent but not a proximate cause of the accident would not be wholly inconsistent and contrary to the weight of the evidence

and *Yondola* is distinguishable from the present case. Here, Plaintiff Glynn was travelling on Batten Road governed by a stop sign and Defendant Altobelli was travelling westbound on State Route 129. The exact manner in how the accident occurred is disputed, and the parties disagreed as to whether Plaintiff Glynn stopped at the stop sign and whether he saw and/or yielded to oncoming traffic pursuant to § 1142 and 1172 of the Vehicle and Traffic Law. The jury was charged to determine issues of fact as to whether or not Defendant was negligent for either failing to stop at the stop sign or failing to see and/or yield to the other vehicle with the right of way before crossing the intersection to turn left.

The Court disagrees with Defendant's assertion that *Yondola* is controlling here and concludes that in the present case, the issues of negligence and proximate cause are not inextricably interwoven. Plaintiff's Glynn could have been negligent in his manner of stopping at the stop sign before proceeding into the intersection, and could have entered the roadway when it was clear, thereby not being the proximate cause of the accident. Upon review of the relevant facts of the case, this is reasonable inference for the jury to make. "Where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Moffett-Knox v Anthony's Windows on Lake, Inc.*, 126 AD3d 768, 768 [2d Dept 2015], *quoting Bonomo,* 126 AD3d at 1094-95).

Accordingly, the Court must conclude that the jury found that Plaintiff Glynn was negligent for failing to stop at the sign pursuant to Vehicle and Traffic Law § 1142 and 1172, but proceeded into the intersection when it was clear and when there were no cars for whom to yield. Therefore, the portion of Defendant Altobelli's motion for an order

pursuant to CPLR 4404(a) to set aside the liability verdict of the jury is denied.

Damages Verdict

Defendant moves to set aside the jury verdict on damages and requests that the Court grant a new trial on the issue because the jury's future damages award was excessive, inconsistent, and contrary to the weight of the evidence. Defendant Altobelli argues that the award for future pain and suffering is excessive when compared to other cases with comparable and/or graver injuries, and that the award is inconsistent when compared to the jury's award for past damages. Plaintiff Glynn moves to set aside the jury verdict because it is not reasonable compensation for Plaintiff's injury and the Court erred in not including the testimony of Plaintiff Glynn and his wife in regards to their mental and emotional suffering. Upon review of the facts before the Court and relevant case law, the Court finds that the award for future pain and suffering deviates materially from what has been considered to be reasonable compensation by the Court for a comparable injury and that the award for future pain and suffering is inconsistent with the lesser award for past pain and suffering. Accordingly, the Court grants this branch of Plaintiff's and Defendant's motion for a new trial on past and future pain and suffering awards.

The amount of damages to be awarded in an action is primarily a question for the jury and that determination is entitled to great deference by the court (*Coker v Bakkal Foods, Inc.*, 52 AD3d 765, 766 [2d Dept. 2008]). When assessing the adequacy of a jury's determination of past and future damages, the court will not disturb the jury's determination "'unless the award deviates materially from what would be reasonable compensation'" (*Kayes v Liberati*, 104 AD3d 739, 741 [2d Dept. 2013], *quoting Guallpa v Key Fat Corp.*, 98 AD3d 650, 651[2d Dept. 2012]; *see* CPLR 5501[c]). There is no precise

mathematical formula for assessing the adequacy of damages so the "reasonableness" of compensation is determined by examining the relevant precedent of comparable cases and making factual comparisons (*Kayes*, 104 AD3d at 741; *see also Donlon v City of New York*, 284 AD2d 13, 14-15 [1st Dept. 2001]).

In the case before the Court, Plaintiff suffered an injury to the hand medically characterized as a displaced intraarticular, commuted fracture of the thumb metacarpal or a Bennett Fracture. Plaintiff underwent surgery to repair the fracture and insert pins into his hand which were removed by a subsequent surgery. In addition, Plaintiff developed post traumatic arthritis; however, Plaintiff did have another form of arthritis prior to the accident, for which he had not experienced symptoms previously. Plaintiff also experienced fibrosis to the hand muscle and decreased motion in the thumb. Three years after the accident he was complaining of stiffness, lack of dexterity, occasional burning pain in the hand, and a constant low level pain. Plaintiff also introduced expert testimony from a doctor that it was "more likely than not" that Plaintiff will need surgery in the future. Plaintiff also testified that his injury interferes with his ability to play banjo and guitar, to work out, and to write and type computer code.

However, upon review of the relevant facts and case law the Court finds that the jury's award for future pain and suffering is inconsistent with its award for past pain and suffering warranting that the damages verdict be set aside and a new trial on damages be held. The Court finds that the jury's finding of $24,000 for past pain and suffering (about $8,000 per year) for a period of three years is logically inconsistent with a ruling of $334,000 for the next 11 years for future pain and suffering (about $36,636.63 per year). The Appellate Division has held that when one element of the damages cannot be

reconciled with another element then the jury verdict should be set aside. (*DePasquale v Klenetsky*, 255 AD2d 546, 546-47 [2d Dept. 1998], *see generally Powell v New York City Tr. Auth*., 186 AD2d 728, 728-29 [2d Dept. 1992]). In *DePasquale*, the plaintiff suffered constant pain in his neck and back as a result of an accident for a four-year period prior to verdict, and the jury determined he would suffer the same or similar pain for one year following the verdict (*DePasquale,* 255 AD2d at 546). The jury awarded the plaintiff $20,000 for a period of four years (an average of $5,000 per year) for past pain and suffering and awarded $50,000 for future damages for a period of one year (*Id*.). The Court held that on the record these two awards were logically incompatible and deviated materially from what would be reasonable compensation because the court reasoned that if the jury found it reasonable to only compensate the plaintiff with $20,000 for the previous the four years of past pain and suffering, it was unreasonable and incompatible to award the plaintiff $50,000 in future damages that span only one year. (*Id*.). Upon retrial, the Court affirmed the new $100,000 award for past pain and suffering. (*Id*.) Here, in the case before the Court, the jury awarded $24,000 for three years of past pain and suffering (about $8,000 per year) after reviewing all Plaintiff's evidence about his injury, but then awarded $334,000 for future pain and suffering for a span of 11 which is an increase from $8,000 per year to about $36,636.63 per year. Plaintiff testified that he had a low level constant pain, it interfered with his ability to play banjo and guitar, and his ability to workout, write, and type computer code. There was no evidence that the pain and suffering that Plaintiff Glynn would experience in the next eleven years would be astronomically more that the pain and suffering of the past three years. After the accident and prior to trial, Plaintiff had to have surgery to insert pins and then remove them, had

to have a cast for several weeks, and could not work full time due to his injuries. Plaintiff testified that the pain eventually had subsided enough to return to full time work duties ten months after the accident and he was eventually able to resume some activities such as riding his bike with hand brakes regularly for forty-five minutes. Here, since the evidence of Plaintiff's issues/suffering prior to trial would be similar to the issues/suffering experienced after trial, the difference in the yearly compensation from $8,000 per year to about $36,636.63 per year is inconsistent and against the weight of the evidence.

Plaintiff seeks a new trial to increase the award for past pain and suffering, but contends that when there is undisputed evidence of a permanent injury as well as future pain and suffering, and since Defendant Altobelli did not bring his own medical expert, the Court should uphold the jury's award for future pain and suffering. However, the lack of expert medical testimony presented by Defendant, does not prevent the Court from reviewing the jury's award for future pain and suffering and engaging in a factual comparison as to other cases with similarly situated litigants to determine if the jury's verdict was a material deviation from what would be reasonable compensation and if it is contrary to the weight of the evidence including the expert reports (see *Lariviere vNew York City Transit Authority*, 131 AD3d 1130, 1132 [2d Dept. 2015]) ("Under CPLR 4404(a), a trial court has the discretion to order a new trial 'in the interest of justice' " (CPLR 4404[a]; *see Micallef v Miehle Co., Div. of Miehle–Goss Dexter*, 39 NY2d 376, 381]). Since the Court is granting the request for a new trial, the Court will not address Plaintiff's arguments as to the past pain and suffering award.

Accordingly, the Court grants this branch of Plaintiff's and Defendant's motion seeking new trial on the issue of damages as to past and future pain and suffering

because the awards for past and future pain and suffering are inconsistent, and contrary to the weight of the evidence.

Inflammatory Comments

Defendant also moves to set aside the jury verdict on damages on the grounds that the Plaintiff used highly prejudicial language in his opening statement. However, upon review of the record and relevant case law, the court denies the motion on these grounds. In order for a new trial to be granted on the grounds of the misconduct of counsel, counsel's conduct must be so inflammatory or prejudicial as to deprive the litigants of a fair trial. *Jun Suk Seo v Walsh*, 82 AD3d 710, 710 [2d Dept. 2011], *see also McArdle v. Hurley*, 51 AD3d 741, 742-43 [2d Dept. 2008]). The Court finds that Plaintiff's comments were not so inflammatory or prejudicial as to deprive Defendant of a fair trial because the comments did not raise any personal knowledge of facts at issue, allude to any matter that would not be relevant or unsupported by admissible evidence, or try to influence the jury in anyway prohibited by the law (*see* Rules of Professional Conduct, 3.4-3.5). Although some of the comments by Plaintiff's counsel were not proper and Defendant's objections were sustained by the Court, the conduct of counsel must be viewed in light of the entire trial and after review, the court concludes that Plaintiff's counsel's actions were not so pervasive or prejudicial, or so inflammatory as to deprive Plaintiff of a fair trial. *Lariviere v New York City Transit Authority*, 131 AD3d 1130, 1132 [2d Dept. 2015], *see Coma v City of New York*, 97 AD3d 715, 716, [2d Dept. 2012]; *Jun Suk Seo v Walsh*, 82 AD3d 710, 710 [2d Dept. 2011]; *Bianco v. Flushing Hosp. Med. Ctr.*, 79 A.D.3d 777, 779 [2d Dept. 2010]).

Therefore, the Court denies this branch of the Defendant's motion.

Award for Lost Earnings Should be Reduced

Defendant argues that the jury's award for damages should be reduced to $10,962 because on the Defendant's interpretation of the facts, Plaintiff is only entitled to that amount. Defendant points to portions of the record that show Plaintiff only had a sling for six weeks and he did not experience any numbness or tingling so he should only be allowed to recover for the time incapacitated. Plaintiff presented evidence which showed that despite only having a sling for six weeks, Plaintiff was partially incapacitated which prevented him from returning to full time work for ten months continuing to experience stiffness, lack of dexterity, and other discomfort in the hand. Defendant also argued that Plaintiff could perform certain job duties after the accident and his earnings had increased the second year following the accident. However, there was evidence presented that Plaintiff's average monthly earnings from the prior twenty-three months had dropped for the ten months after the accident when he was not able to work full time. Plaintiff also introduced evidence that after the ten months, his earnings returned to their normal level. When evidence and witnesses are presented at trial, the jury makes determinations of credibility and that determination is accorded a substantial amount of deference. (*Bertelle v New York City Tr. Auth.*, 19 AD3d 343, 343 [2d Dept. 2005]). It is reasonable that the jury determined that upon review of the evidence presented by both sides that Plaintiff did lose income over the ten months following the accident and awarded accordingly. Therefore, the Court will not disturb the jury's verdict for lost earnings and denies this branch of Defendant's motion.

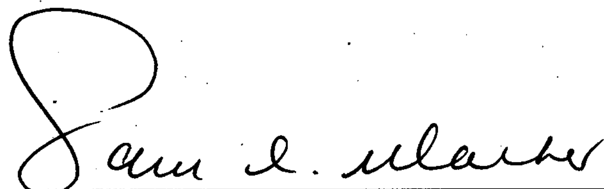
Regarding Defendant's no-fault set off claim, such is an administrative issue between the parties and the insurance company.

Based on the foregoing, the Court hereby denies Defendant's motion for judgment as a matter of law or in the alternative for a new trial on liability. Upon review of Plaintiff Glynn's motion papers to set aside the jury's verdict as to past pain and suffering and Defendant Altobelli's motion to set aside the jury verdict as to future pain and suffering and upon review of the relevant case law, the Court orders a new trial on the issue of damages with regard to past pain and suffering and future pain and suffering. The foregoing constitutes the Opinion, Decision and Order of the Court.

The parties are directed to appear before the Settlement Conference Part on August 15, 2017 at 9:15 in Courtroom 1600 to schedule a re-trial on the issue of damages with regard to past pain and suffering and future pain and suffering.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 30, 2017



HON. SAM D. WALKER, J.S.C.