SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JOSE LUIS MELENDEZ PEDRAZA a/k/a JOSE LUIS MELENDEZ a/k/a JOSE L. PEDRAZA,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, and ANGEL RIVERA,

Defendants.

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DECISION AND ORDER

Index Number

159366/2013

FRANK P. NERVO, J.S.C.

Motion sequences 007 and 008 are hereby consolidated.

I. ADDITUR

Plaintiff's post-verdict motion (mot. seq. 007) seeks to increase the jury's damages award. The jury, inter alia, awarded plaintiff $2 million for past pain and suffering and $3 million for future pain and suffering over a 24 year period. The jury further found plaintiff contributorily negligent, and apportioned 60% fault to plaintiff and 40% fault to defendant NYCTA. Plaintiff contends that the jury was confused and did not realize that in finding plaintiff 60% at fault the award would be reduced by 60%. Plaintiff, therefore, seeks to increase the award for past pain and suffering and future pain and suffering to $5 million each, for a total of $10 million in damages. Alternatively, plaintiff seeks a new trial limited to damages for pain and suffering.

Defendants oppose, and contend that the trial evidence does not indicate the jury was confused, the Court's polling of the jurors established the verdict was recorded correctly, and the Court lacks the authority to increase the jury's award.

Generally, jurors may not impeach their verdict once they are discharged (*Breen-Burns v. Scarsdale Woods Homeowners' Assoc.*, 73 AD3d 661 [1st Dept 2010]). However, under two limited circumstances, courts have recognized the use of juror affidavits to impeach a verdict: first to correct a ministerial error, and second where the trial record evinces a basis for finding juror confusion (*Hersh v. New York City Tr. Auth.*, 290 AD2d 258 [1st Dept 2002]; *Moisakis v. Allied Bldg. Prods. Corp.*, 265 AD2d 457 [2d Dept 1999] *lv. denied* 95 NY2d 752 [2000]; *Breen-Burns*, 73 AD3d at 662).

I. A. MINISTERIAL ERROR

Where a party seeks to correct a ministerial error, such as an incorrectly recorded verdict, the error "may not concern issues of how the jury's verdict was reached" (*Breen-Burns*, 73 AD3d at 662). While plaintiff contends that his instant request for additur is simply correcting a ministerial error, the alleged error concerns an issue of how the jury's verdict was reached – requiring an examination into whether the jury intended their monetary award be reduced by their finding plaintiff contributorily negligent. Notably absent in the four juror affidavits submitted in support of plaintiff's claim is any indication that the jury's verdict was improperly recorded. Consequently, the alleged error is not ministerial and cannot be corrected on this basis (*id.*; *see also Moisakis*, 265 AD2d 457 *lv. denied* 95 NY2d 752 [2000]).

As an alternative holding, and assuming arguendo that the alleged error was ministerial, plaintiff has failed to meet his burden to correct such an error – providing the unanimous affidavits of all jurors (*see e.g. Porter v. Milhorat*, 26 AD3d 424 [2d Dept 2006]). Plaintiff provides affidavits from only four of the six jurors. Plainly said,

affidavits from four out of six jurors will not do. This deficiency cannot be cured by the offer of plaintiff's attorney, as an "officer of the court," that he had a conversation with a fifth juror who stated the same alleged error, but declined to sign an affidavit. Such a conversation is inadmissible hearsay.

I. B. JUROR CONFUSION

Plaintiff also seeks to impeach the verdict on the basis of juror confusion, and requests a new trial on the issue of damages only. Plaintiff provides four juror affidavits containing identical language, to wit that they were unaware that their award would be reduced by finding plaintiff contributorily negligent, and that they intended plaintiff to receive the entire $5 million award. Plaintiff's attorney proffers, as an "officer of the court," his conversation with a fifth juror who stated the same alleged confusion, but declined to sign an affidavit, as further evidence to impeach the verdict. Plaintiff contends, without support, that since a five-sixths verdict is sufficient under the law, proof of confusion of five out of six jurors is sufficient to impeach the verdict.

As an initial matter, and as discussed above, plaintiff has provided the affidavits of only four of the six jurors, and whatever conversation occurred between counsel and the fifth juror is inadmissible hearsay that the Court will not consider. Where jurors are not unanimous in their challenge, juror affidavits may not be considered to impeach the verdict (*Grant v. Endy*, 167 AD2d 807 [3d Dept 1990]). In any event, juror affidavits may not be used to correct alleged errors of a non-ministerial nature (*id.*; *Labov v. City of N.Y.*, 154 AD2d 348 [2d Dept 1989]). Consequently, plaintiff has failed to meet his burden proving juror confusion through the use of juror affidavits.

Nor is a finding of juror confusion supported by the trial record, where the jury was polled and affirmed their verdict (*id.*; *Breen-Burns*, 73 AD3d at 662). The jury's four questions/requests for evidence related to the issue of liability; no questions were made pertaining to damages. The jury was charged, pursuant to PJI 2:277 and 2:36, that should the jury find "the plaintiff is entitled to recover from the defendants, [the jury] must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries that he sustained" and, given plaintiff's concession of contributory negligence, the jury "must then apportion the fault between the plaintiff and the defendant or both defendants" (Tr. at 502 and 497-98). The special verdict sheet and charge to the jury was straightforward and, as such, impeachment of the verdict is inappropriate *(see e.g. Laylon v. Shaver*, 187 AD2d 983 [4th Dept 1992]).

To the extent that plaintiff alleges the verdict sheet's language and jury charge contributed to the alleged juror confusion, plaintiff reviewed the verdict sheet and did not object to its contents, nor did plaintiff object to the jury charge. Therefore, such claims are unpreserved and have been waived as a matter of law (*Malki v. Krieger*, 213 AD2d 331 [1st Dept 1995]).

Finally, to the extent that plaintiff seeks, in the Court's discretion, additur of the jury's award, additur is only appropriate where the Court has found the jury's award insufficient recompense and defendants have agreed to such increase in lieu of a new trial on damages (CPLR § 5501[c]; *see e.g. Matter of New York City Asbestos Litig.*, 191 AD2d 351 [1st Dept 1993]). Here, the Court does not so find, and the defendants have not consented to an increased award.

Consequently, plaintiff's motion for additur/new trial on damages is denied.

II. DISMISSAL/SET ASIDE VERDICT

Defendants move (mot. seq. 008), pursuant to CPLR § 4404, to dismiss plaintiff's suit and for a directed judgment in their favor, or alternatively a new trial, contending that: plaintiff failed to prove the Transit Authority was negligent in allowing trains to enter the Spring Street station faster than could be stopped within an operator's line of sight ("speed theory"); plaintiff's notice of claim and complaint fail to allege his speed theory; the Transit Authority is immune from suit under the doctrine of governmental function immunity and qualified immunity; the Transit Authority is entitled to operate its train at its speed of choice ("speed policy"); and the jury's verdict, determining the train operator was not negligent but finding the Transit Authority negligent, is inconsistent.

Defendants also seek a new trial on the basis that the court erred in: limiting defendants' immunity claims to the subway line upon which plaintiff was injured; precluding defendants' expert, Korach, from testifying about whether the Transit Authority met national industry practice; and charging the jury on missing witnesses regarding those Transit Authority witnesses who did not testify.

Plaintiff opposes, contending that the motion is improper as it relies on affidavits of witnesses who did not appear for trial and whose testimony is not part of the trial record. Plaintiff further contends that the evidence at trial was sufficient for the jury to find for plaintiff, and the jury's decision was rational and based upon a fair interpretation of the evidence.

Defendants' motion seeking a directed verdict or, in the alternative, seeking to set aside the verdict and require a new trial on damages, necessarily implicates two different standards of review. To the extent that defendants' motion seeks a directed verdict in their favor, the standard of review is whether, based on the evidence presented at trial, no valid line of reasoning and permissible inferences exist which could possibly lead a rational person to the conclusion reached by the jury (*Cohen v. Hallmark Cards*, 45 NY2d 493 [1978]). Where a jury's determination cannot be deemed "utterly irrational," and a question of fact exists, the Court cannot direct a verdict under a legal insufficiency inquiry (*id.* at 499). To the extent that the defendants seek to set aside the verdict and a new trial, the standard of review is whether the jury's verdict was based on a fair interpretation of the evidence (CPLR § 4404[a]; *Delgado v. Board of Educ.*, 65 Ad2D 547 [2d Dept 1978] *aff'd* 48 NY2d 643 [1979]). The Court cannot usurp the jury's function and substitute its judgment for that of the jury's on an issue of fact resolved by the jury and based on a fair interpretation of the evidence (*Martin v. McLaughlin*, 162 AD2d 181 [1st Dept 1990]; *Niewieroski v. Nat'l Cleaning Contrs.*, 126 AD2d 424 [1st Dept 1987] *lv. denied* 70 NY2d 602 [1987]).

It is axiomatic that a motion made pursuant to CPLR § 4404 to set aside a jury verdict as against the weight of the evidence must be based upon the evidence presented at trial (*see e.g. Harrington v. Halpert*, 241 AD2d 540 [2d Dept 1997]). Defendants' motion, in part, relies on expert affidavits of witnesses not called at trial.[1] It, therefore,

[1] Affidavits of four experts are included in Defendants papers: Glenn Lunden, Antonio Cabrera, Mukesh T. Patel, and Kenneth Korach. None testified at trial.

seeks to have this Court find the jury's verdict against the weight of evidence not proffered at trial. The use of these affidavits for this purpose is improper and they will not be considered.

II. A. SPEED THEORY

Defendants contend that plaintiff failed to make a prima facie case that the Transit Authority was negligent in allowing trains to enter the Spring Street station at 30 m.p.h. Defendants argue that plaintiff's expert's testimony that trains should enter the station at a reduced speed is unbelievable and his theory regarding train speed has been rejected by the First Department in *DeLeon v. New York*, among others (305 AD2d 227 [1st Dept 2003]).[2] Therefore, defendants argue, his testimony regarding train speed, sightlines, and stopping distance does not establish plaintiff's prima facie case.

The First Department's decision in *DeLeon* did not reject plaintiff's expert's train speed theory, as defendants contend, but rather found it speculative, noting the expert failed to reference any facts of that particular case in arriving at his opinion (*id.* at 228 citing *Santiago v. New York City Tr. Auth.*, 271 AD2d 675, 677 [1st Dept 2000]["Opinion evidence must be based on facts in the record or personal knowledge"]). In the instant case, plaintiff's expert related his opinion regarding the appropriate speed to enter Spring Street Station with sightlines and stopping distances, and thus to the facts of plaintiff's case, as required (Tr. at 264-79). Plaintiff's expert

[2] Defendants list a number of appellate decisions where plaintiff's expert testified and the Appellate Division found such testimony speculative, in order to disprove his theories in this matter. However, those cases are inapposite, as they address different legal issues or arise under facts not found in the instant matter, and they warrant no further discussion. That defendants do not believe plaintiff's expert is of no consequence. The proper standards of review are whether sufficient evidence exists to support the jury's verdict and whether a fair interpretation of the evidence could lead a reasonable juror to that verdict.

discussed his speed theory and stopping distance in terms of the train's actual speed and braking force entering the station, as recorded by the train's event data recorder, commonly referred to as a "black box," and plaintiff's position on the tracks relative to the train's stopping distance (*id.* at 279-84). Consequently, plaintiff's expert provided sufficient evidence, as a matter of law, to allow the jury to reach a verdict finding Transit Defendants liable.

As to the remainder of plaintiff's prima facie case, the jury heard conflicting descriptions of the incident and injuries, and it was the jury's duty to weigh the evidence and resolve any inconsistencies. The jury's verdict was not utterly irrational, given the totality of the evidence submitted by plaintiff. This Court cannot, and indeed will not, supplant the jury's determination under these circumstances.

Defendant's contention that plaintiff did not properly apprise them of his speed theory, that trains should enter the Spring Street Station at speed less than currently allowed, in his notice of claim is without merit. The purpose of the notice of claim is to "enable authorities to investigate, collect evidence, and evaluate the merit of a claim" (*Brown v. City of New York*, 95 NY2d 389 [2000]). Hence, it must set forth the time, manner, and place where the claim arose (*Phillipps v. New York City Transit Auth.*, 68 AD3d 461 [2009]). However, it need not state those items "with literal nicety or exactness" (*Purdy v. City of New York*, 193 NY 521, 523 [1908]; *see also Brown*, 95 NY2d at 393 [2000]). Plaintiff's notice of claim stated that the defendants were negligent in allowing the train to enter the station at "an unreasonable, unsafe and/or excessive rate of speed." This description put the defendants on notice that plaintiff

would allege speed as a component of his claim. Requiring plaintiff to state the exact speed that he alleges trains should enter the station places additional requirements on a notice of claim not found in General Municipal Law § 50-h and does not further the statute's intent.

II. B. IMMUNITY/SPEED POLICY

Transit Defendants argue, for the first time, that its speed policy decisions are entitled to qualified and governmental function immunity, and therefore the jury verdict must be set aside, and judgment entered in defendants' favor. As the immunity doctrines are distinct, the Court takes each in turn.

The doctrine of qualified immunity applies when "a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury" and in weighing safety and efficiency considerations the body has adopted a policy with a "reasonable basis" (*Weiss v. Fote*, 7 NY2d 579, 588-89 [1960]; *Ernest v. Red Cr. Cent. School Dist.*, 96 NY2d 664 [1999]; *Turturro v. City of New York*, 28 NY3d 469, 486 [2016]; *DeLeon*, 305 AD2d at 228). The municipality, however, has a continuing duty to review its plan "in light of its actual operation" (*Friedman v. State of New York*, 67 NY2d 271 [1986]).

The Appellate Division decision in *DeLeon* – a similar case alleging that the Transit Authority allowed its trains to enter a station too quickly causing injury – is instructive (305 AD2d 227). There, the Authority submitted an affidavit of a member of its "Speed Policy Committee" to establish that the Committee regularly reviewed appropriate train speeds for the track in question, and the Authority, after considering

competing concerns, adhered to its speed policy (*id.* at 228). Based upon the affidavit, the First Department was "satisfied that defendant [Transit Authority] has 'entertained and passed on the very question of risk' that plaintiff would put to a jury," and found the Transit Authority entitled to qualified immunity (*id.*). Here, however, the Transit Defendants have failed to submit such an affidavit or evidence. They have not established that the Speed Policy Committee, or a similar body, has weighed efficiency concerns against the very same question of risk presented here – namely a train striking a person on the Spring Street station tracks, as required. Nor did they make a motion at trial seeking similar relief. No evidence or testimony was elicited at trial that may have supported a qualified immunity defense.

Consequently, the Transit Defendants are not entitled to qualified immunity, having failed to show any authorized public planning body considered the very same question of risk and weighed it against efficiency and other public policy concerns.

The doctrine of governmental function immunity "shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions" (*Valdez v. City of New York*, 18 NY3d 69 [2011]). However, the doctrine is available only when a municipality is acting in a governmental capacity (*Turturro*, 28 NY3d at 479). Where a municipality is acting in a proprietary capacity, it does not enjoy immunity and is subject to suit for negligence (*id.*; *see also Wittorf v. City of New York*, 23 NY3d 473, 479 [2014]). A municipality undertakes a proprietary role when its actions "essentially substitute for or supplement traditionally private enterprises" (*Sebastian v. State of New York*, 93 NY2d 790 [1999]; *see also Wittorf*, 23 NY3d at 479;

see also Applewhite v. Accuhealth, Inc., 21 NY3d 420 [2013]). Succinctly stated, when the government provides services traditionally rendered by the private sector, it is subject to the same tort liability as a private actor (*Wittorf*, 23 NY3d at 479; *Applewhite*, 21 NY3d at 426; *Sebastian*, 93 NY2d at 795).

Providing transportation has, historically, been the province of common carriers –private actors– and cannot be described as a discretionary exercise of the State's Police Powers, which are immune from suit. Defendants are therefore subject to the same standards regarding liability as other common carriers (*see generally, Schrempf v. State of New York*, 66 NY2d 289, 294 [1985] ["In those cases, the State is held to the same duty of care as private individuals and institutions engaging in the same activity"]). This determination is in line with the Court of Appeals decision in *Wittorf*. There, the Court of Appeals held the maintenance and design of highways is a proprietary function of municipalities, not entitled to governmental function immunity (*Wittorf*, 23 NY3d at 479). As such, this Court finds Transit Defendants were engaged in a proprietary role and not entitled to governmental function immunity.

Relatedly, Transit Defendants argue they have the right to operate their trains at any speed they choose, and cite *Tullish v. City of Corning*, (278 AD 1020 [4th Dept 1951]) and *O'Brien v. Eire R.R. Co.*, (210 NY 96 [1913]) in support. However, neither case is applicable to the instant matter. *Tullish* found the speed of the train was not the proximate cause of the train striking an automobile at a grade crossing, and *O'Brien* related to the right of the steam railroad to assume an engineer on the tracks "in broad daylight" would leave the tracks when the approaching train was "perfectly visible" from

several hundred feet and its approach was heard (*id.*). Consequently, the Court does not find that the Transit Defendants can operate their trains at any speed they choose free from all negligence, based solely upon their status as a railroad/train operator.

II. C. INCONSISTENT VERDICT – EMPLOYER/EMPLOYEE LIABILITY

Defendants contend that the jury's verdict, finding the train operator not negligent and the Transit Authority negligent, is inconsistent. Defendants seek a new trial on this basis.

Where a jury's verdict is inconsistent, the Court may either order the jury to reconsider its verdict or may set aside the verdict and order a new trial (*Marine Midland Bank v. Russo Produce Co.*, 50 NY2d 31 [1980]). The jury having been discharged, this Court is limited to ordering a new trial should it find the verdict inconsistent. Where a fair interpretation of the evidence supports the jury's verdict, it is not inconsistent (*Caldas v. City of New York*, 284 AD2d 192 [1st Dept 2001]; *Kelly v. City of New York*, 6 AD3d 188 [1st Dept 2004]).

Here the jury's verdict is supported by a fair interpretation of the evidence at trial. A subordinate following the direction of a superior has little choice but to obey the superior's direction and will not be held contributorily negligent, as a matter of law, for injuries arising out of those instructions, provided the subordinate stays within the limits of the superior's instructions (*Broderick v. Cauldwell-Wingate Co.*, 301 NY 82 [1950]). This is precisely the case at bar; the train operator was instructed by his employer to enter the train at a specific speed and complied. The jury found the train operator not negligent but found his employers negligent.

Consequently, as a matter of law the verdict is not inconsistent. Furthermore, the jury's verdict is supported by a fair interpretation of the evidence submitted at trial. Thus, the Court will not order a new trial on the basis of an inconsistent verdict.

II. D. LIMITING TESTIMONY

A motion pursuant to CPLR § 4404 is an inappropriate vehicle to seek review of the Court's determination limiting defendants' experts to discussing delays on the Lexington Avenue subway line only, and not the subway system as whole. Likewise inappropriate is defendants' motion seeking review of the Court's preclusion of defense experts from discussing national industry practices, as it sought to supplant a different standard of care due to plaintiff.

II. E. MISSING WITNESS CHARGE

Relatedly, defendants contend that the Court erred in providing a missing witness charge with respect to two experts, Lunden and Cabrera, employees of NYCTA (discussed *supra*, p. 7 FN 1). Defendants argue, principally, that the Court's preclusion of certain matters rendered the expert witnesses' remaining testimony unnecessary.

A missing witness charge is appropriate when: (1) the witness' knowledge is material; (2) the testimony is not cumulative; (3) the party against whom the charge is sought has control over the witness; and (4) the witness is available (*DeVito v. Feliciano*, 22 NY3d 159 [2013]; *People v. Savinon*, 100 NY2d 192 [2003]).

Here, defendants do not dispute that the witnesses were available, that the defendants had control over their own experts, or that the experts' knowledge was material. Defendants instead contend that because their experts' testimony had been

truncated it was cumulative (*see also* Tr. at 445). The Court's ruling, as it relates to defendants' experts, precluded only discussion of national industry standards and limited efficiency/delay discussions to the Lexington Avenue line. Defendants' experts were free to discuss the speed restrictions on the Spring Street station track, the effect of speed restrictions on the Lexington Avenue subway line, stopping distances of trains, conductor sight lines, and Transit Authority procedures.

Defendants did not call Lunden or Cabrera to testify and, in summation, defense counsel stated he had not called them to discuss the speed policy because plaintiff's expert had agreed with him regarding delays caused by slowing the train's entry speed and he saw no point in "dragging this case out another week" by calling Lunden and Cabrera to testify (Tr. at 445-46). However, a witness' testimony is not cumulative merely because it would be cumulative of the opposing witness' testimony (PJI 1:75; *see Devito*, 22 NY3d 159). Defendants' experts' testimony was, therefore, not cumulative, nor were defendants entirely precluded from introducing these experts' testimony. Consequently, a missing witness charge under PJI 1:75 was appropriate, and failure to provide the charge would constitute error. The Court will not grant defendants a new trial on this basis.

III. STRIKE FROM RECORD

Plaintiff cross-moves to strike all references to testimony and evidence that was not offered at trial, including defendants' experts' affidavits. The cross-motion is entirely conclusory and provides no caselaw or statute in support of striking defendants' pre-trial motion to dismiss and material not offered by defendants at trial. Furthermore, the affidavits of defendants' experts were provided as exhibits to

defendants' motion *in limine*. To the extent that plaintiff contends this material is not properly part of the appellate record, determining what material properly constitutes the appellate record is the province of the Appellate Division and it is the parties' responsibility to assemble a proper record on appeal (*see e.g. Alverez v. Reyes*, 96 AD3d 627 [1st Dept 2012]). Consequently, the cross-motion to strike material from the record is denied.

Accordingly, it is

ORDERED that plaintiff's motion (mot. seq. 007) seeking additur is denied; and it is further

ORDERED that defendants' motion (mot. seq. 008) seeking to dismiss the suit, or alternatively a new trial, is denied; and it is further

ORDERED that plaintiff's cross-motion seeking to strike from the record material not before the jury is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated

Sept. 11, 2019

ENTER:

J.S.C.

HON. FRANK P. NERVO
J.S.C.