

Henry v New Jersey Tr. Corp.
2019 NY Slip Op 31903(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 156496/2015
Judge: Lillian Wan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HONORABLE LILLIAN WAN PART 25

Justice

-----X

INDEX NO. 156496/2015

KATHLEEN HENRY,

MOTION DATE 6/27/2019

Plaintiff,

MOTION SEQ. NO. 004

- v -

NEW JERSEY TRANSIT CORPORATION and
RENAUD PIERRELOUIS,

**POST TRIAL DECISION AND
ORDER**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 110

**SET ASIDE THE VERDICT AND ORDER A NEW
TRIAL, OR ALTERNATIVELY TO REDUCE THE
DAMAGES AWARDED, AND FOR A
COLLATEAL SOURCE HEARING**

were read on this motion to/for

In this personal injury action, the defendants' motion seeking to set aside the verdict and order a new trial, pursuant to CPLR § 4404(a), or alternatively to reduce the damages awarded following a jury trial is denied. The prong of the defendants' motion seeking a collateral source hearing, pursuant to CPLR § 4545, is denied as moot, as the plaintiff does not oppose a collateral source offset.

This action arises from a motor vehicle accident that occurred on October 5, 2014, involving a collision between a bus owned by defendant New Jersey Transit Corporation, and operated by defendant Renaud Pierrelouis, and another vehicle. A jury trial was held, and resulted in a verdict in favor of the plaintiff. The jury returned a unanimous verdict, awarding the plaintiff \$400,000.00 for past pain and suffering, \$400,000.00 for future pain and suffering for the next 21 years, and medical expenses in the amount of \$179,579.50. The defendants seek

an order vacating the damages awarded to the plaintiff and a new trial, or alternatively an order reducing the damages awarded. Defendants also seek an offset for plaintiff's medical expenses, which were fully reimbursed by the health insurance carrier.

The plaintiff, Kathleen Henry, was a passenger on the bus, which was traveling in the Lincoln Tunnel from Manhattan to New Jersey. Ms. Henry was approximately 54 years old at the time of the accident. The testimony at trial indicates that Ms. Henry sustained serious injuries to her right shoulder as a result of the accident. Ms. Henry testified that she was thrown to the floor of the bus, losing consciousness briefly, and when she awoke she was unable to move her right shoulder. She was transported to the hospital, and was diagnosed with a three-part right proximal humerus impact fracture. After an unsuccessful attempt to reduce and relocate the displaced shoulder joint, the physicians determined that surgical intervention was necessary. Ms. Henry's treating physician, Dr. Milan Sen, performed an open reduction internal fixation (hereinafter ORIF) procedure, and inserted permanent hardware and screws to stabilize the shoulder. Ms. Henry was hospitalized for several days, confined to bed most of the time, and required morphine for pain relief.

After the surgery, Ms. Henry continued to experience pain, limitation of motion and weakness of the right shoulder. Approximately ten months later, the plaintiff underwent a second surgery to release and debride scar tissue resulting from weakness to the rotator cuff and the ORIF surgery. Ms. Henry underwent physical therapy for nearly one year based on the two surgeries. Dr. Sen testified that, according to the physical therapy records, Ms. Henry continued to have shoulder pain, decreased rotator cuff strength and decreased range of motion of the shoulder. He further testified that Ms. Henry's shoulder injuries are permanent in nature, and that as she ages the injuries are prone to regression, with increasing degenerative arthritic

changes of the shoulder joint. At trial, defense counsel asked Ms. Henry to raise her right arm above her shoulder, however she had difficulty doing so. Ms. Henry testified to being unable to perform many of the usual activities she had enjoyed and engaged in prior to the accident because of the limited range of motion of her right shoulder and arm. She also testified that she can only sleep if she places a pillow under her right shoulder. She is left with a permanent large scar on her right shoulder, which was displayed to the jury during the trial.

Although the plaintiff was employed at the time of the accident, she was unable to work for at least two years after the accident. Ms. Henry, who is right-hand dominant, testified that after the accident she was employed at Kmart for a few months, but could not continue working in that position because the injuries to her right shoulder interfered with her ability to perform necessary job duties. She testified that she was required to place clothing up on shelves, and that it was necessary for her to seek assistance from other employees to do so. Ms. Henry testified that she is self-supporting, and that prior to the accident she was employed at a spa doing general housekeeping work. Her employment as a housekeeper required unrestricted use of her dominant right arm and shoulder.

The defendants seek to set aside the verdict and a new trial in the interest of justice, pursuant to CPLR § 4404(a). The defendants argue that the Court erred in permitting Dr. Sen to testify based on plaintiff's failure to exchange a narrative report or expert disclosure pursuant to NYCRR § 202.17 and CPLR § 3101(d), and that the Court should not have afforded Dr. Sen "treating physician status." More specifically, the defendants claim that Dr. Sen should not have been permitted to testify concerning the permanency of plaintiff's injuries, or the medical care and treatment of her right shoulder after his care terminated in May 2015. The defendants also assert that Dr. Sen should not have been permitted to testify about his examination of the

plaintiff just prior to trial. According to the defendants, the plaintiff's failure to provide such disclosure prior to trial resulted in medical testimony that was an "unfair surprise."

Defendants further claim that they are entitled to a new trial based on the "inflammatory" summation made by plaintiff's counsel. In particular, the defendants take issue with comments made by plaintiff's counsel during summation, that the plaintiff "has to deal with, and she will witness her own shoulder slowly over time fail." Defendants also claim that it was improper for plaintiff's counsel to refer to the failure of the Drive Cam bus camera to save video footage of the accident. All the defendants' contentions are without merit.

CPLR § 4404(a) authorizes the court, either by motion of any party, or on its own initiative, to order a new trial "in the interest of justice." The statute is based on the assumption that the judge who presides at trial is in the best position to evaluate errors. *Micallef v Miehle Co., Division of Miehle-Goss Dexter, Inc.*, 39 NY2d 376 (1976). The trial judge must decide whether substantial justice has been done, and whether it is likely that the verdict has been affected. *Id. See Bertram v Columbia Presbyterian*, 126 AD3d 473, 474 (2015) ("plaintiffs failed to show that defense counsel's conduct constituted a substantial injustice or that it likely affected the verdict"); *Genet v Appel*, 118 AD3d 519 (1st Dept 2014) (holding that the trial court's failure to give the jury charge was not a "fundamental" error that might warrant review in the interests of justice) (internal quotations omitted); *Selzer v New York City Tr. Auth.*, 100 AD3d 157 (1st Dept 2012) (finding that defense counsel's remarks did not contaminate the proceedings and deprive the plaintiff of a fair trial).

In determining whether a new trial is required pursuant to CPR § 4404(a), the trial court "must look to his own common sense, experience and sense of fairness rather than to precedents in arriving at a decision." *Id. In Smith v Rudolph*, 151 AD3d 58 (1st Dept 2017), the Appellate

Division First Department held that a trial court's determination is discretionary in nature and should not be reversed in the absence of an abuse or improper exercise of discretion. *See also Trapp v American Trading and Production Corp.*, 66 AD2d 515, 518 (1st Dept 1979) ("it is the trial court, presumably the closest impartial observer, which must exercise its discretion and determine whether that elusive concept of substantial justice, fairness, and due process were observed at the trial"). In the instant case, the Court finds that the defendants have failed to show that a new trial is required in the interest of justice.

Pursuant to 22 NYCRR § 202.17(h) of the Uniform Rules for Trial Court, a trial court may dispense with the time requirements for the exchange of a narrative report "in the interests of justice and upon a showing of good cause." In *McDougald v Garber*, 135 AD2d 80 (1st Dept 1988), *mod on other grounds*, 73 NY2d 246 (1989), the trial court found that the late exchange of the testifying physician's report was excusable, relying on 22 NYCRR § 202.17(h). Significantly, the court held that the interests of justice and good cause shown requirement is less concerned with the excuse offered than it is "with a party's need for the medical proof, the availability of alternate sources and the adverse party's preparedness to cross-examine with respect to the newly furnished report." *Id.* at 94. The court determined that the defendant had ample time to prepare for cross-examination of the physician, having received the report three weeks before trial, and that the medical information was available from alternate sources, such as the hospital records. Further, the trial court noted that the defendant could not point to any prejudice resulting from the delay in exchanging the report. *See also Banks v City of New York*, 92 AD3d 591 (2012) (relying on *McDougald* in permitting plaintiff's treating orthopedic surgeon to testify concerning the possible need for future surgery despite the plaintiff's noncompliance with 22 NYCRR § 202.17(h)).

Likewise, in *Freeman v Kirkland*, 184 AD2d 331 (1st Dept 1992), the Appellate Division First Department held that the trial court did not abuse its discretion in denying the defendant's motion to preclude the testimony of plaintiff's treating physician for failure to comply with 22 NYCRR § 202.17(g) or CPLR § 3101(d). The court held that the plaintiff's failure to comply was not willful, and that the defendant did not seek to compel compliance until the jury had been selected and the trial had commenced. The court further noted that the defendants had alternative sources of medical information concerning the plaintiff's injuries and rehabilitation available to them, and therefore could not have been surprised or prejudiced by the physician's testimony.

In the instant matter, although the plaintiff had not provided the defendants with a narrative report or expert disclosure, the Court did not preclude Dr. Sen's testimony. The Court found that the testimony was permissible in the interests of justice and for good cause shown. Contrary to the defendants' contentions, Dr. Sen's testimony at trial concerning his most recent examination of the plaintiff and the permanency of her injuries was not an "unfair surprise." Moreover, the defendants have not shown that they were prejudiced in any way by Dr. Sen's testimony, or that plaintiff's failure to comply with the rules governing the exchange of medical information was willful. Plaintiff's counsel did not locate Dr. Sen until two weeks prior to trial because he had moved his office. The plaintiff provided trial authorizations ten months prior to trial for release of Ms. Henry's medical records, which include assessments relating to the plaintiff's shoulder injuries and the permanency of the injuries. As the plaintiff points out, these records were available for review by the defendants long before the trial began. Significantly, the defendants did not seek to compel a narrative report from Dr. Sen until after commencement of the trial.

Additionally, there were alternative sources of medical information concerning the plaintiff's injuries and the permanency associated with those injuries, which were available to the defendants prior to trial. Specifically, Dr. Hojraj's records relating to his examination of Ms. Henry in January 2018 reflect that the plaintiff was experiencing pain and decreased strength and range of motion of her right shoulder. Similarly, the physical therapy records clearly document that Ms. Henry was continuing to experience shoulder pain, with decreased rotator cuff strength and rotation. The defendants do not claim that they were unaware of these records prior to trial.

The plaintiff's bill of particulars, served three years before trial, also sets forth a detailed itemization of the plaintiff's injuries, including, *inter alia*, limitation of motion, impaired strength, and the onset of arthritis at an accelerated rate over time. Further, two years before trial, Ms. Henry testified at her deposition that Dr. Sen informed her that the metal plate in her shoulder would never be removed, and that the pain "won't go away." She also testified that Dr. Sen told her that her shoulder would never be the same as it was prior to the accident. The defendants were aware of the extent of plaintiff's injuries, as well as the permanent effects of the injuries long before trial, and did not seek to compel disclosure of medical and expert reports prior to the commencement of trial.

Additionally, the defendants argue that Dr. Sen's testimony as to the permanency of the plaintiff's injuries was an "unfair surprise" because it conflicts with Ms. Henry's deposition testimony that the surgeon told her the shoulder "is healing nicely" during a post-operative examination. On cross-examination, Ms. Henry clarified the deposition testimony, testifying that her statement referred to the stitches that were used to close the wound after the second surgery, not to the shoulder injuries in general. Specifically, in response to defense counsel's inquiry, she stated "I was focused on the stitches, and that's it. I wasn't focusing inside my arm." It is

apparent therefore that Ms. Henry was referring to the incision site where the stitches had been removed a week earlier, not to her shoulder injuries. As such, Ms. Henry's testimony was separate and distinct from that of Dr. Sen concerning the permanency of the shoulder injuries, and does not support defendants' claim of "unfair surprise" resulting from Dr. Sen's trial testimony. Therefore, the defendants' claim that they were prejudiced or surprised by Dr. Sen's testimony is conclusory, unsupported by the trial record, and must be rejected.

Similarly unavailing is defendants' argument that plaintiff's counsel's summation was inflammatory and inappropriate. Counsel's reference to the plaintiff's shoulder failing over time was not a new diagnosis, suggested for the first time during summation. In fact, the medical testimony as well as the medical records firmly support the assertion. Additionally, the defendant mischaracterizes the plaintiff's reference to the video in his summation. Plaintiff correctly stated that video footage of the accident was not saved on the Drive Cam located on the subject bus. The defendants' employee, Elmira Buongiorno, testified that the accident met the criteria for triggering the Drive Cam to save the video, however, she was unable to explain why in this instance the video footage had not been saved. Plaintiff's counsel merely commented on the obvious contradiction arising from Ms. Buongiorno's testimony that suggests that the Drive Cam should have been triggered to save the video of the accident, but for some unknown reason it was not saved. Plaintiff's counsel did not suggest that the defendants destroyed the video of the accident, and references to the video in his summation were not inflammatory. Accordingly, based on the foregoing the defendants are not entitled to vacatur of the jury verdict and a new trial under CPLR § 4404(a).

The defendants argue that in the alternative, the damages awarded by the jury are excessive, and should therefore be reduced. The Court finds that the damages awarded by the

jury do not deviate materially from what would be reasonable compensation, and should not be disturbed. *See Capuccio v City of New York*, 174 AD2d 543 (1st Dept 1991), *lv denied*, 79 NY2d 751. CPLR § 5501(c) sets forth the standard to be applied by the appellate court in determining whether a jury verdict should be set aside as excessive. This standard has been made applicable to trial courts as well; however, “the exercise of the discretion of a trial court over damage awards should be exercised sparingly.” *Shurgan v Tedesco*, 179 AD2d 805, 806 (2d Dept 1992); *see also Fudali v New York City Tr. Auth.*, 6 Misc3d 1020(A) (Sup Ct, New York County 2005).

The cases cited by the defendants are distinguishable from the instant case, as plaintiff’s injuries are more extensive in nature and degree. In *Thompson v Toscano*, 166 AD3d 446 (1st Dept 2018), the plaintiff was a 29-year-old who sustained a partial labral tear, a soft tissue injury, to the left shoulder. She underwent surgical repair of the injury and physical therapy. Her surgeon testified at trial that she might need surgery in the future. The trial court reduced the award for past pain and suffering from \$400,000.00 to \$300,000.00, and from \$750,000.00 to \$250,000.00 for future pain and suffering.

The facts relating to the plaintiff’s damages in *Thompson* are not analogous to those presented here. Ms. Henry sustained a complex and serious humeral bone fracture, not a soft tissue labral tear. The *Thompson* plaintiff did not require the surgical insertion of a metal plate and hardware to stabilize the entire shoulder joint as did Ms. Henry. Moreover, while the treating physician in *Thompson* opined that the plaintiff might require a second surgery sometime in the future, Ms. Henry did undergo a second surgery to correct scar tissue formation and weakness of the rotator cuff. Additionally, in *Thompson*, the plaintiff was 29 years old at the time of the accident, and here Ms. Henry was 54 years old. In comparing the injuries of the two

plaintiffs the defendants do not acknowledge the distinct age difference between the two plaintiffs at the time of the accident, or the difference in the nature, treatment and permanency of the injuries.

Similarly, the defendants' reliance on *Morales v Manhattan and Bronx Surface Transit Operating Authority*, 106 AD3d 459 (1st Dept 2013) and *Greblewski v Strong Health MCO, LLC*, 161 AD3d 1336 (3rd Dept 2018) is misplaced. The *Morales* case also involved a 24-year-old plaintiff who sustained a soft tissue injury involving a partial tear of the rotator cuff, not a fracture with surgical placement of hardware, as in the instant case. Treatment involved surgical repair and a course of physical therapy, and the possibility of another surgery in the future. Further, in *Greblewski*, the 80-year-old plaintiff did sustain a similar fracture as the plaintiff here, however no surgical intervention was performed, and 12 weeks of physical therapy was completed. The appellate court reversed the trial court's reduction of the jury's award of \$250,000.00 for past pain and suffering and \$300,000.00 for future pain and suffering over 10 years, holding that the award did not deviate materially from what constituted reasonable compensation. In doing so, the appellate court noted that "a court's discretionary authority to upset a jury's monetary award should be used sparingly." *Id.* at 1340.

Moreover, analogous cases support the damages awarded by the jury in the case at bar. In *Fudali, supra*, the 57-year-old plaintiff sustained a similar injury as a result of a motor vehicle accident. She underwent two surgeries and months of physical therapy, and was left with a permanent scar and physical limitations in her daily activities. In *Fudali*, the jury awarded \$1,250,000.00 for past pain and suffering, and \$1,500,000 for future pain and suffering for a period of 22.5 years. In reducing the plaintiff's damages, the trial court noted that it had not found a case that awarded more than \$1,200,000.00 for similar injuries. More importantly, even

though the trial court reduced the plaintiff's damages, the award was still greater than the damages awarded to Ms. Henry in this case. Specifically, the *Fudali* court reduced the past pain and suffering damages to \$650,000.00, and the future pain and suffering award was reduced to \$550,000.00.

Likewise, in *Guillory v Nautilus Real Estate*, 208 AD2d 336 (1st Dept 1995), the Appellate Division First Department affirmed the jury award of \$1,200,000.00 for future pain and suffering, based on a very extensive rotator cuff tear. The 51-year-old plaintiff underwent one surgery, a lengthy course of physical therapy, and suffered permanent physical limitations. Further, in *Roshwalb v Regency Mar. Corp.*, 182 AD2d 401 (1st Dept 1992), an award of \$750,000.00 for a comminuted fracture of the 63-year-old plaintiff's right elbow was upheld. Without discussing whether the plaintiff required surgery, a course of physical therapy or the permanency of the injuries, the appellate court found the award did not constitute a material deviation from what would be considered reasonable compensation. *See also Lewis v New York City Tr. Auth.*, 100 AD3d 554 (1st Dept 2012) (upholding an award of \$2,500,000.00 for past pain and suffering and \$4,000,000.00 for future pain and suffering based on a fractured fibula requiring surgery with placement of hardware and several debridements); *Sanchez v Morrisania II Assoc.* 63 AD3d 605 (1st Dept 2009) (increasing the award for past pain and suffering from \$100,000.00 to \$250,000.00 based on an ankle fracture and torn rotator cuff).

Here, based on prevailing case law it is clear that the jury's unanimous award of \$400,000.00 for past pain and suffering, and \$400,000.00 for future pain and suffering for 21 years did not constitute a material deviation from what would be reasonable compensation. The evidence at trial showed that plaintiff sustained a very serious and complex fracture of the right humerus, requiring surgical intervention and insertion of a permanent stabilizing plate and

- hardware, as well as a second surgery ten months later. The evidence also showed that the plaintiff, who is right-hand dominant, will have a permanent large scar on her right shoulder.

Although the plaintiff underwent nearly one year of physical therapy, the evidence unequivocally established that the plaintiff will continue to suffer from permanent pain, limited range of motion and decreased strength in her right shoulder in the future.

The evidence further established that as Ms. Henry ages the injuries are prone to regression, resulting in further loss of rotator cuff strength and decreased rotation of the shoulder, and degenerative arthritic changes in the shoulder joint. The plaintiff testified that as a result of the physical limitations caused by the shoulder injuries she was unable to work for two years after the accident. The plaintiff also testified to being unable to engage in daily activities she had been able to perform prior to the accident. In particular, the plaintiff testified to having difficulty washing and styling her hair, and therefore she wears a wig. She is also not able to participate in Pilates classes or lift weights at the gym. Ms. Henry testified that she cannot clean her home, fold sheets or maintain her home in an organized manner. Accordingly, the Court finds that in light of the foregoing, the damages awarded to the plaintiff do not deviate materially from what constitutes reasonable compensation for the injuries she sustained, and should not be disturbed.

Finally, the plaintiff does not oppose that portion of the defendants' motion seeking a collateral source offset, and therefore the defendants' request for a collateral source hearing is denied as moot.

Plaintiff's award shall be reduced by \$179,579.50, reflecting the sum paid by health insurance, and the amount of damages awarded by the jury for plaintiff's past medical expenses.

Accordingly, it is

ORDERED, that the defendants' motion to set aside the verdict and order a new trial, or, in the alternative to reduce the damages awarded to the plaintiff is denied; and it is further

ORDERED, that the defendants' application seeking a collateral source hearing is denied as moot.

This constitutes the decision and order of the Court.

ENTER:

June 27, 2019

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

Lillian Wan

HON. LILLIAN WAN, J.S.C.

HON. LILLIAN WAN
J.S.C.