

Swanburg v County of Nassau
2020 NY Slip Op 31131(U)
February 14, 2020
Supreme Court, Nassau County
Docket Number: 604860/2015
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 17
Present: Hon. Sharon M.J. Gianelli, J.S.C.

LORI SWANBURG,

Plaintiff,

Index No. 604860/2015

-against-

Mot Seq. No. 001

Decision & Order

COUNTY OF NASSAU and DWIGHT FORD,

Defendants

Papers submitted on this motion:

Plaintiff's Notice of Motion, Affirmation in Support and Exhibits _____ X
Defendant's Affirmation in Opposition _____ X
Plaintiff's Reply Affirmation _____ X

This action was commenced by the filing of a Summons and Complaint on or about July 28, 2015. On or about August 24, 2015, Defendants County of Nassau and Dwight Ford served an Answer and issue was joined.

This is an action for personal injuries sustained as a result of a collision between the Plaintiff's vehicle and a Nassau County patrol car operated by Defendant Dwight Ford, at an intersection in the town of Seaford, in Nassau County, New York.

A trial on Liability was held from April 29, 2019 to May 7, 2019. The Jury rendered a verdict in Plaintiff's favor apportioning 60% of the fault for causing the accident against Defendant and 40% of fault against Plaintiff.

An Expedited Trial Stipulation was executed between the parties dated June 12, 2019, which set the parameters of damages from a minimum of twenty-five thousand (\$25,000.00) dollars to a maximum of one hundred thousand (\$100,000.00) dollars. A trial on damages took place on October 23, 2019 and October 24, 2019.

In its verdict, the Jury found that Plaintiff qualified for compensation under all three of the theories submitted to them, including but not limited to a finding that Plaintiff had sustained an injury which resulted in a "permanent consequential limitation of use of body organ or member". The Jury awarded Plaintiff fifty thousand (\$50,000.00) dollars for past damages and zero (\$0.00) dollars for Plaintiff's future damages, to cover zero (0) years.

Plaintiff now seeks an Order granting Plaintiff a new trial on damages on the grounds that the Jury's verdict on damages was inconsistent. Plaintiff further seeks an Order granting Plaintiff a new trial on damages on the grounds that the Jury's verdict on damages was against the weight of evidence and deviated materially from what would reasonably compensate Plaintiff, unless the parties stipulate to an additur for future damages from zero (\$0) dollars to one hundred fifty thousand (\$150,000.00) dollars.

Defendants have filed an Affirmation in Opposition on the basis that Plaintiff's motion has no basis in law or fact. Defendants claim that the Expedited Trial Stipulation prevents Plaintiff from making the instant application as it contains a provision which reads "I have advised my client that the verdict in the Expedited Jury Trial is *final* and that there can be no appeals taken from this verdict."

Further, Defendants claim there was no inconsistency in the Jury's determination to award zero (\$0.00) dollars to cover zero (0) years. Defendants argue that not every permanent injury has value and that the determination is within the exclusive purview of the Jury.

Plaintiff replies that the within application is not an appeal and that the Expedited Trial Stipulation does not preclude a challenge to the verdict. Further, Plaintiff presents additional caselaw to support points made in the Affirmation in support of the motion.

Analysis

CPLR 4404(a) provides that 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 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. Whether a Jury verdict is against the weight of the evidence is essentially a discretionary and factual determination. *Nicastro v. Park*. 113 A.D.2d 129 (2d Dep't 1985).

The discretionary power to set aside a verdict and order a new trial must be exercised with considerable caution because fact finding is the province of the Jury, not the Trial Court. The operative factor in the Court's determination as to whether to set aside a Jury's verdict is a finding that the Jury could not have reached its verdict on any fair

interpretation of the evidence. *Ramirez v. Sears, Roebuck & Co.*, 236 A.D.2d 530 (2d Dep't 1997).

“The amount of damages to be awarded for personal injuries is primarily a question of fact for the Jury.” *Schare v. Welsbach Electric Corp.*, 138 A.D.2d 477, 478 (2d Dep't 1988). However, the Jury's role is not unfettered. A verdict with respect to damages may be set aside as against the weight of the evidence if it deviates materially from what would be reasonable compensation for the injury. *Ventriglio v. Active Airport Service, Inc.*, 234 A.D.2d 451 (2nd Dep't 1996).

In this matter, the Jury heard live testimony from the Plaintiff regarding her injuries, reviewed over 190 pages of Plaintiff's medical records and reports, as well the medical report of Defendant's examining physician. The Jury then found that Plaintiff had sustained a permanent injury, awarded the Plaintiff fifty thousand (\$50,000.00) dollars for past damages and zero (\$0) dollars for future damages, to cover zero (0) years in the future.

The Jurys' award of zero (\$0) dollars for future damages, together with the Jury's determination that the future award is intended to cover zero (0) years, cannot be reconciled with the Jury's findings that Plaintiff sustained "permanent consequential limitation of use of body organ or member". Further, the Jury's failure to award any amount for damages for future pain and suffering is against the weight of the evidence as the evidence reveals that there is a reasonable likelihood that Plaintiff will require anterior cervical discectomy with fusion surgery as a result of the injuries in her cervical

spine as well as arthroscopic surgery in her right shoulder and left knee. Accordingly, the failure of the Jury to award any amount for future pain and suffering is inadequate to the extent indicated herein (see, *Wendell v Supermarkets Gen. Corp.*, 189 A.D.2d 1063; *Powell v New York City Tr. Auth.*, 186 A.D.2d 728).

Upon review, the Court finds that Plaintiff has met its burden as a matter of law.

Accordingly,

It is

ORDERED, that the jury's verdict as to future pain and suffering damages only, rendered on October 23, 2019 in connection with the underlying action herein, is set aside; and

It is

ORDERED, that Plaintiff's Motion for an Order granting Plaintiff a new trial on future damages on the grounds that the Jury's verdict on future damages was inconsistent, against the weight of the evidence, and deviated materially from what would reasonably compensate Plaintiff, is GRANTED; and

it is

ORDERED, that all counsel shall appear in this Court before the Clerk of the Calendar Control Part ("CCP"), who shall place this matter on the CCP Trial Calendar of Nassau County Supreme Court for a new trial on damages only, on the 31st day of March 2020, or any other date as determined by the CCP; and

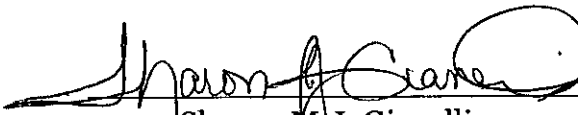
it is

ORDERED, that the Justice presiding in CCP may refer this matter to a Justice, Special Referee or Judicial Hearing Officer as he or she may determine.

All applications not specifically addressed herein are denied.

The forgoing constitutes the decision and order of the Court.

DATED: Mineola, New York
February 14, 2020



Sharon M.J. Gianelli
Justice of the Supreme Court

ENTERED
MAR 04 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE