

Taylor v Greenbaum Cab Corp.
2021 NY Slip Op 32161(U)
October 26, 2021
Supreme Court, Kings County
Docket Number: Index No.: 503616/2015
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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JOHN TAYLOR and LINDA TAYLOR,

Plaintiffs,

DECISION/ORDER

Index No.: 503616/2015

-against-

Motion Seq. No.: 3

GREENBAUM CAB CORP. and ASIF HAFIZ,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of plaintiffs' motion to set aside the verdict and direct a new trial on damages.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed	<u>74-78</u>
Answering Affirmation.....	<u>80</u>
Replying Affirmation.....	<u>81</u>

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

This action arises from a rear-end collision which occurred on the Brooklyn Queens Expressway on July 2, 2012. Pursuant to a prior court decision on defendant's "serious injury" motion, plaintiff was limited to going forward on his claim for injuries to solely his claims with regard to his left knee. He claimed his left knee hit the dashboard as a result of the accident, and that he subsequently had arthroscopic surgery and then a total knee replacement.

The jury rendered its verdict following a damages only trial in this action on July 15, 2021. The jury awarded the plaintiff for past pain and suffering the amount of \$100,000 and made no award for future pain and suffering.

Plaintiffs move pursuant to CPLR 4404 to set aside the jury award as contrary to

the weight of the evidence and for an additur or a new trial, arguing that the damages award deviates materially from reasonable compensation for the injuries that plaintiff John Taylor (hereafter, "plaintiff") sustained as a result of the accident. Defendants oppose the motion.

The court must consider a variety of factors in assessing the adequacy of the jury's verdict, including the nature of the accident and injuries, to determine whether the jury's award of past and future damages for pain and suffering "deviates materially from what would be reasonable compensation" for plaintiff's injuries (*see Lopiano v Baldwin Transportation, Inc.*, 248 AD2d 161 [1st Dept 1998]). The issue of whether an award deviates materially from comparable awards is a mixed question of law and fact that is resolved by analogizing the case with relevant precedent and similar cases (*Donlon v City of New York*, 284 AD2d 13 [1st Dept 2001]).

Here, the evidence adduced at the trial was that the plaintiff had been in approximately four prior motor vehicle accidents, one of which resulted in his car going into a ditch, and one which resulted in cervical spinal fusion surgery. Plaintiff testified that he is six feet three inches tall, was around fifty years old on the date of the subject accident, and for some period of time until he had gastric bypass surgery in 2002, he weighed three hundred and seventy pounds. On the date of trial, he said he weighed two hundred and fifty-eight pounds.

Plaintiff did not call any of his treating doctors to testify, and only called an "expert" doctor as a witness, who examined him solely for providing trial testimony. The doctor testified that plaintiff had some pre-existing arthritis in his left knee, which was "activated" by the accident. Defendants did not call any doctor to testify on defendants' case who had conducted an IME exam, but only called a radiologist, who did not

examine plaintiff. She testified that the injuries shown on the left knee MRI films were all pre-existing, being either degenerative or congenital. She testified that plaintiff had longstanding degenerative changes, thinning of the cartilage, extra bony growth, little loose bodies, arthritis, and that his patella (knee cap bone) in both of his knees “doesn’t line up correctly,” which would have been present since his childhood and would have caused the cartilage to wear out sooner than if he did not have this condition. She concluded that there was no visible trauma from the accident shown on the films, and that both the arthroscopic surgery and the total knee replacement surgery were necessitated by his arthritis and the tear of his ACL, which occurred two years after the accident, and that neither surgery was related to this motor vehicle accident. In addition, the court was asked by both sides to charge the jury with either the “eggshell plaintiff” or the “aggravation” charge, PJI 2:282,¹ which acknowledges that the plaintiff had a pre-existing condition. The court chose the “aggravation charge.” The condition was stated to be arthritis in his left knee.

The court concludes here that the jury's verdict as to damages was supported by a valid line of reasoning and permissible inferences from the evidence at trial (see *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]), and was not against the weight of the evidence (see CPLR 4404 [a]) and did not deviate materially from what would be reasonable compensation under the circumstances (see CPLR 5501 [c]). In

¹ This charge says, in its entirety, “If you find that before this (accident, occurrence) the plaintiff had a [*specify the particular condition*] and further find that because of the (accident, occurrence) this condition was aggravated so as to cause (increased) suffering and disability, then the plaintiff is entitled to recover for any (increased) disability or pain resulting from such aggravation. (He, she) is not, however, entitled to recover for any physical ailment or disability which existed prior to the (accident, occurrence) or for any injuries from which (he, she) may now be suffering which were not caused or contributed to by the (accident, occurrence). The plaintiff can recover only for damage caused by aggravation of the pre-existing condition, not the condition itself. The plaintiff should be compensated only to the extent that you find (his, her) condition was made worse by the defendant's negligence.”

considering the conflicting testimony of the parties' respective expert witnesses, the jury was not required to accept one expert's testimony over that of the other, but was entitled to accept or reject either expert's position in whole or in part.

The verdict awarding plaintiff \$100,000 for past pain and suffering, but nothing for future pain and suffering, finds support in the testimony of plaintiff's expert, who opined that plaintiff's pre-existing arthritis was "activated" by the accident, and defendants' radiologist, who opined that plaintiff had both pre-existing and congenital injuries which were what pushed him to have the surgery, which was not necessitated by the accident. This testimony also included an opinion that the plaintiff's continuing pain in the knee arises from his pre-existing and underlying condition of degenerative arthritis as well as a congenital misalignment of his patella in both knees, which predated the accident.

On this point, the court in *Hotaling v Carter* (137 AD3d 1661 [4th Dept 2016]) said "The jury's decision not to award damages for future pain and suffering was based upon a fair interpretation of the evidence . . . , with consideration given to the credibility of the witnesses and the drawing of reasonable inferences therefrom, and we discern no basis in the record to disturb the jury's resolution of credibility issues against plaintiff" (*id.* at 1663 [internal citations omitted]).

Based upon the foregoing, it is **ORDERED** that the plaintiff's motion is denied.

This shall constitute the decision and order of the court.

Dated: October 26, 2021

ENTER :



Hon. Debra Silber, J.S.C.